A STEP FORWARD TO THE REVISION OF NATIONAL LAW

# LEGAL ASPECTS ON THE PROTECTION OF IRAQI CULTURAL HERITAGE


PROCEEDINGS OF THE LEGAL SYMPOSIUM
BAGHDAD, 28TH FEBRUARY - 1ST MARCH 2022

# INTRODUCTION

Distinguished Readers:

EUAM Iraq had the honor to host on 28 February to 1 March 2022 distinguished Iraqi law scholars who gave presentations in response to EUAM Iraq's Call for Papers on "Legal Aspects of the Protection of Iraqi Cultural Heritage. A Step Forward to the Revision of National Law." The aim of this Legal Symposium was to address national and international legal issues related to the legal framework for the protection of Iraqi cultural heritage and develop theoretical and practical solutions for a way forward. The presentations of the Legal Symposium are contained in this booklet.

The European Union approach to cultural heritage protection in conflicts and crises is based on protecting and enhancing cultural heritage as a factor contributing to peace, reconciliation, and mutual understanding. This event was organized by EUAM Iraq as part of the European Union's efforts in relation to civilian security sector reform in Iraq, which includes the protection of cultural heritage as part of the fight against organized crime.

At the European Union level, the Protection of Cultural Heritage was first mentioned 2016, in the "European Union Strategy on International Cultural Relations." The Council Conclusions of 2019 advocate "strengthening the role of culture in policies and programs within the framework of external relations, including under the Common Security and Defense Policy (CSDP)."

EUAM Iraq was the first CSDP Mission to gain a mandate for cultural heritage protection. EUAM Iraq was launched in October 2017 in response to a request by the Iraqi government for advice on how to undertake civilian security sector reform. The Mission currently has a mandate until end of April 2024. Among the core of the Mission's mandate is to advise senior officials at the Ministries of Interior and the Office of the National Security Advisor on the coherent implementation of the civilian aspects of security sector reform. Consequently, the Mission is providing expertise on a diverse range of reform components.
This includes upholding cultural rights through the protection of cultural heritage protection, as well as human rights at large.

This is particularly relevant to Iraq, as the country is considered the cradle of western civilization with its 5,500 years old history.

However, cultural heritage does not only include antiquities and artifacts, but it is an expression of the ways of living developed by a community, and passed on from generation to generation, including customs, practices, places, artistic expressions, and values. Cultural heritage is very important to national identity; it's the foundation upon which the culture of a society is built.

Why are laws important in the protection of cultural heritage? If we want to make sure that heritage is available for future generations, including research, education, and public interpretation, we need laws to protect it. Cultural heritage laws help define what is deserving of protection. Law further helps us define and categorize heritage. Knowing that there are different types of heritage means that we can develop the right legal framework for protection based on particular features and needs. Law helps us create the standards necessary to assess what is significant and worthy of protection and develop mechanisms to enforce rules to keep heritage and people accessing heritage safe.

Please note that the views expressed in the presentations contained in this booklet belong to the authors thereof and not EUAM Iraq. EUAM Iraq does not accept any responsibility related thereto.

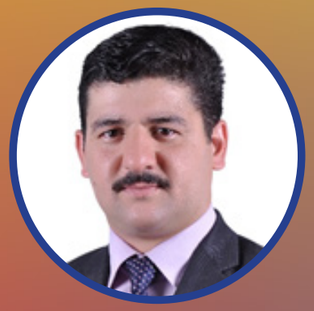
We encourage you to share this booklet with colleagues and friends. In case you have any questions or comments, please feel free to contact us at chp@euam-iraq.eu.

Thank you.

# Contents

## “Legal Aspects of the Protection of Iraqi Cultural Heritage A Step Forward to the Revision of National Law”



**Professor. Dr. Saddam Faisal Kokes Abdul Hamad Al-Mohammadi**

- Specialized in Contract Law
- Lecturer in College of Law al-Fallojah university

# The Efficiency of the Legal Protection for Iraqi Cultural Heritage. An analytical study under the roles of Antiquities and Heritage Law in force No 55 issued in 2001

Cultural heritage is considered relatively a modern concept. Sometimes, it expands to the extent that it can include many types of heritage, which has historical, artistic, educational, scientific, and literary important whether they are possessed by the state or individuals as long as they are considered a heritage asset by the specialized authorities. Because of this importance, the tourists and businessmen of cultural properties and antiquities would like to buy them.

Since the topic of exchanging the heritage asset and transferring its ownership is related to the interests of states and the global interest of humanity, countries have an interest in preserving their cultural and heritage properties, protecting them from vandalism and damage, and preventing their transfer. Yet, countries have the right to increase their national collectibles through buying cultural items (antiquities) produced by other nations. This interest is opposite to the idea of preserving cultural items and goes in the direction of buying policy. On the other hand, each individual carries the citizenship of a country that has its history, civilization and heritage within this world, has the interest protect the cultural heritage and prevent transferring it out of the country.

Because heritage assets are considered one of the elements of cultural heritage, Iraqi legislators defined heritage assets in antiquities and heritage law number 55 in 2011 as ((the movable and immovable properties than are less than 200 years old and have historical, patriotic and national values and announced by a resolution from the minister)). According to the legislative definition, Iraqi legislator defined heritage as a movable asset or a property that is less than 200 years old that its value pushes the minister of culture to issue a resolution to consider it heritage. We can define the heritage asset as a ((distinguished characteristic that is attached to a physical or spiritual object that has a historical or cultural or scientific or literary value and related to the cultural heritage of a specific nation or individuals or global heritage giving it legal protection of a special kind by a decision issued by a specialized administrative body)).

Special regulations and instructions were issued in Iraq related to the legal structure of antiquities, heritage objects and artworks. Iraqi laws prevent trading with antiquities and transferring them out of Iraq.

The Antiquities Law provided for several penalties imposed on anyone who looted, robbed and illegally transferred the ownership of Iraqi antiquities outside Iraq, according to Article (44) of the Iraqi antiquities and heritage law No. 55 of 2002 in force. The problem of adapting the heritage appears within the scope of the search for the legal description that determines the legal system to which the heritage is subject, due to the diversity of the types of this heritage. Iraqi legislators resolved the issue of legal adaptation of heritage in the antiquities and heritage law No. 55 of 2001 in Article 4 / 8 of the law. Accordingly, it is subject to the legal system that includes a number of rules that prohibit dealing in public heritage assets and may not be disposed of or possessed by sale, will, donation, inheritance, or even by prescription, as stated in the text of Article (42) of the antiquities and cultural heritage law No. 55 of 2002 in force for a prison sentence of no more than (10) years for anyone who begins excavating antiquities or tries to reveal them without written approval from the archaeological authority, with the imposition of compensation amounting to twice the estimated value of the damage and the seizure of the extracted antiquities, and the penalty is tightened for a period not exceeding (15) years if the cause of the damage is an employee of the archaeological authority, and these provisions are among the directive rules of immediate application that are specific to Iraqi antiquities and which can be applied to the Iraqi heritage that is not permitted to be dealt with. value of the damage and the confiscating the extracted antiquities, and the penalty is tightened for a period not exceeding (15) years if the cause of the damage is an employee of the archaeological authority, and these provisions are among the directive rules of immediate application that are specific to Iraqi antiquities, and which can be applied to the Iraqi heritage that is not permitted to be dealt with.

# Efficacy of Legal Protection of Iraqi Cultural Heritage an Analytical Study as per the Provisions of the Valid Antiquities and Heritage Law No. 55 of 2001.

**Professor Dr. Saddam Faisal Kawqaz Al-Mohammadi**
Professor of Private Law
College of Law - University of Fallujah

## Introduction

Heritage is considered as a relatively modern concept whose scope sometimes extends indefinitely, as it can include many forms of cultural heritage of historical, artistic, civilizational, scientific and literary importance, whether it is owned by the state or by individuals, provided that it is associated with a decision from the competent authority, considering it as heritage asset. Given this importance, tourists and dealers of heritage and tangible heritage assets tend to collect them.

Whereas, the issue of the circulation of tangible heritage asset and the transfer of its ownership is associated with the interests of the countries themselves on the one hand, and the global interests of humanity on the other hand, countries have an interest in preserving their cultural and heritage properties located therein, protecting them from vandalism and damage and preventing their transfer, but states also have an interest in increasing their national acquisitions by purchasing cultural items (be it heritage or antiquities) produced by other peoples. This interest is against adhering to cultural items and tends towards a purchase policy on one hand, and on the other hand, every person has an interest, as a citizen who belongs to a specific country that has its history, civilization and heritage within this world, to be keen on preserving the cultural heritage of all peoples and preventing its circulation and transportation to outside the country of origin.

It is evident that determining the legal attitude of states regarding the circulation of tangible heritage properties does not always take place from the internal point of view only, but also from the point of view of global interests, and must be understood from both angles. In case it is viewed from one angle only, we will arrive at very different rules. It may better serve the global interest by activating exchange or stopping it sometimes, and may also enhance the national interest through exchange or by placing restrictions on it. We cannot hold on to the notion that the exchange would serve the global interest and, if restricted, it would serve the national interest. We cannot say the contrary as both the exchange and restriction are driven by the global interests as stimulated by national interests. This is the approach adopted by some countries such as France, Britain, the United States and other liberal countries, which restrict some forms of their cultural properties from circulation and prohibit the circulation of others, and at the same time allow individuals to deal in some other forms.

This study seeks to establish the concept of cultural heritage and explain the legal regulation of the process of transferring its ownership, and how its ownership is transferred to a foreigner. In this case, the transfer of ownership would lead to the escape of the disputed cultural heritage to outside the territory of the state, which leads to the emergence of a problematic conflict of laws. This study shows methods for resolving conflict of laws in the process of transferring the ownership of tangible and intangible heritage properties, according to conflict resolution methods pursued in private international law, and to determine the law applicable to the transfer of cultural heritage ownership.

It is sometimes difficult to specify a framework for this study since the process of transferring the ownership of tangible heritage properties, indicating the authenticity of dealing with them, and the most important provisions related to conflict of laws when transferring their ownership, is not that easy on one hand, and on the other hand, most Arab legal studies are confined to explaining the concept of antiquities and cultural properties from the private international law perspective. This matter is nothing but a reflection of the provisions of Arab laws and legislation, which are considered as among the protective countries that attach utmost importance to antiquities and cultural property with protection and legal regulation, and have not reached the stage of





legislative recognition of cultural property, which can be an attribute attached to any property that falls within the category of cultural property, antiquities or heritage.

The methodology of the study is based on the descriptive scientific research method for the stipulations established in comparative national laws and international agreements in this regard. We also rely, in special places, on the analytical method in presenting ideas and scientific propositions and stating the position of comparative national laws in some countries such as France and Egypt, as well as the positions of international conventions in this regard.

Therefore, we will show in this study what heritage is, so that we can identify its definition and identify its distinctive characteristics, and distinguish it from other terms that are close to it.

In the second topic, we will address how the ownership of cultural property is transferred.

We will discuss in the first of the two topics what heritage is. In the second topic, we will address the transfer of ownership of heritage, and we conclude the study with a conclusion, including in it the most prominent results and proposals that can be adopted within the framework of the legal regulation of antiquities and heritage in Iraq.

## First topic
## What is heritage

The nature of heritage is clearly manifested by identifying its meaning on one hand and indicating the characteristics of the heritage property that makes it different from what is suspected to be legal terms on the other hand, as follows:

### Requirement One
### Definition of heritage

The definition of heritage differs with the difference of the angle from which it is viewed, where we find that the term of heritage in international law means differently and differs from its definition in Iraqi law. So, we will divide the research in this requirement into two branches, the first of which addresses the meaning of heritage in international law, while the second branch will clarify what is meant by heritage in Iraqi law as follows:

#### First branch
#### Defining heritage in international conventions

Heritage in many of its forms is an element of cultural heritage, or international cultural property. This means that when some conventions provide definitions of cultural heritage or cultural property, this definition can be applied in one way or another to heritage.

In Article One of the Hague Convention for the Protection of the World Cultural Heritage in Situations of Armed Conflict of 1954 [1](Cultural property) is defined in general as "the ownership of movable or immovable property of great importance to the cultural heritage of peoples, such as architectural, artistic, historical or religious buildings." Whether civil or archaeological sites, groups of buildings that , combined, acquire a historical or artistic value, artifacts, manuscripts, books, and other things of historical or archaeological artistic value, as well as scientific collections, important book collections, archives and reproductions of the aforementioned property[2].

This definition focuses on enumerating the images of cultural property and indicating their types. They are properties that can fall within the category of heritage properties as well, but at the same time this definition leaves the space open for the introduction of many tangible and intangible cultural objects, thus making this description non-prohibitive nor comprehensive for cultural properties.

*1 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict established in the 1899 and 1907 conventions. This convention is dated May 14, 1954 and entered into force on August 7, 1956.*

*2 We support, within the framework of this study, that the correct translation of the term (Biens Cultures) of this article from the French language is "ownership" not "property", and this is what Dr. Waleed Mohammad Rashad has adopted in his book " Protection of Antiquities and Elements of Cultural Heritage in Private International Law" , Dar Al-Nahdha publications,, Cairo, 2008, p. 26. The same is set forth in French jurisprudence.*

Article (9) of the Rome Convention for the year 1957 defines heritage property as ((the cultural thing that has historical or artistic importance and is lent the economic appreciation of nations and is eligible for the protection of national legislation and attention of countries of one group in light of the idea of trans-border free trade and movement of goods))[1].

This is the clearest definition of the term "heritage property" without using other terms such as cultural ownership or cultural property. It has also stated the balance between protection of heritage property as a cultural heritage and their economic importance as a type of cultural commodity.

Article (2) of the 2003 Convention for the Protection of the Intangible Cultural Heritage provides a detailed definition of intangible cultural heritage as "the practices, developments, forms of expression, knowledge, skills and associated machinery, objects, artefacts and cultural places that are considered by the communities, groups, and sometimes individuals as part of their cultural heritage." This cultural heritage, inherited from generation to generation, is continuously recreated by groups as consistent with their environment, interactions with nature and history, instilling in them a sense of their identity and a sense of its continuity, and then respect for intangible cultural diversity that is in line with this convention whether the intangible cultural heritage that is consistent with the international instruments that are related to human rights, with the required mutual respect between communities, groups and individuals, and sustainable development)).

This text is closer to explanation than to definition, as it is an explanation of what is set forth in this convention and what falls within its scope, because the definition must be comprehensive and somewhat concise and clear in its significance to what is intended, and we do not see this matter in the narrative and enumeration that is indicated in the aforementioned article. In addition, it focuses on the intangible heritage, which is outside the scope of the study that focuses on the tangible heritage property, and leaves out the intangible heritage property on which this convention focuses.

F. Coulée: 'Quelques remarques sur la restitution interétatique des biens culturels sous l'angle du droit international public', R.G.D.I.P, (2000), p-373.

**Definition of heritage in Iraqi law**

Since heritage property is an element of cultural heritage[2], the Iraqi legislator, within the framework of the Iraqi legal regulation, defined heritage in the Antiquities and Heritage Law No. (55) of 2001 in the article as ((Movable and immovable property that is less than 200 years old and has a national and historical value, which is announced by a decision of the Minister)). It is clear from the legislative definition that the Iraqi legislator defined heritage as movable property or real estate that is not more than 200 years old, having a value that prompts the Minister of Culture to issue the decision considering it as heritage, and defining heritage as property prompts us to refer to the meaning of property in general in the valid civil law, where it is defined as: ((Every right has a material value))[3].

This definition makes it clear that the material value of property is embodied in the financial right that is attached to the thing, and the composition of the tangible or intangible heritage property is related to the elements of the mixture or the cultural compound of peoples, that is, it is part of this complex compound, so heritage property is one of the most important elements of peoples' cultural heritage. However, this would not mean that all the elements of cultural heritage are cultural property, as the lack of common things between them stems from a confirmed paradox in content, and since the Iraqi law has not provided a specific definition of the term "heritage property"[4] whether in the Antiquities Law or other private laws, despite it provided legislative definitions of many terms synonymous or similar to cultural property definitions.

On the other hand, it is clear that the definition of cultural property in accordance with national legislation differs from the framework specified for this definition in international conventions, and we see that this

*1 Waleed Mohammed Rashad, ibid, page 27-28*

*2 Compare with Dr. Nafi' Bahr Sultan, The idea of cultural property in private international law, a research published in the Journal of the Faculty of Law, Al-Nahrain University, Issue No. (3), Volume 19, Part 1, 2017, p. 140.*
*3 in accordance with the text of Article (65) of the valid Iraqi Civil Code No. 40 of 1951 amended ; For details, see: Dr. Abdul Razzaq Ahmad al-Sanhoury,Al-Waseet in explaining the new civil law, the right to ownership, vol. 3, 3rd edition, Nahdat Misr Press, without publication year, item 1, p. 9.*

*4 Where it defined antiquities as: "Movable and immovable property that is at least 200 years old and has no value in itself, that is, it is just old property, even if it has nothing to do with national or cultural symbols in the state."*



Legal aspects on the Protection of Iraqi Cultural Heritage, Baghdad, 28th February - 1st March 2022

Efficacy of Legal Protection of Iraqi Cultural Heritage an Analytical Study as per the Provisions of the Valid Antiquities and Heritage Law No. 55 of 2001. Professor Dr. Saddam Faisal Kawqaz Al-Mohammadi

difference is due to two reasons:

(First) The existence of many treaties and agreements concerned with regulating the issue of cultural property, its circulation and protection, as each agreement provides a definition that expands or narrows the scope of the heritage property covered by it.

The (second) is the difference in the standards adopted by these treaties and legislation in classifying cultural property[1] as the aforementioned international conventions, the formulations therein draw a general framework for the term heritage property, in a manner that is useful in specifying the legal framework for international relations that are related to cultural property, with diversity of forms of heritage property between public tangible and intangible properties and the private real estate or movable property the determination of which concept is based on criteria such as the element of time and its historical, artistic and cultural importance.

We believe that we can define heritage property as: ((a distinctive characteristic attached to a tangible or intangible thing that has historical, cultural, scientific or literary value, and is associated with the cultural heritage of a particular people or individuals or to the world heritage, which provides it with legal protection of a special kind by a decision issued by a competent administrative authority.

Within the scope of the research on the nature of cultural heritage, the problem of legal characterization that determines the legal system to which heritage is subject, arises due to the diversity of the categories of this heritage. The Iraqi legislator has resolved the subject of legal adaptation of heritage in the Antiquities and heritage Act No. 55 of 2001 in Article 4/Eighth that it is: ((Movable and immovable property that is less than 200 years old and has a national historical value, announced by a decision of the Minister)). When adapting the heritage, two important things must be taken into account:

(First) It is property related to the cultural identity of the people, so every country sets rules of a peremptory character with regard to its cultural property.

The (second) is that it is unique, often small in size compared to its very high price, as if it was a mental or intellectual production such as rare manuscripts, for example.

The problem of adapting the property in Iraq, whether it is movable or immovable, shall not arise if the case is brought before the Iraqi courts[2], nor the problem appear if the case is filed outside Iraq before foreign courts, whereas heritage in some countries is on ranks and categories as it is in French law[3]. So, the question of determining the movable heritage is referred by the judge to the law, the origin of the heritage, if he has to determine the issue of which types it is, and whether it is permissible or impermissible to deal with it or not, and dealing with it is a crime punishable by law internationally and subject to international treaties.The big problem we are facing in the issue of adaptation here, is whether the heritage is movable property or a part extracted from immovable cultural property, as in artifacts in archaeological and cultural palaces, art paintings in churches and temples, and other heritage property inside the historical site such as manuscripts, documents and books. So shall, a dispute arise regarding the transfer of its ownership independently, or according to whether it is an affiliation of the original, or a real estate by destination, or attached to it?

*1 M. Sykes: Manual on Systems of Inventorying Immovable Cultural Property ,UNESCO ,Museums and Monuments, UNECO , xlx ,p-21.*

*2 According to the text of Article (62) of the amended Iraqi Civil Code of 1951: ((1- Real estate is everything that has a stable and fixed basis so that it cannot be moved or transferred without being damaged. It includes land, building, plantation, bridges, dams, mines and other real estates. 2- the movable property is everything that can be moved and transformed without damage, including money, displays, animals, scales, weights, and other movable things. In this sense, Iraqi antiquities such as buildings, archaeological and historical sites are considered immovable property. As for the movables that are inside it and that are designated for its service, it is subject to the rule of real estate by destination . As for artifacts, paintings, books and archives, they are considered movable cultural property. For more, see: Dr. Waleed Mohammad Rashad: Protection of Antiquities and Elements of Cultural Heritage in Private International Law, Al-Nahdha Al-Arabia House, 2008, p. 111.*

*3 M. cornu: op.cit, p-8.*

The difficulty here lies in the difference of countries in adapting this type of property to their national legislation, after which there are those who consider it as movable complementary or attached property[1]. While some consider it as attached movable property due to functionality or adornment such as real estate by destination in Iraqi law[2] so if heritage is an important part of the original real estate property and leads it to the main purpose, then it is movable property, so attachment is the reason for the functionality, and a movable property would not change if the heritage exists for the purpose of ornamentation or for artistic or creative aesthetics, and it remains movable property[3]. Also, some laws, such as the English law, distinguish between movable property and immovable property in the degree of fixedness of property. If it is strong, then it is considered as immovable property, but if it is weak, it is considered as movable property[4].

In Iraqi law, property is generally classified into two sections, movable and immovable. With regard to heritage, Antiquities Law No. 55 of 2002 included an explicit text that distinguishes between heritage and antiquities on the one hand, and defines the legal description of heritage in Article 4 / Fifth of it.

**The second requirement**

**Characteristics of heritage property**

The most important characteristics of heritage property which distinguish it from similar terms, are as follows:

First: Property is a legal description of heritage:

Heritage property is an attribute attached to tangible and intangible things that the legislator confers on for considerations in his discretion, placing this thing in a distinct legal position, which establishes a right, a right originally decided for a people or a group of it, and the right is basically an interest established by law and protected by legal means[5].

This would entail significant consequences if the property is state -owned and stolen or owned by individuals, or a property that was sold and circulated outside the country, showing that it shall be forbidden to deal and dispose of it later. The most significant implications of it are:

First: It shall not be permissible to dispose of public heritage property:

As the heritage property takes the rule of antiquities, then the provisions of antiquities shall be applied to it. So, accordingly, it shall not be permissible to dispose of it by buying, selling, mortgaging, donating or gifting[6]. Only the state has the right to adhere to the invalidity of contracts on these properties[7]. The invalidity of disposing of public heritage property shall result in three consequences[8]:

(First consequence): Not to accept the claim of the holder against the public person who owns the cultural property. And (the second consequence): is that the claim for compensation for damages established as public property shall not be accepted

And (the third consequence): the prohibition of exporting heritage property outside the borders of the state, and a fortiori, the state has the right to regain this property if it crosses these borders[9]

*1 The Greek Civil Code of 1940 defines movable cultural property complementing a thing according to Article (47/2) as anything that cannot be separated from the main thing without damage or a complete material change that affects the main thing. As for the property attached to something, it is defined in Article (51/1) ) as the movable things necessary for the use of another thing (the main thing) as consistent with its purpose when there is a realistic link consistent with this purpose..*
*2 Where Article 63 of the Iraqi Civil Code defines real estate by appropriation and stipulates: ((It is considered a real estate with a movable assignment that its owner places in a real estate owned by him in order to serve or exploit this real estate)).*
*3 Wojciech W.kowalski: Restitution of Works of art Pursuant to Private and Public international law, RCADI, VOL 288, 2001, P215-217.*
*4 Wojciech W.kowalski : op cit .p-217 .*
*5 Prof. Abdul Baqi Al Bakri and Pro. Zuhair Al-Basheer, Approach to the Study of Law, Legal Library, 1st Edition, Baghdad, Atek Bookstore for Book Industry, Cairo, pp. 219-221.*
*6 Article (3)/First of the Iraqi Antiquities and Heritage Law No. 55 of 2002 stipulates ((First - it shall be forbidden to dispose of antiquities, heritage and historical sites except in accordance with the provisions of this law...)). Also, Article (87/2) of the Egyptian Civil Code stipulates preventing the disposal of Egyptian public property.*
*7 Dr. Suleiman Mohammad Al-Samawi, Concise Administrative Law, A Comparative Study, Without a Press or Place of Publication, 1991, p. 60.*
*8 see Dr. Sawsan Safi, International Protection of the Archaeological Environment and Cultural Property under the Provisions of Private International Law, Dar Al-Nahdha Al-Arabiya, Egypt, Dar Al-Nahdha Al-Alamia, Emirates, 2017, p. 42; and Dr. Waleed Mohammad Rashad, ibid, p. 38.*
*9 An example is the return of Kuwaiti property after the invasion of Kuwait in 1990. Paragraph (30) of Security Council Resolution 687 of 1991 obligated Iraq, in cooperation with the International Committee of the Red Cross, to return Kuwaiti property. The Iraqi government had made continuous efforts which resulted in the delivery of a number of properties of various types including cultural property.*





Accordingly, this rule applies to everyone to whom the ownership of public heritage property has been transferred or has acquired by disposition or by way of inheritance. What applies to the national also applies to the foreigner.

Second: not permissible to seize it: It shall not be permissible to seize the public heritage property because the seizure is only a prelude to disposing of it by forcible sale which is prohibited for public property in general, and heritage property in particular [1].Also, it shall not be permissible to burden the heritage property any right in kind as a collateral of a debt, nor it is permissible to take a right of jurisdiction over it or to arrange a right of privilege over it[2], Also, it shall not be permissible to establish a right of easement over it on the basis of its peculiarity and high importance.

Third: not permissible to own it by prescription: Although the Iraqi legislator has neglected a text that shows this in the valid Iraqi Antiquities and Heritage Law, this omission can be overcome by referring to the rules of the civil law that prohibits the acquisition of public property by prescription, no matter how long the period is. Article (71)/ Paragraph (2) stipulates: ((2- These properties may not be disposed of, seized, or possessed by prescription). This article includes movable heritage property and real estate, so it shall not be permissible to acquire movable public heritage property by possession, and this is stipulated in Article (17/First) of the valid Iraqi Antiquities and Heritage Law ((It is prohibited for natural and juridical persons to possess movable antiquities)). Also, the principle of not owning public heritage property by prescription applies to both the Egyptian Antiquities Protection Law/ Article (15) and the French Heritage Law/ Article (621), Paragraph (17)[3].

Second: The heritage property is a right with economic value:

Cultural property often has an economic value that is often high, so that its value cannot be described[4]. Therefore, this property is often expensive and marketable nowadays, so that auctions have become crowded with property and cultural properties that are traded and transferred in different countries of the world.

Third: The heritage property has a legal status of a special nature:

Cultural property has a special description, because it does not aligned with the traditional rules of common property and shared property to be governing it, as heritage property has two distinct features: (First): This property is closely attached to the personality of its owner, as this property is associated with the personality of its originator, whether this originator is an individual, a group of specific individuals, or a state[5]. As for (the second), it is the feature associated with the technical aspect that is related to the nature of this property and to its similarity with in- kind rights in the possibility of dealing with them wholly, or with some or partially, and at the same time similar to intellectual rights in terms of being closely related to their owners, which keeps them as properties of a special legal nature[6].

Fourth: Heritage property has humanitarian value:

Heritage property is associated with the past and civilization of peoples or with the history of a group of individuals, where heritage property is one of the noblest aspects that highlight the identity of peoples and manifest their originality, and considered as one of the achievements of their sons throughout the ages including workers, architects, sculptors, engravers and others[7],. This value of cultural property is embodied therein, whether it is a tangible or intangible heritage[8].

Fifth: Heritage property is tangible or intangible property:

*1 Dr. Mohammad Sameer Mohammad Zaki Abu Taha, Criminal Protection of Antiquities, an applied comparative study, first edition, Dar Al-Nahdha Al-Arabiya, 2012, p. 58.*
*2 Dr. Ameen Ahmed Al-Hudhaifi, Criminal Protection of Antiquities, a comparative study, Dar Al-Nahdha Al-Arabiya, Cairo, 2007, p. 174.*
*3 P. Guilot : Droit du Patrimoine Culturel et naturel elipses , Ellipses Marketing 24 mars, 2006 , p-47*
*4 P. Lyend: op.cit, P-34.*
*5 some private cultural properties fall within the scope of intellectual rights and so are subject to the legal protection of copyright law, industrial drawings or models or trademarks, Dr. Nafi' Bahr Sultan, ibid, p. 150.*
*6 Dr. Husam Abdul Ameer, The Legal System of Cultural Heritage in Iraq, Al-Saisaban Bookstore, Baghdad, 2014, p. 7.*
*7 Le préambule de l'Association de droit International sur la coopération dans le domaine de la protection mutuelle et transfert de propriété du fonds culturels, International Law Association Conference qui s'est tenue au Canada en juin, 74 session 2006.*
*8 L .Aragon: Copyrighting Culture for the Nation? Intangible Property Nationalism and the Regional Arts of Indonesia, International Journal of Cultural Property 2012, USA, p-(269_275).*

So, heritage property in most of its forms is of one of two types: either material or moral. Sometimes, heritage property is tangible and can be perceived with the senses, and sometimes it is intangible and spiritual, but it can be perceived by the mind[1]. Also, the tangible heritage property may be property owned by the state and designated for public benefit, and it may be owned by individuals as their private property[2], if it is owned by the state, then it is considered public property that may not be dealt with, possessed, disposed of, or possessed by prescription or seizure[3].

As for private heritage funds, its scope includes all things and property not owned by the state, even if the state restricts the ownership of some of these funds.

Sixth: Heritage property has a historical value:

Heritage property is historical in that it represents rights and cultural legacies linked to a specific time date, and related to the civilization and history of a particular people[4].

Therefore, all heritage funds, whether movable or immovable, depend in their circulation and transfer of ownership on their monetary value if this value can be estimated, and this value in turn depends on the age of these funds and their connection to the past. Or immuable, depending in its circulation and transfer of ownership on its monetary value if it is possible to estimate this value. This value in turn depends on the age of these properties and how are they are associated with the past[5].

## Second branch

## Distinguishing heritage from situations close to it

There is some confusion and similarity between some of the features heritage shares with antiquities and cultural properties. For This reason, the Iraqi legislator has provided a definition of the term antiquities in paragraph Seventh of Article 4 of the Antiquities and Heritage Law No. 55 of 2001, which states that antiquities are: ((movable and immovable properties built, made, sculpted, produced, written, drawn or photographed by man, whose age is not less than (200) two hundred years, as well as the human, animal and plant structures). According to this definition, antiquities are either movable or immovable, whose age is not less than 200 years, without having a value in themselves, that Is, they are just old properties even if they are not associated with national or cultural symbols in the state.

If we look at the definition, we find that heritage and antiquities are very similar in terms of content, making it difficult to distinguish between them sometimes, because there is no difference between them. The problem with the differentiation here appears in the case of mixing between the cultural property that takes the rule of antiquities and is protected by an administrative decision from the competent authority, and the antiquity itself. Both are subject to the provisions of the Antiquities Law, and the Iraqi legislator is not satisfied with determining the heritage property by the criterion of oldness that is based on the element of time, but has given wide power to the competent authorities to consider any property it deems necessary for public interest or the Iraqi cultural heritage or based on historical, national, religious and artistic necessities, as heritage for its protection, and this is an exception to the legally established original text[6]. If we want in this research to

*1 Dr. Nafi' Bahr Sultan, ibid, p.149*

*2 B. Bernard : Statut des Beins Culturels en droit International Prive Francan ,revue international de compore ,rvrilijuin ,1994, VOL46 ,N2, p-407.*

*3 See: Dr. Muhannad Dhia Abdul Qadir, ibid, p. 145; And Ali Hassan Abdul Ameer, ibid, p. 259 and subsequent pages.*

*4 Cultural properties are often gold, but This does not mean That all cultural properties are required to be gold. It is important for cultural properties to be expressing a specific history or period of time, and for their beauty and importance, a decision has been issued by the competent authority considering them as cultural propret, see :*

*5 M. Cornu: droit des biens culturels et des archives ,directeur de recherhes,CNRS ,2003 ,P-8.*

*The French law of 1913, according to which many decisions concerned with French art and history were issued concerning some works of art that express the great history of France, and because of their aesthetic value and the quality of the paintings in them and the person of the painters, considered these works as cultural properties, for example considering the paintings and works of the French painter Van Gogh as cultural properties, and the French Council of State considered him one of the most prominent painters of the twelfth century.*

*M. Cornu: Droit des Biens Culturels, op.cit, P- 8.*

*6 This is done by a decision of the Ministry of Culture and Information (formerly, where the name of the ministry has been changed into the Ministry of Tourism, Culture and Antiquities after the decision of the Council of Ministers on August 15, 2015 merging the previous ministry with the Ministry of Tourism and Antiquities) that includes an announcement that a certain property is an antiquity with providing grounds of the decision and to publish it in the official gazette ... Dr. Ghazi Faisal Mahdi, "Legal Protection of Antiquities in Iraq, Legal Protection of Arab Antiquities", Bait Al-Hikma, Baghdad, 2001, p. 94.*

*For more see: Dr. Muhannad Dhia Abdul Qadir, "Constitutional Provisions for the Protection of Archaeological Properties according to the Iraqi Constitution of*





introduce heritage property into Iraqi law and protect it according to the valid Iraqi law of antiquities and heritage, we have to draw analogy according to these two criteria, then we can include the heritage property into the first category and some of the heritage property into the second category according to the heritage age criterion[1],. As for some of the cultural property of the second and third category of heritage property, they can be included into Iraqi law according to the second criterion, that is. the issuance of a decision by the competent administrative authority considering this property as cultural property[2].

The antiquity differs from cultural property in two respects: legally and administratively, and the extent to which it can be dealt with, as follows:

1-The difference in legal terms: Antiquities are given greater legal protection than that granted to all types of cultural property, as antiquities are given criminal protection (incriminating transactions related to antiquities smuggling)[3]. As for cultural property, its protection is less severe than this, as it is possible to deal it in some of its types, and even transfer its ownership and take it out of its country of origin as well, except for some heritage property that the state criminalizes dealing in for specific reasons, provided that the state lists in a written document the names and descriptions of heritage properties that shall not be traded[4].

2-As for the administrative aspect of antiquities, the legal nature of antiquities is that they are public properties owned by the community and are at the disposal of the state and may not be dealt in, and are also subject to the control of the authority concerned with antiquities in the state[5]. As for cultural property, it is often owned by individuals and may be owned by the state after a decision is issued thereon given its historical, aesthetic, artistic importance, or their oldness[6].

It should be noted here that heritage properties have the capacity of oldness not only because they are old in terms of time but that these properties may have the characteristic of oldness because they express a lifestyle of an era that can only be identified by these properties, whether these properties are paintings, architecture or human activity, old books or archives, artifacts, or certain illuminations ... etc.[7].

Also, the term" heritage properties" is a broad term that does not necessarily require association with the past, except that it is a window for portraying certain ideas related to an era, and it is sufficient that it represents scientific or cultural importance[8], and according to the valid Iraqi Antiquities Law No. 55 of 2002 which adopted the criterion of the scientific, historical and cultural importance of antiquities as stipulated in Article (4/8) by indicating: ((These properties have historical, national, ethnic, religious or artistic value or importance)).

As for distinguishing heritage from cultural property, they both share being properties of historical, national, ethnic, religious or artistic value. However, cultural property is distinguished from heritage by several features. Every heritage is considered cultural property, but not every cultural property is heritage property, including:

*2005", a research published in the Journal of Law, Al-Mustansiriya University, Issue 15, Volume 4, 2011, p. 141 and subsequent pages,. Ali Hassan Abdul-Ameer: "The Adaptation of Archaeological Properties to Recover the Ishtar Gate," same source, p. 259 and subsequent pages. Silwan Jabir Hashim:" International Protection of the Holy Places", a research published in the Journal of the Faculty of Law - Al-Nahrain University, Vol. 16, No. 4, 2014, p. 320 and subsequent pages.*

*1 An example is the inclusion of the Mosul Dam in the list of cultural properties to which the provisions of antiquities (first category) apply, as well as the inclusion of some Iraqi buildings that are constructed after the Al-Baghdadi style (Shanasheel of Baghdad) to the category of protected cultural properties (second category).*

*2 An example of this is the introduction of some modern paintings by great Iraqi painters whose paintings represent an important artistic and historical importance to the Iraqi heritage, such as the paintings of Riyadh Nima, as well as the music of lute player Naseer Shamma, the Monument of Liberty, the Unknown Soldier Monument, the Martyr Monument, and others.*

*3 See text of Article (41/1) of the Antiquities and Heritage Law No. 55 of 2002*

*4 Voie sous de system: A. Bernard: Le Status de Beins Culturessen droit International prive Francais, Reuve international de droit compare, Vol. 46, N2, Avril- Junin 1994, P- 40. http//:www.perse.fr/doi/rid.*

*5 For more, see Dr. Tu'ma Al-Jarf, "Administrative Law", Dar Al-Nahdha Al-Arabiya, Cairo 1978, p. 707; Dr. Ibraheem Al-Fayyadh, "Activity and Work of the Administrative Authority between Kuwaiti Law and Comparative Law", Al-Falah Bookstore, Kuwait, First edition, 1987, p. 162; Mahmoud Abdul Ali Al-Zubaidi, "The Legal System for the Protection of Archaeological Artifacts and its applications in Iraq", a research published in the Journal of the College of Law, Al-Mustansiriya University, Volume 4, Issue 15, p. 299 and subsequent pages; Silwan Jabir Hashim, ibid, p. 320 and subsequent pages; Dr. Ghazi Faisal, ibid, p. 94.*

*6 M. Cornu: op., cit, P- (8-9).*

*7 Substantive laws expanded the scope of historical and archaeological highlights and cultural properties, including in its framework cultural real estate properties and the movable cultural properties associated with them (real estate by destination ) such as furniture, artefacts, tools and ornamental materials, and even included within its scope works of historical importance such as books, paintings, and high aesthetic valuable properties that bear witness to the past or outdated lifestyle due to development, such as documents and manuscripts.*

*8 as it is considered one of the most important characteristics of cultural properties as stipulated in most national legislation and international conventions. All of this can be inferred from the Hague Convention of May 14, 1954 on the Protection of Cultural Properties during Armed Conflict. This quality or characteristic.*

*Fon de me che: la protection juridique international du partimoue cultural en cas de conflit non international, Paris V 2008, P-9.*

1- In terms of concept: The concept of heritage is a complex concept with changing dimensions, as it provides a wide range of things and meanings[1], . It is a concept that includes both antiquities and cultural property because it includes cultural and natural elements, tangible and intangible elements[2].

As for cultural property, it is a new description attributed to movable or immovable things, tangible or intangible, owned by the individual or the state, having a archaeological, literary, artistic, historical or heritage importance[3].

2- In terms of scope: The term "heritage" within the scope of private law differs from its scope in public law, which is also reflected on cultural property, as the concept of heritage within the scope of private law refers to the properties and rights enjoyed by a natural or juridical person, as well as the arising obligations for owning such property. As for its concept within the scope of public international law, it is related to administrative law and the state's authority to protect this property because of the cultural interest and the breadth of its components of wealth and values, and there is a responsibility that falls on the violator of the sanctity of heritage in public law[4].

## Second topic

## Transfer of ownership of cultural property

The ways and methods of the process of transferring ownership of cultural property are diverse and multiple, and differ from one country to another. For the process of transferring ownership of cultural property that is mingled with a foreign element, its governing law shall be subject to the conflict of laws approach. Therefore, we will review in the first requirement the methods of transferring ownership of cultural property, while the second requirement will be allocated to researching into the restrictions that are imposed on the transfer of ownership of cultural property, as follows:

### First requirement

### Methods of transferring ownership of cultural property

The process of transferring the ownership of heritage property in general, is undertaken either by the heritage owner or his general successor, and in general, under this assumption, the ownership of heritage is transferred in two ways:

First: Transfer of ownership of heritage properties through international contracts.

Second: Transfer of ownership of heritage properties by inheritance or will.

We will explain these two methods in two branches as follows:

### First branch

### Transfer of ownership of heritage properties through international contracts

The transfer of his ownership of heritage property is usually done through contracts, whether these contracts bear a foreign element, as they are international contracts, and the differentiation occurs within the scope of international trade, between international trade of cultural property, when it is done between amateur and professional traffickers for this work, while auctions of contractors and collectors of heritage property are considered as the main picture in this field[5].

Contracts relating to the transfer of ownership of heritage property, either in the form of contracts of sale, purchase and gift, are contracts that transfer ownership of heritage permanently, and often fall within the international scope, but this does not preclude them from falling within the internal local scope of the state as

*1 the financial and non-financial cultural heritage includes treasures, abandoned objects and natural materials.*
*2 Dr. Hossam Abdul Ameer, ibid, p. 100 and subsequent pages*
*3 Dr. Nafi' Bahr Sultan, ibid, p.140*
*4 M. Cornu: op cit, p- 4.*
*5 International and regional associations of deal ersc and collectors includes the confederation international des negociants en oenvers d'art (( CINOA )) international league of antiquarian book sellers (ILAB), and the international association of dealers in ancient art (IADAA); VOIR SURE CE : A.R. james, nafziger cultural heritage law , The international regime, report of the directore of studies, p-148.*





national contracts, except it is outside the scope of our study, but the sale, gift and mortgage on heritage and tainted with a foreign element would raise the issue of conflict of laws. I will explain each of these contracts separately, as follows:

First: Contracts directly transferring the ownership of heritage:

Contract for the International Sale of Cultural properties:

Traditionally, the sale contract is an exchange of property for money[1], where a commodity is exchanged for cash, and therefore it is an agreement between the seller and the buyer to exchange the heritage for what is equal or equivalent to it in cash, and thus the process of selling heritage is conducted in two directions[2]:
As for the first direction: it is illegal trade in heritage property, which includes heritage that is subject to the rule of antiquities, and public heritage owned by the state. It shall not be permissible for this type to be disposed of or owned neither by ordinary or juridical persons nor the state to which it has been transferred as it is a public property of the people, which the state manages, maintains and protects, and therefore any trading in the sale is void as the contract shall be invalidated because of the invalidity of the subject matter[3].

As for the second direction: it is the sale of heritage properties that are licensed to be traded or those that are permitted to be dealt in. If the sale contract is signed on cultural property permissible to be dealt in, the contract becomes valid and enforceable, but if dealing in them is not permissible, then the contract shall become void, and this matter does not necessarily require taking the heritage out of the country of origin as the contract is deemed void, whether it is contracted to transfer its ownership outside the territorial borders of the country of origin.
The idea of dealing in these heritage properties is based on the legislative permission to transfer their ownership as per the legal provisions other than those to which the antiquities themselves are subject, or the heritage properties that take the rule of first-category antiquities. The contract transferring the property creates a problem regarding the rights that arise from the transfer of ownership of this property, such as the right of use and exploitation, and you can see this in a decision of the French Court of Cassation about the exploitation of photographs belonging to (LE CAFÉ COONDREE) café that violates the owner's right to enjoy his quiet ownership[4].

However, the court had pleaded the terms of the violation of the right of ownership in this case, by a subsequent ruling contained in the court decision[5] " ((that the use of a picture in itself is not a violation of the right of the owner, but rather the owner must prove that he is suffering from damages because of the use or exploitation of his property))[6].

In addition, there are violations resulting from the sale contract for the properties reproduced from heritage properties, i.e. the sale and imitation of copies of the heritage itself. Reproduction for private personal purposes is free and permissible, as Article (13) of the valid Iraqi Copyright Protection Law stipulates: ((If a person reproduces a copy of a compilation published for his personal use, then the author shall not prevent him from doing so))[7], especially if good reproduction of the heritage does not constitute copyright infringement. However, the problem appears here with what is expressed by the reproduced heritage. The heritage may be specific to a particular person or his private life. Therefore, reproduction here leads to violations of privacy. This is what was stipulated in the text of Article (544), French civil law[8], for example a painter paints a picture

*1 text of Article 506 of the aforementioned Iraqi Civil Code..*
*2 M. Cornu ,Protection de Propriete culturelle et Circulation des Biens Etude de droit compare Europe \ asie, centre d'etude sur la cooperation juridique international ( CECOJI) _ UMR 6224, Universatede opitiers \ CNRS, septemdre ,2008 ,p- 12 ets.*
*3 Article (44) of the aforementioned Iraqi Antiquities Law and Article (8) of the valid Egyptian Antiquities Law No. 3 of 2010, as is considered in French jurisprudence:*
*4 C.Caram: Les Virtualites Dangereuses du Droit de Propriete, defesnois, 1999, p-897, cass.civ1, 10 mars1999*
*5 cass 1ere civ mai 2001.*
*6 Here, a distinction must be made between economic damage and non-economic damage. For example, if the cause of this damage and violation of the right of ownership is the decrease in the flow of tourists or an increase in their flow due to the publication or use of a painting owned by another owner, which resulted in wealth to the violator of the right of ownership, then this is considered an economic damage but using the painting itself for a specific purpose, which led to the mistaken belief that the violator of the right of ownership here is the real owner of it, then this is considered a non-economic damage.... For more, see the French jurisprudence:*
*T. Ferrand,23 janvier 2002, juris classeurs, communicaction, commerce eletronique, avril 2002, p-15.*
*7 The text of Article (13) of the Copyright Law No. (3) of 1971, amended by virtue of the (dissolved) Coalition Authority Order No. (83) of 2004.*
*8 Art. 544: Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations.*

of the house of a famous person, then others reproduce this picture, and the problem appears in a larger and more complex manner, if this painting is within a collection of drawings or paintings that are homogeneous and integrated. The Paris Court ruled in a decision issued on April 12, 1995, according to a vague criterion, that (if the painting can be separated from the collection, without this affecting the integrity of the collection, this harm is considered to be affecting the right to privacy, but if it is not possible to separate it, then this may not be considered as a violation of the right to privacy[1]. So, how can the value of the painting be estimated if it is part of the whole cut off therefrom and eventually from the general composition of the artwork, which affects the nature of property given its high value and artistic aesthetics.

An example of this is also the case (1999, Paris, 14 September), where there was a film that used in one of its scenes a reproduced mural for a few moments, and because the owners of the film did not obtain the approval of the owners, the judges decided that the said art work is not the main subject of the film and because of the nature of the dependency of the disputed picture. The judges also affirmed the principle that reproduction must not result in damage to the authors' rights to a cultural work:

C. Magnant Chronique: De Propriete in Tellectuelle de Cecoji, sous ladirection dr h.j.lucas, JCP, enter prise et affaires, 7 september 2000, p-1374.

## B- Heritage Gift Contract:

A gift is a type of disposition by which the ownership of cultural funds is transferred. Heritage, being property owned, can be included in the dispositions in respect of which the gift contract can be concluded. Heritage may be privately owned by individuals and may be public.

Accordingly, the issue of gifting it by individuals, and transferring it from one country to another, is a legitimate matter as long as this property does not fall within the scope of heritage properties which the state bans dealing in or circulating. An example is the gift by Spain of the temple of "Debor", which is currently standing high on a hill in Madrid Square[2].

The mortgage on the heritage, whether it is an collateral mortgage or a lawn, in both types the pledged heritage property should be within what the law allows to deal in and transfer its ownership, because the mortgage may end with the payment of the pledged debt or sale in a public auction or the deduction of the debt from the price, and thus, this property must be subject to the transfer of ownership, otherwise the mortgage contract will become void and null due to the invalidity of the subject matter of the contract. Also, in mortgaging the heritage, the official procedures followed in the territory of the country in which the contract is concluded, including official registration and writing the contract, and other procedures, must be observed[3], noting that mortgaging a heritage property in Iraq is illegal because our heritage properties come within the domain of antiquities or heritage, and they are public properties that may not be mortgaged or seized.

Therefore, heritage in Iraq, although it is legally described in general as a property, it is not treated as ordinary property, and we believe that this situation must be sufficient to provide the necessary protection to preserve Iraq's cultural properties and safeguard Iraqi cultural property. The legislator must stipulate heritage protection in the private laws, such as the valid Iraqi Antiquities and Heritage Law. These properties are considered cultural properties of a protected type whose ownership or possession may not be transferred to anyone other than the party authorized by law.

*1 M. Cornu: op.cit, p-22*
*2 R. Delasizeranne: Droit on Render Les marbres delgin au Parthenon ? revue des mondes, 1934, p)-832-850).*
*As well as the gift by Baron "Python" in 1885, of a silver vessel which was one of the offering vessels, and it used in the Spanish "Yorgos" Church. It is considered one of the pieces of art made outside the scope of dealing in Spain, as he possessed it as a gift from the saint of the church:*
*P. Lyndel v:, op.cit, p-328.*
*3 Also, there are contracts for the ownership of cultural properties, except that their possession and benefits are transferred only as loan contract and deposit, the purpose of which is to increase cultural awareness and cultural diversity among countries. These contracts are often concluded between the state and museums, whether these museums belong to the state or to individuals as their own property, where the state also has the right to exploit its cultural properties, and the museums have the right to obtain copies of historical monuments and cultural proeprties for advertising and publication...*
*M. Cornu: op.cit, p- 25.*





## Second branch

## Transfer of heritage ownership by will

The ownership of heritage can be transferred with respect to cultural properties whose ownership may be transferred, other than the heritage properties such as antiquities, heritage and cultural property, because the ill

is a post-mortem disposition, requiring ownership without compensation[1] and therefore the will is a means or tool by which the testator determines the fate of some or all of his cultural property after his death in a manner that differs from what would have been regulated by the law if he had died without leaving a will.

Since the heritage properties are human production, either tangible or intangible, and are the right of man over his material scientific, literary and artistic production, he can benefit from them in order to obtain their tangible or intangible fruits and the possibility of transferring them to others by will.

Here, religious and legal provisions play a major role in the validity of the transfer of heritage ownership by will. The ruling differs between movable heritage and immovable heritage. When bequeathing movable heritage, two aspects must be observed:

The first: It is the permissibility of the will in relation to cultural property, for example if it is one of the heritage properties that are permitted to be dealt in when transferring its ownership, or monitored by the state and hence the need for the state to permit transfer of its ownership abroad[2].

The second point is the provisions of the will, i.e. the rules for the transfer of properties outside Iraq or outside the borders of the state in general, as a principle of reciprocity and bequeathing within the limits of one-third of the estate only. Article (70) of the Iraqi Personal Status Law of 1959 stipulates: ((It shall not be permissible for a will to be more than a third except with the permission of the heirs, and the state shall be considered the inheritor for those who have no heir))[3], which means that the testator has the right to bequeath only one third of his tangible estate, and anything in excess of that shall depend on the permission of the heirs, as well as issues specific to the validity of the will and the conditions of the testator, the testate and the form of the will[4].

As for the will for the heritage that is transferred outside the borders of the state, here the will shall be valid for the transferred heritage only on condition of reciprocity[5], as well as not exceeding the limits of one third, otherwise it shall hinge on the permission of the heirs. If the heirs have permitted it, then the will shall be valid and the ownership transferred, but if not permitted, then the will shall be void but valid within the limits of one-third only[6].

On the other hand; the process of transferring the ownership of heritage property by will faces many obstacles that often end up in the failure of transferring its ownership to others. This is due to two important matters:

(First): The rules of private international law, which prevent the transfer of ownership of real estate to foreigners, because the difference in citizenship is one of the reasons for preventing the transfer of ownership of real estate to a foreigner[7].

(Second): Type of heritage. Heritage properties are either public state- owned, and therefore are outside the scope of dealing and dispositions of transferring the ownership, or owned by individuals as private property, if these properties are not prohibited from being circulated and disposed of, by a special decision from the competent authority or being controlled by the state over all legal dispositions, with no permissions granted for their transfer. The will here is void because of the invalidity of its content. All of this takes place if we assume that the transfer of ownership by will is outside the borders of the state, but if it is within the borders of the state, there is no objection to the transfer of ownership, as long as they are properties permitted to be dealt

*1 Article 64th of the Personal Status Law No. 188 of 1959.*
*2 Article (2) of the Instructions No. 12 of 1994*
*3 Article (70) of the Iraqi Personal Status Law No. 118 of 1959.*
*4 see for all of this, Dannoni Hujeira, " A Person's Behavior in Deadly Illness and the Protection of the Family", Journal of Legal and Administrative Sciences, 2004, No. 2, p. 19 and subsequent pages; Zahdour Mohammad, "The Will in Algerian Civil Law and Islamic Law", National Book Foundation, Algeria, 1991, p. 139 and subsequent pages, Dr. Mustafa Ibraheem Al-Zalmi, "Provisions of Inheritance and Will", Atek Press, p. 129 and subsequent pages.*
*5 Dr. Mustafa Ibraheem Al-Zalmi, ibid, p. 142.*
*6 Cheboro Nouriya, "Inheritance and effective post-mortem dispositions within the framework of private international law", a master's thesis submitted to the Faculty of Law and Political Science, University of Abu Bakr Balkayid, Telmecen, 2011, p. 19 and subsequent pages.*
*7 Dr. Mustafa Ibraheem Al-Zalami, ibid, p. 142.*

in or controlled, but approval and permission have been obtained to transfer its ownership if the transaction conditions are available likewise.

### Third branch

### Transfer of heritage ownership by inheritance

Inheritance is defined as compulsory succession to the heir in inherited property or in a right subject to succession[1]. Heritage just like all ordinary properties can be transferred (i.e. transfer of its ownership) by inheritance. If a painter, author or owner of a cultural work dies, heirs shall be entitled to inherit such properties if not owned by the state as public properties. The transfer of ownership of heritage property through inheritance is subject to the inheritance - related provisions in Iraqi law, and that the transfer of a movable property is subject here to the principle of reciprocity within the framework of private international law according to the text of Article (71) of the Personal Status Law, if its transfer would lead to it being taken out of the state[2], as the inheritance of a collection of old art paintings is subject to two important issues:

(First): The issue of considering it as a cultural property related to the civilization of a particular people and expressing their culture, and it shall not differ from the content of the aforementioned point on the issue of wills.

(Second): the issue of inheritance and the difference in inheritance provisions in Islamic countries from foreign countries[3], in terms of the pillars of inheritance and inheritance impediments. The most important thing that can be paid observed is the legal percentages in inheritance[4].

Reference is made that it shall not be valid to transfer the ownership of the property by inheritance while it is registered as a real estate heritage, if this transfer of ownership will lead the heritage to be moved outside the borders of the state, as Article (71) of the valid Iraqi Personal Status Law stipulates: ((The will for the movable property shall be valid only with the difference of nationality on the condition of reciprocity)), and this means that the previous article restricted the transfer of ownership of properties in general, including heritage properties, to movable properties only not real estate properties, and according to the principle of reciprocity, and therefore this principle does not apply in the case of the estate being real estate property because it is considered as the wealth of countries and the transfer of its ownership would constitute a violation of their sovereignty.

As for the transfer of ownership of heritage properties by inheritance within the borders of the state, here the transfer of ownership is valid and shall be enforced, on condition of observing the provisions relating to inheritance by legal shares, the pillars of inheritance, inheritance impediments and other legal stipulations[5].

It is worth mentioning here; The inheritance by which the ownership of the intangible or literary heritage is transferred from its originator or author to the heirs, is subject to the provisions of inheritance and the rules of intellectual property where the material and moral rights are transferred to the author's right by will and inheritance. Which are closely related to the person of the deceased author, inventor or merchant[6], so the part of the rights generated from intangible things with the personality of their owner is called moral rights[7], and the part that is not mixed with the personality of its owner is called material rights. Material rights are transferred to the heirs according to the rules for dividing the inheritance, shares of wills, and inheritance, and in that regard, the same is true of the rights generated from other material elements[8] that the bequeather leaves to his heirs, whether these elements are personal or in kind. As for the moral (non-financial) rights generated from non-material things that the testator leaves to his heirs, it is difficult to transfer them to the heirs entitled to them (such as creditors, bequests and the heirs of the deceased), due to the predominance of their connection

*1 Dr. Mus̆tafa Ibraheem Al-Zalmy, ibid, p.6*
*2 Dr. Mus̆tafa Ibraheem Al-Zalmy, ibid, p.142*
*3 Inheritance in foreign laws is an optional right, but the heir in those laws may refuse the inheritance in its entirety or accept it on the condition of inventory and verifying the obligations that the inheritance carries. Inheritance includes all the rights and obligations that were to be accrued to the legator, Dr. Jamal Mahmoud Al-Kurdi, "Conflict of Laws", Dar Al-Nahdha Al-Arabiya, 2006, p. 397.*
*4 These rules are considered part of the public order in particular in accordance with the provisions of Article (130/2) of the Iraqi Civil Code, which is also one of the invariable of the provisions of Islam, which the legislative authority itself may not violate in accordance with the provisions of Article (2/Firs̆t/A) of the permanent Iraqi cons̆titution for the year 2005, and therefore it shall not be permissible for the jurisprudence or the judiciary to interpret the order of the beneficiaries of the es̆tate and the decree of dis̆tribution. For more, see: Dr. Akram Fadhil Saeed, ibid, p. 445.*
*5 According to the text of Article (1) of the Iraqi Personal Status Law No. 188 of 1959, as amended, which s̆tipulates: ((The legislative provisions in this law shall apply to all issues that deal with these texts in their wording or in subs̆tance)), where the provisions of Articles (86) to (94) of the said law shall apply.*
*6 Dr. Akram Fadhil Saeed, ibid, p. 345*
*7 For more, see Dr. Abdul Kareem Mohsen Abu Dalu, "Conflict of Laws on Intellectual Property", 1s̆t Edition, Wael Publishing House, Amman, 2004, pp. 34-75.*
*8 The law of the legator at the time of his death shall apply to it, taking into account the valid provisions of Article (32) of the Iraqi Civil Code.*





with the author's personality over their financial value, no matter how large[1]. Accordingly, the material rights related to the heritage are transferred to the heirs or the legatee, but the moral rights related to the personality of its author are not transferred to the heirs or the bequeathed to him. To the heirs, but remains close to the personality of its author.

### Second requirement

### Role of rules with necessary application in the protection of heritage

The immediate application rules are laws of the protectionist system that permit the state to intervene and assume its responsibility in taking appropriate measures to preserve its environmental resources and archaeological and cultural treasures that are part of the environment and heritage, and to activate the movement of tourism and investment through them, which are both considered as sources of economic support for the country.

The general guiding system is considered a system that is limited in its rules to cases in which the national judge applies the imperative rules of his law without recourse to the rule of attribution[2], as it is limited to laws that are consistent with the state's intervention and guidance. The guiding system is divided into two types:

(First type): It is the system that directs international trade business to apply material rules that are based on commercial customs for the purpose of encouraging them.

(Second type): It is the realization of the interests of the national community and political, social and economic goals[3].

Both sections include rules of necessary application that extend outside the territory of the state to protect persons and properties by applying them to contracts concluded between individuals, that deal with private heritage properties and public heritage properties.

The goal of laws that provide for rules of necessary application is to protect the public interest and the national economy. The feature of these rules by extending beyond the borders of the state and their applicability to the contract or the fact of transferring the ownership of the heritage regardless of the applicable law according to the law of willpower or the chosen law makes them of great importance in protecting these properties, if it is not permissible to deal in them, and at the same time regulating the provisions relating to the international contracts transferring the ownership of these properties that are permitted to be dealt in. Accordingly, we will divide this requirement into two branches that show the role of rules with necessary application in the protection of heritage properties. The first branch studies the rule of prohibiting the disposal of public heritage properties and their non-acquisition by prescription, while the second branch deals with the rule of confiscation of cultural properties in the law of the country of origin, as follows:

### First branch

### Rule of prohibiting the disposal of public heritage properties and their non-acquisition by prescription

The rules with necessary application include all the legal rules of immediate application that apply directly to the contractual relationship and without reference to the conflict of laws methodology that attributes the legal disposition to the law of willpower. .Among these rules are the rules that prescribe prohibiting dealing in public heritage properties and impermissibility of disposing of or possessing them by prescription[4]. Article (42) of the valid Antiquities and Cultural Heritage Law No. 55 of 2002 stipulates a prison sentence of no more than (10) years for anyone who has embarked on excavation or attempts to uncover them without obtaining written approval from the archaeological authority, and imposes compensation by double the amount of the estimated value of the damage and the seizure of the excavated antiquities. The penalty is aggravated for a period not exceeding (15) years if the damage is caused by an employee of the Antiquities Authority. These rulings are immediate application provisions on Iraqi antiquities which can be applied to Iraqi heritage which is not permitted to be dealt in.

In this regard, we refer to Article (3) of the decision of the International Law Council in its session held on

*1 For more see: Dr. Akram Fadel Saeed, previous reference, p. 344.*
*2 Dr. Akram Abdul Kareem Salama, "Necessary Application Rules", ibid, P. 46*
*3 A. chapelle : Iesfonctions de Iordre public endroit international prive, these paris, 1979, N299 es̆t, p -320.*
*4 This has been indicated by Dr. Waleed Mohammed Rashad, ibid, P. 213*

3/12/1991 that stipulates: ((the texts of the law of the country of origin relating to the export of archaeological and cultural properties shall be applicable)). This means that the legal texts that govern the procedures for exporting cultural and artistic properties without licenses are among the rules of immediate application.

We suppose in our turn that this Article covers the modern trend in the private international law on the obligation of applying the foreign rules with necessary application documenting the spirit of international cooperation through acceptance by the foreign judge to apply the laws up to reaching the decision of annulling the disposition of antiquities and national heritage properties and the annulment related to public order, while the state that owns these properties has the right to request their recovery. The international cooperation stems through the application of foreign criminal law[1].

Also, the penalties imposed by the law of the country of origin of cultural property on the illegal export will be applicable with the penalty of confiscation of that property, and will be an opportunity for the country of origin to restore these properties and possessions immediately, once it proves its interest in returning those properties, as stipulated in the Convention of the International Institute for the Unification of Private Law (Unidroit) when it paid attention to archaeological excavations and national heritage and history properties[2].

The decision of the previous International Law Council contained in Article (4), was a radical handling that resolved the illegal export of archaeological and heritage properties that fall within the concept of heritage properties, as the decision aimed to protect the interest of the country of origin in recovering its cultural properties from the acquirer, whether he is in legal possession or out of good faith. This article has established the right of the state of origin to demand the recovery of its archaeological, artistic and cultural properties, provided that it proves that the absence of such properties causes damage to its cultural heritage. The request for recovery of such properties must be made within a specific period of time, and the legal possessor shall not adhere to the presumption of good faith unless he proves his good faith[3], and the state of origin must compensate the bona fide possessor here with fair compensation[4].

Regulations and instructions have been issued in Iraq regarding the legal regulation of antiquities, heritage materials, artifacts and art works[5]. Iraqi laws prohibit the circulation of antiquities and archaeological materials and transporting them to outside Iraq. The Antiquities Law provided for several penalties on anyone who looted, stole and illegally transferred the ownership of Iraqi antiquities outside Iraq, according to Article (44) of the valid Iraqi Antiquities and Heritage Law No. 55 of 2002.

## Second branch

## Rule of confiscation in the law of the country of origin of cultural funds

Confiscation is defined as “material precautionary measures that are aimed at the forcible possession by the state of seized items related to a crime from their owner.” Article (117) of the Iraqi Penal Code stipulates that “there should be ruling on the confiscation of seized items whose manufacture, possession or acquisition, use, sale, or offered for sale is deemed to be a crime in itself, even if they are owned by the accused or if he is not convicted, and if the aforementioned items were not actually seized at the time of the trial, and were sufficiently specified, then the court shall issue a ruling for their confiscation upon their seizure)). Article (30) of the Egyptian Penal Code, stipulated confiscation, but it is an optional penalty, and it is not permissible to pass judgment on it except for a person who has pleaded guilty and has been convicted of an original penalty that falls within the scope of felonies and misdemeanors. Confiscation may be obligator, is considered an in-kind preventive measure required by public order due to its relation to properties that are in nature outside the scope of dealing[6].

Finally, international efforts are being made to agree on the need to respect the protection established in various

*1 Dr. Sawsan Al-Safi, ibid, p 230*
*2 this has been indicated by Dr. Waleed Mohammed Rashad, ibid, P 214*
*3 Desbois: Des Conflits de lois en matiere de tranfert de propriete , DR Journ, int ,1931, p-317 ets.*
*4 The holder shall be considered bona fide if he did not know or could have known that these items were illegally obtained from the country of origin; The country of origin must request the recovery of the stolen cultural property within a period of 3 years from the time of the theft taking place: For more see:*
*J. Berge ,la convention d’unidroil sur les biens culturels remarques des Sources en droit international, clunet 2000 ,p-249 ets.*
*5 Instructions for regulating the circulation and sale of artifacts and heritage materials No. 3 of 1995 and Instructions on regulating the circulation of artworks No. 12 of 1994.*
*6 Dr. Waleed Mohammad Rashad, ibid, p. 216.*





legislations to control the phenomenon of illegal export to smuggle archaeological and cultural properties, and the eligibility of the country of origin of the cultural and archaeological properties to recover its cultural and archaeological properties for their exit illegally. Those properties existing in the territories of the country hosting them are considered as nothing but a type of a seizure under a prior claim for the country of origin[1].

Ruling the confiscation pursuant to the legislation of the country of origin is a prerogative of the public authority in that state, which lends the confiscation the administrative capacity and applies directly to the relationship, even outside the territory of the state (1).

## Conclusion

Results:

1- Cultural heritage is a flexible term that includes a large collection of properties of historical, literary, artistic and scientific importance that is associated with the culture of a particular people and their cultural, civilizational, scientific and literary heritage. It is not required to be old, but can be a modern human cultural product according to which a decision has been issued by the competent authority considering it as a cultural heritage.

2- The rule of attribution for the process of transferring ownership of cultural heritage is based on the type of cultural heritage, whether it is real estate or movable, public or private, tangible or intangible heritage, so that it is consistent with the nature of the cultural heritage. The world community subjects the contract transferring the ownership of cultural heritage and determines the applicable law sometimes according to the willpower and the law of the cultural heritage site at other times, according to the circumstances, and may subject the contract to the law of the country of origin of the cultural heritage, even though the law of the country of origin is the most appropriate regarding the cultural heritage, whether by transferring its ownership through a will, inheritance or through international contracts.

3- The law applicable to the transfer of the ownership of the cultural heritage shall be determined according to the implicit or express willpower of the contracting parties, or it may be enforced by rules of attribution that refer to the applicable law or by rules of necessary application, which are considered as immediately applicable to the case in dispute as long as it is linked to a rational link between its objective and the scope of its application and the contract which is the object of dispute. The rules with the necessary application impose themselves by themselves, whether in the law of the judge looking into the dispute, or in the law of the state concerned with the dispute, or in the law of a third country, such as the state of the cultural heritage site or the original cultural heritage[2].

Second: the suggestions

1- We propose to the legislator to amend the valid Iraqi Antiquities and Cultural Heritage Law No. 55 of 2002 so that the amendment includes provisions related to the Iraqi cultural heritage as follows:

A- Adding the paragraph “Third” to the first article of the aforementioned law, provided that it is read as follows (((The law aims to: ...Third: protect the Iraqi cultural heritage and regulate the circulation of heritage properties inside and outside the country)).

B - Amending Article (3) of the aforementioned law by adding a third paragraph as follows: ((It shall be prohibited to dispose of and transfer the ownership of Iraqi cultural properties outside the country except in the cases permitted by law)).

C- Adding a paragraph to Article (4) of the aforementioned law that defines cultural heritage and is read as

*1 Among the judicial applications in this regard: the case of the United States of America and Guatemala in 1990, whose facts are summarized in that a cultural archaeological item had been illegally confiscated from the territory of Guatemala, and the law of the latter country provided for confiscation. The property was seized in the American territory upon its entry, while the defendant argued that the property was not stolen. The US court refused that argument and confirmed the ownership by the original country (Guatemala) of those items and its right to recover them:*
*United States District, NDIL Ionis 14 October 1993 ED.845.F.S.P.544.*
*2 This has been indicated by Dr. Waleed Mohammed Rashad, ibid, P. 218-219*

follows: ((Eleventh - Cultural heritage: It is every right that is based on a tangible or intangible thing that has a heritage, historical or artistic value and is associated with the cultural heritage of a particular people or individuals or world heritage).

D- Amending the text of Article (22) of the valid Antiquities Law as follows: ((First - It shall not be permissible to:

(a) Forge or imitate archaeological and cultural material.

b- Make moulds or models of the cultural and heritage material.

c- Break or deform the archaeological, heritage or cultural material by inscribing on it, engraving in it, or changing its features.

Second - The Archaeology Authority or whoever entrusted by it to this, shall undertake the manufacture of molds or models stipulated in Paragraph (B) of this Article in accordance with specific conditions and methods in order to prevent manipulation and fraud.

Third: It shall be prohibited to sell or donate present as a gift the heritage materials, and public cultural properties or to take them outside Iraq in cases other than the cases stipulated in this law).

2- Adding a legal article to the valid Iraqi Antiquities and Heritage Law stating that ((the minister shall have the right to issue decisions considering a particular property a cultural heritage, provided that the decision grants a degree of protection to it and the reason for issuing the decision)).

3- Enacting the rule of jurisdiction in the Antiquities Law that is consistent with Article (15) of the Iraqi Civil Code as follows ((The Iraqi courts shall have jurisdiction to look into cases related to cultural heritage if: a- the defendant is present in Iraq or b- the heritage property exists in Iraq at the time of initiating the lawsuit).

**The end**

**Praise be to Allah**



**Assistant Prof. Dr. Nabil mad Allah al-Obaidi**

- Specialized in International Criminal Law
- Lecture in al-Nissur college, al-kitab university and al-anbar university
- Produced many types of research in Public Law

# Cultural Heritage Protection according to Sources of Legal Rules

## 1st- Introduction

Heritage is considered the history and memory of nations on the national level, and it is a patriotic symbol that people feel proud of. It is also a tool that links the past and future.

*Recently, there has been interest and responsibility placed on the shoulders of the international community to preserve it and protect it for future generations as much as possible, as it has attracted great international attention in order to preserve it from all forms of intentional and unintended aggression. Heritage was created to remain throughout the ages, and preserving it is the same as preserving the holy sites. Any failure to accomplish this task means breaking the connection and bond with the past and depriving future generations of their identity.*

*Human heritage is constantly exposed to various types of dangers, some of them are natural, such as earthquakes and floods, which lead to its disappearance and loss, and others are caused by man, such as mining, tourism, looting and illegal trade in it, in addition to the devastating effects of armed conflicts and civil wars. At that point, it turns into an important topic in international politics, because the cultural identity of societies becomes a target for the aggressors when wars break out since the most successful way to eliminate the identity of a society is to target its cultural heritage.*

*International efforts form many governmental and non-governmental organizations and more than 350 experts representing 90 countries gathered under the umbrella of the United Nations* Educational, Scientific and Cultural Organization to set an agreement regarding the protection of cultural heritage.

Among the international conventions or protecting cultural heritage during peace or war are;

1. UNESCO Convention on the Means of Prohibiting and Preventing the illicit Import, Export and Transfer of Ownership of Cultural Properties 1970.
2. UNESCO Convention for the protection of the world cultural and natural heritage 1972.
3. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954.
4. UN Convention on the law of the Sea 1982.

**2nd- The importance of the paper**

*The papers is important regarding the topic of protecting cultural heritage within the rules of international law and international conventions that gave great importance to cultural heritage, and this is a key factor in the protection of heritage and the biggest experience of the United Nations contribution to the Iraq heritage antiquities after the control of ISIS and its attempt to obliterate the cultural heritage of Iraq and Syria. Thus, the international community realized that there is a grave danger to which the world heritage is exposed.*

**3rd- The Topic of the paper**

*The paper will answer the following questions.*

1. *What is the definition of cultural heritage?*
2. *How can cultural heritage be protected at the international level?*
3. *What are the sources of legal rules?*

*4th- The approach of the paper*

*I will adopt the analytic approach for the international conventions in addition to the Iraqi law of cultural heritage.*

*5th- The plan of the paper*

*Due to the conditions set by the organizer with regard to the number of words, I see the division of the search into:*

*The first chapter: the definition of cultural heritage.*

*The second chapter: The sources of the international rules regarding cultural heritage protection.*

*Keywords: cultural heritage, rules, legal, protection, international, conventions.*



# Cultural Heritage Protection according to Sources of Legal Rules

**Assistant Professor Dr. Nabeel Al-Ubaidi**
Professor of International Law

First: introduction of the research: Heritage is a history and memory of the people and nation at the international level, and is a national symbol cherished by all the members of the society, and a tool linking the past and the future. Not long ago, there has been interest and responsibility placed on the world community to keep it as safeguarded and protected as possible, and heritage has been given large international interest to maintain it against all forms of intentional and unintentional assaults.

Heritage has been established to survive over the ages, and maintaining it is as maintaining the holy places. Any failure in completing this task would mean cutting off the relationship and linkage with the past and depriving the future generations of their identity.

Human heritage is continually exposed to different types of risks including natural risks such as earthquakes and floods which are the causes for its depreciation and waste, and also human-caused risks such as mining, tourism, theft and illicit trading in addition to the destructive effects of armed conflicts and civil wars, and then heritage is turned into an important issue in international policy because the cultural identity of societies become a target for assailants when a war breaks out, and so the most successful means of eliminating the identity of a society is the targeting of its civilizational heritage.

The international efforts of more than one governmental and non-governmental organization have been concerted, in addition to the efforts of more than 350 experts representing 90 states are working under the UNESCO umbrella to develop a convention on protection of cultural heritage in time of peace and war under international treaties such as:

- 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property
- The 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage
- The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and
- The 1982 UN Convention on the Law of the Sea.

So, the legal international protection of cultural heritage was clear and of high interest, urging the world community to speed up drawing up international conventions containing quick measures for protecting this heritage.

Second: The importance of the research: The research is important in protecting cultural heritage within the rules of international law and international conventions that have attached great importance to cultural heritage. This is a key factor in the protection of heritage and the biggest experience is the United Nations' contribution to heritage artifacts of Iraq after the control of terrorist ISIS and its attempt to obliterate the cultural heritage of Iraq and Syria. For this reason, the world community realized that there is a grave danger to which the world heritage is being exposed.

Third: The problem of the research: The problem of the study relates to answering the following questions:

1- What is the definition of cultural heritage?

2- How can cultural heritage be protected at the international level?

3- What are the sources of legal rules?

Fourth: Research Methodology: I will pursue the analytical approach to the texts of international conventions in addition to the cultural heritage- related national law.

Fifth: Plan of the research:

In my opinion, the search must be divided into:

The first topic: What is the cultural heritage?

The second topic: Protection of cultural heritage in accordance with the sources of legal rules.

**Abstract**

Heritage is the common heritage of all humanity due to the set of values that belong to the international cultural heritage for which the world community has been working to protect heritage by various means at all times through the application of national and international legal texts as well as through the texts of international conventions. The world community has realized the importance of these great cultural heritages and their preservation from any direct or indirect assault, whether this assault is intentional or unintentional.

Keywords: cultural heritage, rules, legal, protection, international, conventions

## The first topic

## What is cultural heritage?

Cultural heritage is a link between the past and the present, and a symbol cherished by the peoples of the world because they it is their inherited memory of the past times. The human heritage is constantly exposed to various types of dangers, some of which are natural, such as earthquakes and floods which lead to its disappearance and loss, and others are human-caused, such as mining, tourism, theft and illegal trading, in addition to the devastating effects of armed conflicts and civil wars. It is noted that the identity of the cultural society seems to be the most oriented target of the aggressor in all wars and conflicts, because it is the most successful way to eliminate the identity of the society and obliterate its landmarks by targeting its cultural heritage.

Based on the foregoing, we have divided the study into two requirements:

The first requirement: the definition of cultural heritage

The second requirement: types of cultural heritage

### The first requirement

### Definition of cultural heritage

Heritage in the general sense means that it is the efforts of man and human creativity that has reached the stage of advancement in different periods and times for places that may be convergent or lying far apart. It is the heritage of societies, whether tangible or intangible, a source of information and knowledge about a history that has passed, and a witness to human civilizations of past nations.

Cultural heritage means the cultural and national identity of every people or group of individuals in a society, and a container that contains the memory of human culture in all its forms, materially or morally.

International jurisprudence has provided many definitions of cultural heritage, including:

- Part of the international jurisprudence advocated the process of linking cultural heritage and the term "culture", defining culture as a means of communication between peoples throughout a state, which has a clear impact on the development of peoples from one period to another and from one category to another[1].

In order for the cultural heritage to be covered by the protection of international law, it is required in addition to having a global cultural value, that it must be described as an artistic and human creativity such as archaeological sites and their inscriptions, pictures, masterpieces, statues, writings and a group of buildings that have high architectural pattern.

*1 Dr. Salih Mohammed Badrulddin: "Protection of Cultural and Natural Heritage in International Conventions", Dar Al-Nahdha Al-Arabia, Cairo, 1999, P. 15*





- As for the World Heritage Convention adopted by the UNESCO General Conference in 1972, it defined the world heritage of humanity as "those landmarks, collections and sites of exceptional universal value from the perspective of history, such as art or sciences, natural landmarks, geological compositions, natural sites of exceptional value from the aesthetic or scientific perspective[1].

- As for (UNESCO), it had a significant and clear role in the safeguarding and protection of cultural heritage. The Convention on the Protection of the World Cultural and Natural Heritage, which was approved by the UNESCO General Conference at its seventeenth session held in Paris in November 16, 1972, provided a definition of cultural heritage that includes:

- Antiquities: Architectural works, sculptures and paintings on buildings, elements or formations of an archaeological nature, inscriptions, caves, and groups of monuments, that have an exceptional universal value from the perspective of history, art or science.

- Compounds: - a group of isolated or connected buildings, which have, because of their architecture, symmetry, or integration into a landscape, an exceptional universal value from the perspective of history, art or science.

- Sites: They are man-made works, or joint works between man and nature, as well as areas including archaeological sites that have exceptional universal value from the historical, aesthetic, anthological or anthropological perspective.

The concept of cultural heritage is broad as it includes antiquities, compounds and archaeological sites as indicated in Article 1 above of the 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage [2].

The national legislation concerned with the protection of antiquities introduced a definition of their antiquities[3] as every real estate or movable property produced by different civilizations or brought about by arts, sciences, literature and religions from the prehistoric era and through successive historical ages until a hundred years ago so long it has an archaeological or historical value or importance as a manifestation of different civilizations, or has a historical link to them, as well as the remains of human races and their contemporary beings.

The Iraqi Antiquities and Heritage Law No. 55 of 2001 defined it as (Antiquities: movable and immovable property that has been built, made, sculpted, produced, written, drawn, or depicted by humans and whose age is not less than (200) two hundred years, as well as human, animal and plant structures).[4]

The law of the Kingdom of Bahrain defined it as anything created by civilizations or left behind by previous generations, which is uncovered or found, whether it is real estate or movable property related to the arts, sciences, literature, morals, beliefs or daily life. As for public events or others that date back fifty Gregorian years at least, whenever they have an artistic or historical value, they are considered as antiquities, in addition to historical documents, manuscripts, and the covers found with them for their preservation. The remains of human and animal races and their contemporary beings dating back to before 600 Gregorian years shall be considered as antiquities too).[5]

In the Iraqi Law of Antiquities and Heritage No. 55 of 2002, we find the definition of antiquity in Article (4/ Seventh) as "the movable and immovable property that has been built, made, sculpted, produced, written, drawn, or depicted by humans and whose age is not less than two hundred years, as well as the human, animal and plant structures). Therefore, we find that the Iraqi legislator in the new antiquities law has pursued the direction adopted by most laws on antiquities in Arab and Western countries.

*1 The World Heritage List includes 890 properties that constitute cultural and natural heritage that the World Heritage Committee (belonging to UNESCO) considers to be of exceptional global value. The List also includes 689 cultural properties, 176 natural properties and 25 mixed sites (natural and cultural) located in 148 member countries.*
*2 Article 1 of the UNESCO Convention on the Protection of the World Cultural and Natural Heritage, date of visit 3/1/2022. https://www.arcwh.org/ar/publications/basic-texts-of-the-1972-world-heritage-convention*
*3 Article one of the Egyptian Antiquities Protection Law No. 117 of 1983*
*4 Iraqi Antiquities and Heritage Law No. 55 of 2001*
*5 Article 2 of Antiquities Protection Law No. 11 of 1995/ Kingdom of Bahrain*

**The second requirement**

**Types of cultural heritage**

What makes the world heritage different from others is the significance that characterizes it including the whole world. Given that the world heritage locations are considered the property of all the peoples of the world, regardless of the place where these heritage monuments are located. UNESCO also encourages safeguarding and protecting cultural property on a large scale.

Cultural heritage is valued as the most comprehensive and broadest of all types, as it includes all the customs and traditions passed on by individuals from one generation to another, such as religious beliefs and social customs. Many countries are working to preserve their heritage for fear of depreciation.[1]

The laws related to antiquities have adopted many directions with regard to the classification of antiquities, with varied directions as follows [2]:

The first direction: adopting the classification of antiquities into: -

1- National Antiquities: The antiquities here are classified as national cultural properties made by the people of the country, that is, a national heritage. One of the legislations that has adopted this classification is the legislation of Mongolia.

2- Foreign antiquities: Here they mean that the antiquities on their territories are international antiquities that have been brought in from outside Mongolia [3].

The second direction: this classification tended to classify antiquities into:

First: movable antiquities

Second: immovable antiquities

Several laws have adopted this classification, which is the most common classification other than the laws. Among these laws for example are the law of the Kingdom of Saudi Arabia, the Syrian law and the law of the Kingdom of Bahrain, according to the provisions of the articles [4]. In the same direction, the classification divided antiquities into:

1- immovable antiquities: they mean those antiquities connected to the land such as archaeological mounds, remnants of settlements, burial places, castles, forts, buildings, historical and heritage houses, springs, canals, and religious buildings such as temples, mosques, and others, whether they are on the ground, underground, or in their territorial sea.

2- movable antiquities: These are the antiquities whose place can be changed without being exposed to damage or harm. Among the powers of the entity that specializes in antiquities and their care is to consider movable antiquities as immovable antiquities if they are part of an immovable antiquity complementing it, associated with it, or ornamental in it, such as writings, inscriptions, architectural elements, and tombstones. This authority is applicable in Iraq based on what is presented by the Minister and decided by the Council of Ministers [5].

Among the countries that have adopted this direction is the Republic of Iraq. Article (2) of the Iraqi Antiquities Law No. 59 of 1936 stipulates the following: "Antiquities are divided into two types: movable and immovable. Immovable antiquities mean ancient monuments that are built on the land and connected to it, such as buildings,

*1 www.marefa.org. Date of visit 3/1/2022*
*2 UNESCO, the conservation of cultural property. Paris, 1979.*
*3 Article 4 of the Mongolian Cultural Property Protection Act No. 167 of 1970.*
*4 and also Article (7) of the Saudi Antiquities Law of 1971, Article (33) of the Syrian Antiquities Law of 1963, and Article (3) of the Law of the Kingdom of Bahrain.*
*5 By a decision of the Prime Minister, based on a proposal submitted by the Minister of Information, it shall be permissible for technical or historical reasons to consider any real estate or movable property as antiquity if the state has a national interest in its preservation and safeguarding, without being bound by a time limit. See Article (2) of the Law of the Kingdom of Bahrain No. 11 of 1995.*





mounds, caves, and all other things that are usually associated with buildings and constitute part thereof."

Movable antiquities mean (old antiquities that are separated from the land and buildings and that are easy to separate from them and moved to any other place).

The third direction: This direction has pursued a different direction, as it adopted the triple classification and abandoned the previous binary classification. Among these laws is the Indian legislation that has adopted the triple classification of antiquities. The first includes archaeological sites and ancient memorials, while the second includes antiquities and the third includes artistic treasures[1].

In order to protect cultural heritage on a large scale, specialized international organizations, including UNESCO, have classified the world cultural heritage into:

First: tangible cultural heritage

Second: Intangible cultural heritage

First: tangible cultural heritage: It is divided into:

A- Immovable heritage: It includes the archaeological heritage such as archaeological sites and ancient sites, and the urban heritage represented by cities, heritage buildings, traditional neighbourhoods historical centers, landmarks and architectural works.

b- Movable heritage: It is a heritage that includes museum artifacts, as well as stone engravings, paintings, seals and pictures.

Second: Intangible cultural heritage: This type of intangible cultural heritage is in the form of arts, traditions and social practice, as well as a festivity, knowledge, practices and craftsmanship skills [2].

**The second topic**

**Sources of international rules for the protection of cultural heritage**

The subject of international protection of cultural heritage is one of the issues that were raised in the past, and it is an idea that is not new, as its roots extend to ancient civilizations, but this protection has undergone evolution with the passage of time, and this involvement was through the recognition of international legal rules that are concerned with protection[3].

The wars and armed conflicts, whether internal or international, and the control of terrorist organizations over cities have generated a state of damage, looting and theft of antiquities and all cultural property, as happened in Iraq, Syria and Libya. The terrorist organizations have carried out several acts and destroyed many sites and archaeological sculptures that date back to thousands of years. Some of these monuments are listed on the UNESCO World Heritage List[4]. Among these cities are the ancient city of Hatra, as well as the city of the Prophet Yunus, Ashur, the Mosque of the Prophet Sheet and Kaleh, in addition to the destruction of mosques, churches and temples belonging to other faiths, as well as some individuals stealing and smuggling them outside Iraq in order to sell them to merchants. For these acts carried out by terrorist organizations, armed groups and individuals, there should be legal rules and legislation criminalizing these them and imposing the most severe penalties on their perpetrators and considering these crimes as International crimes.

*1 Indian Antiquities and Art Treasures Act 1972.*
*2 Dr. Yasir Hashim Imad Al-Hayajt: Role of International and Regional Organizations in the Protection, Management and Consolidation of Cultural Heritage, Al-Domato Magazine, Issue 34, July 2016, p. 90.*
*3 Israa Fadhil Habeeb Khaleel: Protection of Natural Heritage in International Law- The marshes of southern Iraq as a model, Master's thesis at the Faculty of Law, University of Karbala, 2018, p. 6.*
*4 https://whc.unesco.org/ar/list/?iso=iq&search=&*

Based on the foregoing, we will divide the topic into:

**The first requirement: international conventions on protecting cultural heritage**

**The second requirement: bilateral conventions on protecting cultural heritage**

**The third requirement: regional conventions on protecting cultural heritage**

## The first requirement

## General international Conventions

The world community has sought to lay the foundations and legal rules that constitute the international legal framework for the protection of world cultural heritage by concluding several international conventions that are aimed at protecting the world human cultural property, whether in times of war or peace, ensuring the safety of archaeological and historical sites and preventing attacks on them, their theft or looting, in the forefront of which was the (Grand Emir de Vaschel Treaty) in the 18th century, which was the first international treaty that stipulated the principle of respect for sanctities, graves and cultural buildings such as temples by virtue of their civil character, as well as considering them as part of the cultural or spiritual heritage of peoples. As such, their protection shall be on the part of civil protection, in addition to being subject to special protection under the provisions relating to the protection of cultural property in cases of war and armed conflict.

The international conventions are considered as the first direct source for establishing international legal rules. They are within the international system as the legislation within the bylaw.

When states agree among themselves on establishing a specific convention, they assume the same function that the legislator assumes within the state[1].

The UNESCO corridors have witnessed the conclusion of many international conventions, which resulted in many countries acceding to them due to their clarity and vividness of their purpose which is to preserve and safeguard heritage in all its forms against the dangers of loss and extinction or the dangers of wars and crises that human beings forge from time to time.

UNESCO has contributed to enriching legal thought and alerted public opinion and governments to the need to preserve world heritage.

The conventions also prohibit any operation of seizure, destruction or damaging institutions that are dedicated to worshipping and arts, even if they are owned by the occupied state. Due to the failure of these previous conventions to provide adequate protection for the world heritage in many archaeological sites in the world, many international conventions have been concluded in an attempt to bridge the gaps And to make it more mandatory on the State- Parties, the most important of which are[2]:

First: The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954: It was signed in 1954 and entered into force on 7/8/1956 and ratified on 9/4/2003 by more than 100 countries at the time, supplemented by the 1954 Protocol Concerning Cultural Property During Occupation, and an additional second Protocol signed on March 26, 1999.. Because the process of preserving cultural heritage is of great benefit to all the peoples of the world, it was necessary to ensure the international protection of heritage of all kinds, and since the alarming and rapid development of war techniques, it was necessary to regulate protection in peacetime by taking the necessary measures, whether national or international, and the protection enshrined in this Convention to cultural property.

The preamble to the Convention affirmed that cultural property has sustained severe damage during armed conflicts and that the dangers to which such property is exposed are steadily increasing as a result of the

*1 Dr. Hamid Sultan: Public International Law in time of Peace , Dar Al-Nahdha Al-Arabiya, Cairo, 1962, p. 46.*
*2 Hike Speicher: Protection of Cultural Objects According to the Law of International Treaties, research published in the book "Studies in International Humanitarian Law", Arab Future House, first edition, 2000.*





progress of war techniques, and as such, all damage to cultural property owned by any people is considered an offense to cultural property owned by all of humanity, whose definition was mentioned in Article 01 of the Convention and includes:

(a) Movable or immovable property of great importance to the cultural heritage of peoples, such as artistic or historical architectural buildings, religious or mundane, archaeological sites, groups of buildings that acquire, when combined, historical or artistic value, artifacts, manuscripts, books and other objects of historical and archaeological artistic value, as well as scientific collections and important collections, books, manuscripts and reproductions of property.

b- Buildings primarily and effectively designated for the protection and display of movable cultural property, such as museums, major bookstores and manuscript stores, as well as hideouts intended for the protection of movable cultural property during armed conflicts.

C- Centers that contain a large group of cultural property, which are called “memorial buildings centers.”

We conclude from the text of this article that cultural property is divided into three types, namely, movable or immovable property of importance, buildings designated for the protection and display of cultural property, and memorial building centers. Expanding the scope of protection for all these properties is aimed to provide the largest possible international protection for the world cultural heritage which forms part of the world heritage, and this will only be achieved by taking a set of preventive measures, which is a principle contained in this Convention which obligates the states in times of peace to safeguard cultural property located in their territories against damage that may result from an armed conflict, by taking the measures they deem appropriate through establishing hideouts designated for the protection of movable cultural property[1], centers of memorial buildings and other immovable cultural property of great importance, and to facilitate the identification of cultural property, the Convention permitted placing a distinctive emblem on it[2]. The Convention also established certain conditions to provide special protection for cultural property as a preventive measure to prevent the destruction of cultural property, namely:

- That it should be at a sufficient distance from any large industrial center or any important military building that is considered as a vital point such as an airport, a radio station, a factory for national defence a seaport, a railway station of importance, or an important transportation route.
- It should not be used for military purposes.
- If a memorial building center is used for the movement of forces or military materials, even for passage, this shall be considered as a use for military purposes, and that this center has been used for the same purpose if works are carried out therein directly related to the military operations or the establishment of military forces or the manufacture of war materials.

4 - The presence of armed guards specifically set up to guard one of the cultural properties described in the first paragraph shall not be considered as use for military purposes, and this also applies to the presence of police forces whose normal task is to maintain public security.

The Convention also stipulates that protection begins as soon as the cultural property is registered and recorded in the International Register of Cultural Property placed under a special protection system.

The Convention also set a number of obligations on the State- Parties with regard to respect for cultural

*1 Article 8 of the Convention on granting special protection.*
*2 Article 6 of the Convention Concerning Placing a Distinctive Emblem on Cultural Property and Article 17 Concerning the Use of the Emblem, which stipulate the following:*
*1 - The emblem may not be used three times, except in the following cases: a- for immovable cultural property placed under the special protection system, b- for the transfer of cultural property in accordance with the conditions set forth in Articles 12 and 13, c- for makeshift hideouts, in accordance with the conditions stipulated in the executive bylaw. 2 - The emblem may not be used alone except in the following cases: a- For cultural property that has not been placed under the special protection system; b- Persons entrusted with monitoring work in accordance with the provisions of the executive bylaw; (c) for employees entrusted with the protection of cultural property; D- For the identity cards described in the executive bylaw.*

property, the most important of which are[1]:

1- Respect for cultural property located on the territory of the State-Parties by refraining from using such property or the means designated for its protection, or the places directly adjacent to it, for purposes that might expose it to destruction or damage in the event of an armed conflict arising, and by refraining from any hostile act against it.

2- The obligations stipulated in the first paragraph of this Article may not be waived except in cases necessitated by compulsive military imperatives.

3- The Contracting Parties shall also undertake to prohibit any theft, looting or waste of cultural property, to protect it from such acts, and to stop such acts when necessary, whatever their methods, and similarly to prohibit any act of sabotage directed against such property.

4 - The State- Parties shall undertake not to seize any movable cultural property located in the territory of any state which is a party to the Convention.

5 – The state- Parties shall undertake to refrain from any revenge measures affecting cultural property.

6- The state- parties that occupy all or part of the territory of one of the other contracting parties shall undertake to work to the extent possible to protect and preserve their cultural property[2].

7. The state- Parties shall undertake to guarantee the inviolability of cultural property that is placed under the special protection system by refraining from any hostile act towards such property once it has been registered in the "International Register" and from using it or using the places that are directly adjacent to it for military purposes, except in the cases provided for in the fifth paragraph of Article Eight [3].

8- During an armed conflict, the distinctive emblem must be affixed to cultural property that is placed under the special protection system, and allowed to be placed under monitoring of an international character, in accordance with the provisions of the executive by laws[4].

The Convention also obligates the contracting parties to include, since the peacetime, in the regulations and instructions for their military forces, provisions that ensure the application of this convention, and to work since the peacetime to inculcate in the members of their armed forces the spirit of due respect towards the cultures and cultural property of all peoples, as well as preparing departments or specialists or by enlisting them in their armed forces, whose task is to ensure respect for cultural property and to assist the civil authorities responsible for protecting such property[5].

The Convention has also established a special system for the transfer of cultural property, whether within a territory or to another territory, where, at the request of the relevant contracting party, it may be placed under special protection, as is the transfer under special protection that takes place under international supervision. In this framework, the Convention has obligated the member-states to refrain from any hostile act towards any transfer that takes place under the special protection system[6]. The Convention also authorized one of the contracting parties that consider that the safety of some cultural property requires its urgent transfer, for example in the event of an armed conflict, to use the emblem in the process of transferring and to notify the hostile party of this transfer, which under this convention, it shall refrain from any hostile operations directed against it[7].

Within the framework of continuing the efforts for the international protection of cultural property, the protocol of the 1954 Hague Convention was concluded, which stipulates the prevention of the export of

*1 Article 4 of the Convention*
*2 Article 5 of the Convention on occupation*
*3 Article 9 of the Convention on the inviolability of cultural property that is under special protection*
*4 See Article 10 of the Convention on Distinctive Emblem and Monitoring.*
*5 Article 7 of the convention on military measures*
*6 Article 12 of the system of transfer under special protection*
*7 Article 13 of the Convention on transfer under urgent cases*





cultural property from occupied territories, and the guarding of all cultural property that has been exported on its way back to its place of origin. The protocol also obligates the state- parties to return the cultural property that is deposited with other countries to protect it from the dangers of armed conflict, and given the destruction of cultural property during the conflicts that erupted in the late eighties and early nineties of the last century, which necessitated the introduction of some improvements to the Hague Convention, where the Convention was subjected to a review that began in 1991, resulting in the adoption of the Protocol Second to the Hague Convention in March 1999, which established a set of preventive measures to avoid the extinction of these world properties through[1]:

Preparing lists for making an inventory of the cultural property.

planning for emergency cases.

Preparing to transfer cultural property and provide protection for it.

Appointing authorities responsible for protecting cultural heritage.

However, despite all the obligations imposed by the Convention on the State- Parties to protect the world cultural heritage as a common heritage of all humanity, given that every people contributes its share to the world's culture and its cultural diversity, the Convention was the subject of several criticisms due to the inclusion of several exceptions, the most important of which is the removal of protection for heritage In the event of the use of this property for military purposes, or the existence of compelling military necessities, which seriously prejudices the objectives of the Convention and weakens its impacts, and this was the result of American pressures, which made the Convention infeasible in the case of wars.

Second: The UNESCO Convention on the Measures to be Taken to Prohibit and Prevent the Illicit Import, Export and Transfer of Ownership of Cultural Property.

It was approved by the UNESCO General Conference at its sixteenth session in Paris, adopted on November 14, 1970, and entered into force on April 24, 1972. The number of acceding countries totaled 97 member states on October 2, 2003. The UNESCO Convention[2] established legal principles for preserving the human heritage, which are:

- State- Parties shall refrain from stealing cultural heritage and hiding it in caches or storerooms in a manner that exposes it to damage or loss.

- The export or import of cultural heritage whenever it is illegal was in contravention of the principle of good faith that governs international relations between nations and runs counter to the rules of international understanding between them.

- The Convention has introduced several means that the state parties should act upon[3], so it decided to establish what is known as special national agencies, and established an agency for granting certificates of cultural heritage export from one country to another[4].

- The Convention made it obligatory on the State- Parties to take necessary appropriate legislative measures, especially with regard to the illegal ownership of museums by individuals and in a manner that is inconsistent with the principles of the Convention[5].

- The state- Parties shall provide for criminal and administrative liability, and shall arrest criminals who steal cultural heritage and in cases of illegal transfer[6].

*1 Article 5 of 1999 protocol is complements the 1954 Hague Convention*
*2 UNESCO has issued a recommendation on the means of prohibiting and preventing the import, export ans illicit transfer of cultural property in 1964 in its 13th session.*
*3 Article 5 of the 1970 UNESCO Convention*
*4 Article 6 of the same Convention*
*5 Article 7 of the same Convention*
*6 Article 8 of the same Convention*

Nothing in the Convention that prevents the States Parties from concluding special conventions among themselves or from continuing to enforce previously concluded conventions regarding the recovery of cultural property that has been transferred for any reason from its place of origin prior to the entry into force of this Convention[1].

- It is the right of the state whose cultural heritage has been assaulted, or in the event of its theft, to demand compensation for the damages caused by the state that has caused the damage and its right to recover the stolen items, taking into consideration the necessity of international cooperation in settling the problems of recovering the world cultural heritage and returning it to its original place.

Second – 1972 Convention for the Protection of the World Cultural and Natural Heritage:

This Convention, which contains 83 articles, is concerned with the world cultural and natural heritage. Cultural heritage includes[2]:

(Antiquities, which are represented by architectural works, sculpture and depiction on buildings, elements or formations of an archaeological nature, inscriptions, caves and groups of landmarks, which all have an exceptional world value from the perspective of history, art or science[3].

Compounds, which are groups of isolated or connected buildings that, because of their architecture, symmetry, or integration into a landscape, have an exceptional world value, from the perspective of history, art or science.

The sites, which represent the works of man or the joint works of man and nature, as well as areas, including archaeological sites, of exceptional global value from a historical, aesthetic or anthological perspective.

This Convention affirms that each state must adopt a general policy aimed at making cultural heritage perform a function in the life of the community and work to establish a department for its protection and preservation, as well as developing scientific studies and research[4].

The Convention provides for establishing an international intergovernmental committee[5]whose mission is to protect and preserve the cultural and natural heritage known as (the World Heritage Committee), which consists of 15 state- parties to the Convention, to be elected by the state- parties at a general meeting. In this context, the Convention[6] indicates that each state -party to the Convention must submit a list of its cultural and natural heritage properties located in its territory, containing comprehensive documents of the locations of the said properties.

UNESCO is also establishing a fund to protect the cultural and natural heritage of outstanding global value known as the (World Heritage Fund)[7] to which state-parties contribute It also calls for establishing public and private institutions to contribute by donating money to the Fund under the UNESCO supervision[8].

The Convention gives the right to each state entering into it, to request international assistance to protect its cultural and natural properties of exceptional global value. Aid is to be provided after studying technical, scientific and technological issues to be carried out by the World Heritage Committee, seeking the assistance of experts and technicians before granting any financial aid. Usually the loans carry low interest or interest-free, to be paid over long periods.

Finally, the Convention affirms that state- parties shall be obligated to promote the respect of their peoples for

*1 Article 15 of the same Convention*
*2 UNESCO Convention concerning the protection of the world cultural and natural heritage*
*3 Article 1 of Convention concerning the protection of the world cultural and natural heritage*
*4 Article 4 of 1972 Convention concerning the protection of the world cultural and natural heritage*
*5 Article 8 of 1972 Convention concerning the protection of the world cultural and natural heritage*
*6 Article 11 of 1972 Convention concerning the protection of the world cultural and natural heritage*
*7 Article 15 of 1972 Convention concerning the protection of the world cultural and natural heritage*
*8 The World Heritage Fund established under the 1972 UNESCO Convention had its money allocated to cover the costs of projects concerned with protecting the world's cultural and natural tangible heritage, whether it was on land or underwater, and even the intangible heritage.*
*See, Daily Reports of the United Nations, March 22, 2004*
*http://www.un.org/arabic/ar/radio/news/2004/no403220.htm*





cultural and natural heritage, through the media and educational curricula[1].

In addition to all of the above, the recommendations issued by UNESCO within the framework of the protection of the world cultural and natural heritage[2], and although they do not have an obligatory nature as an international act, they enjoy a widespread literary value among the member states. Indeed, it can be said that UNESCO's recommendations have undoubtedly become customary international legal rules in the field of preserving and safeguarding the world's cultural and natural heritage, and assisting the state- parties on how to enforce the provisions of the conventions signed in this regard.

UNESCO, as an international organization entrusted with the responsibility of preserving human heritage, has contributed to the establishment of conventions in the years 1970, 1972, 1995, 2001, 2003[3], which had a great impact in achieving that protection.

However, the UNESCO Convention of 1970 (on the measures to be taken to prohibit and prevent the illegal import, export and transfer of ownership of cultural property) did not achieve all the desired goals, and the reason was attributed to:

Focusing on urging countries to take legislative measures to protect cultural heritage without focusing with the same force on the need for international cooperation as a first solution to achieve the objectives of this convention[4], so the UNESCO General Diplomatic Conference in 1995 approved a new convention.

Third: The UNESCO Convention for the Recovery and Recovery of Stolen and Illegally Exported Cultural Properties for the year 1995[5].

This Convention has come to define cultural properties[6], as (religious or mundane proeprties that have a special importance and a global historical value such as antiquities, whether they were pre-historic or historical, and literature and arts).

The Convention has not deviated from the definitions that are included in the 1972 UNESCO Convention. Each state must identify the cultural objects and properties it possesses and register them with the UNESCO secretariat.

The Convention stipulates that its provisions[7] do not apply retroactively, but rather govern only the facts that follow its entry into force.

The Convention also clarified the necessity of recovering and retrieving the stolen heritage with compensation to the owner of these stolen items if he is in good faith and exerted diligence in preserving the heritage. The Convention specified a period for claiming the recovery, which is a relative period of three years from the date of locating the stolen items, and an absolute period of fifty years since the theft of cultural heritage.[8]

However, what is noted despite all the international conventions concluded to protect the world cultural heritage, whether in times of war or peace, is that they achieve the desired goals, as most of the tangible antiquities in the world hardly appear on the surface of the earth, except after searching and excavation as a result of neglect or their exposure to destruction or theft during wars and armed conflicts, especially in the aftermath of 2003,

*1 Article 27 of 1972 Convention concerning the protection of the world cultural and natural heritage*
*2 Dr. Salih Mohammed Badruddin: ibid, p.87*
*3 UNESCO Convention for the Protection of the Oral Cultural Heritage, adopted by the General Conference of UNESCO on October 17, 2003, which complemented UNESCO's efforts in the Convention for the Protection of the World Cultural and Natural Heritage, aims to protect oral traditions, heritage, performing arts, social customs, rituals, festive occasions, traditional craftsmanship, knowledge and skills related to nature and the universe.*
*UNESCO, safeguarding of intangible cultural heritage.*
*http://portal.unesco.org/culture/en/er.php-URL-ID=1551&URL-DO=DO-TOPIC&URL*
*The Director-General of UNESCO, during the sessions of the meeting of governmental experts to prepare a draft convention for the protection of the underwater cultural heritage, stresses the importance of the previous UNESCO conventions 1970, 1972, 1995, and the subsequent international efforts dedicated to the protection of cultural heritage.*
*See Draft Convention On Underwater Cultural Heritage 10 July/2001*
*http://www.unesco.org/bpi/eng/unescopress/2001/0.18le.shtml*
*4 Dr. Salih Mohammed Badruddin: ibid, p.98*
*5 Convention on stolen or illegally exported cultural objects. (convention UNIDROIT 1995)*
*6 Article 2 of 1995 UNESCO Convention for the Recovery and Recovery of Stolen and Illegally Exported Cultural Properties*
*7 Article 10 of the 1995 UNESCO Convention for the Recovery and Restitution of Stolen and Illegally Exported Cultural Properties.*
*8 kifle jote, international legal protection of cultural heritage, Stockholm 1994, ISBN. 91-7598-644-2,p. 249.*

where the largest theft was recorded in the history of museums in Iraq, when about 150 thousand artifacts were looted from the Iraq Museum. This was the beginning of the country's loss of antiquities that date back to thousands of years, with the world standing shocked again in front of what was carried out by the terrorist Islamic State organization (ISIS) in the city of Mosul after they had seized it in 2014 and played havoc in all the historical landmarks of the city. Also, the Syrian city of Palmyra, classified as a UNESCO World Heritage Site, is the most prominent example of the cultural disaster that Syria has seen as since the Islamic State established their control of the city in May 2015, they followed a policy of systematic destruction of the city and its cultural and civilizational memory, which makes us call on the whole world to move quickly to solve this dilemma.

**The second requirement**

**Bilateral convention for the protection of cultural heritage**

The bilateral convention has a significance from its name that it is between two countries in order to regulate a specific subject, as it results in provisions that are binding on the two parties which signed the convention between them.

It is noted that, in most cases, bilateral conventions are concluded for a specific purpose, which is to protect cultural heritage from illegal trafficking in antiquities, and may also be concluded in order to return cultural property that has been illegally transferred from its homeland to another country[1].

An example of bilateral conventions related to the protection of cultural heritage, which were concluded between countries bilaterally, is the 1970 American-Mexico Convention on returning stolen and illegally exported cultural property.

The purpose of the convention is to address the problem of illegal trafficking and theft of cultural property, as well as working to recover the stolen items. The Mexican government submitted a proposal for concluding a convention that addresses this problem, which is the illegal trafficking and recovery of stolen antiquities, similar to the convention between America and Mexico previously concluded in 1963, which concerns the return of stolen property, as there is a need for Mexico to conclude this convention because of the transfer of quite a few antiquities into America on an ongoing basis, and that is why it insisted on concluding this convention to curb this phenomenon. There is also a very important purpose of this convention, which is to prevent illegal excavation of antiquities and to ensure bilateral cooperation for the return of stolen cultural property[2].

We notice that through the texts of the American-Mexican convention, it affirmed the continuous cooperation in all fields, such as those related to the excavation and search for antiquities and providing the committees with studies related to archaeological sites, exchange of experiences and use of modern methods in the excavations and searching for antiquities, in addition to the need to provide financial support in order to cover archaeological project operations. The Convention also clarifies the conditions that should be in place in regard to the return of cultural property, and the first of these steps is through diplomatic missions, while submitting all evidence and proofs to establish justice in order to return the archaeological property to its owners[3].

Article (4) of the American-Mexican Agreement clarified that the two states should bear responsibility to return the cultural property that is stolen and transferred to it, that is, the state in possession of this cultural property should return it, but it legislated that it is not obligatory to compensate for the damage the property incurred. Accordingly, America returned 1,218 artifacts to the State of Mexico in 1986.

1 Among the most important bilateral conventions concluded for the purpose of protecting cultural property are the convention between the United Kingdom and Spain in 1960, the convention between Spain and Brazil in 1968 and the convention between Brazil and Costa Rica in 1968. See:
Kifle jote : International legal protection of cultural heritage, chapter seven, 1994.

2 Article 2 of the US-Mexico Convention 1970 relating to the return of stolen and illegally exported cultural property.

3 Article 2 of the above convention





Undoubtedly, the Convention has great importance and established restrictions on preventing the illegal trafficking in antiquities and provided a motive for both states.

**The third requirement**

**Regional conventions for the protection of cultural heritage**

The culture of peoples is considered as one of the important pillars in the world as a whole, and the important pillar in the Universal Declaration of Human Rights, considering culture an important and integral part of world peace throughout history. The close relationship between the cultural rights of indigenous peoples and their right to self-determination is evident through the text of Article 3 of the Declaration, which states that these peoples may freely develop their cultural heritage, in accordance with their right to self-determination. The Declaration addresses the tangible heritage, customs and traditions of indigenous peoples (Article 11) , the religious and spiritual customs, traditions and rituals of indigenous cultures (Article 12); their intangible heritage (Article 13); and their right to uphold the majesty and diversity of their cultures and languages, with regard to education and the media (the two Articles 14 and 15). With regard to cultural heritage specifically, the Declaration stipulates the following:

(Indigenous peoples have the right to maintain, control and protect their cultural heritage, traditional knowledge and traditional cultural expressions, as well as manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of animal and plant characteristics, oral traditions, literature, drawings, sports, traditional games, visual arts and performing arts. They also have the right to maintain, control, protect and develop their intellectual property of this cultural heritage, traditional knowledge and traditional cultural expressions (Article 31).

The Universal Declaration of Human Rights stressed the right of all peoples to develop culture, customs and traditions, and to use things specific to their rituals.

At the regional level, the African Charter on Human Rights enshrines the right of the individual to participate freely in the cultural life of his community (Article 17) and upholds the right of all peoples to develop their cultural heritage and enjoy the common heritage of humanity on an equal footing (Article 22). As for the American Declaration of Human Rights and Duties, it declares that every person has the right to participate in the cultural life of the community (Article 13).

The desire of European countries to protect their common cultural heritage through regional cooperation under the umbrella of the European Union had a great impact, not only on the level of European countries, but also on the level of the world community.

The European Council which was established on May 5, 1949, facilitated cooperation between member states in concluding several regional conventions in various economic, social, environmental, legal, scientific and cultural fields, and even in the field of defence and military cooperation. In the cultural field, the European Council has formulated many regional cultural conventions to facilitate and improve policies related to the protection, safeguarding, maintenance and preservation of European cultural heritage, and to provide a legal framework for international cooperation.

The most prominent cultural conventions: -

European Cultural convention 1954.

European Convention for the Protection of the Architectural Heritage (Granada) 1985.

European Convention for the Prevention of Assaults on Cultural Property 1985.

European Convention for the Protection of the Archaeological Heritage (Valetta) 1992.

Given the importance of the Valletta convention, we will discuss it in detail, and will present the rest of the

conventions in subsequent sections.

The objective of the Valletta Convention is to protect the archaeological heritage as a source of European memory and a tool for historical and scientific study[1]. The importance of this convention lies in the rapid development of planning and reconstruction policies.

A final version of the convention has been agreed upon after several ministerial meetings, and it was approved on January 16, 1992. Its preface states:

- Member states' recognition of the natural and human threats to which European antiquities are exposed.

- States stress the necessity of adopting the UNESCO recommendations and agreements and ICOMOS charters if any European convention on cultural heritage has been formulated.

The convention included the contents of the archaeological heritage, which include (buildings, structures, archaeological sites, and movable and immovable memorials, whether on land or underwater)[2]. The concept of archaeological heritage was broad, comprehensive and new at the European level.

As for the provisions of this convention[3], they are:

-Providing procedures and measures for legal protection represented by the preservation and maintenance of the archaeological heritage.

- Monitoring and supervising the authorities in charge of archaeological excavations to give licenses before starting these activities.

- Providing financial resources to cover the expenses of projects related to archaeological search and rescue.

- Providing all surveys, tables and maps of archaeological sites to facilitate archaeological excavations.

- Facilitating the exchange of national, regional and international experiences and participating in international research programs.

- Spreading public education regarding the value of archaeological heritage and the threats to heritage, and developing public access to archaeological sites, and encouraging public display.

- Preventing the illicit circulation of cultural heritage between member states.

The objective of the European Council as regards the Valletta Convention is to unify regional efforts to ensure the best protection and preservation of the common European heritage, taking into account the following documents:

• The European Cultural convention signed in Paris on December 19, 1954.

• European Convention for the Protection of Architectural Heritage (Granada Convention) signed on 3/10/1985.

• The European Convention on Preventing Assaults on Cultural Property, signed on June 23, 1985.

It is noted that the European Union's efforts to preserve cultural heritage have always been crowned with success, as a result of their pride in cultural heritage and their diligent work to protect cultural property.

*1 Article 1 of the 1992 European Convention on the protection of Archeological Heritage (Valletta Convention)*
*2 Article 1-Paragraph 3 of the European Convention for the Protection of the Archaeological Heritage (Valetta) 1992.*
*3 The 2001 UNESCO Convention comes close to the Valletta Convention provisions. This is evident from the desire of the governmental experts in their first meeting held in 1998, by providing a copy of Valletta Convention, specially the provisions related to the exchange of national, regional and international experiences and competences, spreading education among the public for review and the need for cooperation by member states to prevent its circulation illegally. See:*
*The heritage council an chomhairle oidhreachta a study of planning and development in a historic town. http://www.heritagecouncil-ie/publications/cashel/ch1-html*





## Conclusion

It is very difficult to imagine the survival and permanence of cultural heritage unless through the means of legal protection for it and its continued existence, given that cultural heritage is a common human heritage for all mankind. We see and follow that there are international efforts at the global level that play the role of protection for this heritage at all times, but still there is a case to the contrary, which is the continuous neglect, theft, looting and deliberate destruction as a result of wars and terrorist attacks by terrorist organizations repeatedly, especially what happened recently to historical cities such as Iraq, Yemen and Syria, which puts us in front of a living reality, which is the absence of an activated legal system to protect the existing cultural heritage, and which has proven its failure in the inability to protect the world cultural heritage. These results have been set out in the above study.

Based on the foregoing, we set recommendations that could provide protection for cultural heritage, namely:

1- Working with exceptional and continuous efforts to preserve the cultural heritage by all legal means.

2- Allocating all legal potentials to create serious legal rules that are concerned with the cultural heritage protection.

3- The existence of a new international cooperation mechanism that differs from the previous one in terms of interest in the safeguarding and protection of cultural heritage in modern ways that differ from the old classical methods.

4- Preparing international conventions that bear the character of legal obligation to protect cultural heritage and considering it as an integral part of the common human heritage.

5- Working to spread cultural awareness of the need to protect the tangible and intangible cultural heritage by enhancing educational and media curricula and engaging the media in this task.

6- Working to develop the legal rules related to the Convention for the Protection of Cultural Heritage, especially with regard to the obligations of the state- parties and imposing penalties for violating them and tightening punishment for that.

7- Finding a legal mechanism through which to amend the conventions that authorize bombing cultural heritage in the case of using these places where the inherited objects are located.

8- Finding a new mechanism with regard to military necessities and working to find legal rules that deal with this, especially when military operations are to be launched.

9. Indigenous peoples should ensure that their cultural heritage is transmitted across generations within their communities.

10- Sending representatives of the Republic of Iraq with a great deal of scientific expertise to UNESCO and ICOMOS to represent Iraq in the best way.

11- The European Union supports all cultural projects to develop the third world countries with regard to the safeguarding and protection of cultural heritage through conferences, seminars and workshops.

12- Museums and other places that preserve the cultural heritage of indigenous peoples inform the respective indigenous peoples about their possession of this heritage and enforce mechanisms that allow these peoples to recover their cultural heritage whenever they so desire.

13- Attending all meetings of international and regional organizations concerned with the protection of heritage, both governmental and non-governmental.

14- Demanding UNESCO to open a headquarters in Iraq and requesting its help to overcome this cultural ordeal.

15- Expediting demanding the return of some Iraqi archaeological sites to the World Heritage List after they have been crossed out, and to search and excavate new sites and monuments to include them on the World Heritage List.

Therefore, all hopes are directed to the UNESCO Convention (Protection of Cultural Heritage) to be an international legal tool that seeks to protect and preserve this heritage through international cooperation in which experiences and scientific capabilities are exchanged, and a tool for providing financial aid to ensure this protection, as the sooner countries ratify it, the sooner it becomes a binding applicable law.

## References

**Arabic references**

- Israa Fadhil Habeeb Khaleel: "Protecting the Natural Heritage in International Law- The Marshes of Southern Iraq as a model", Master's thesis, College of Law, University of Karbala, 2018.

- Dr. Hamid Sultan: "Public International Law in Peacetime", Dar Al-Nahdha Al-Arabiya, Cairo, 1962.

- Dr. Salih Muhammad Badrulddin: Protection of the Cultural and Natural Heritage in International Treaties, Dar Al-Nahdha Al-Arabiya, Cairo 1999.

- Hike Speicher: "Protection of Cultural Objects According to the Law of International Treaties", research published in Studies in International Humanitarian Law, Arab Future House, first edition, 2000.

**Magazines and newspapers**

- Dr. Yasir Hashim Imad Al-Hayaji: "The Role of International and Regional Organizations in the Protection, Management and Promotion of Cultural Heritage", Al-Domato Magazine, Issue 34, July 2016.

Laws:

1. Iraqi Antiquities and Heritage Law No. 55 of 2001.
2. Indian Antiquities and Art Treasures Act 1972.
3. Law of the Kingdom of Bahrain No. 11 of 1995.
4. The Egyptian Antiquities Protection Law No. 117 of 1983.
5. Mongolian Cultural Property Protection Law No. 167 of 1970.
6. The Saudi Antiquities Law of 1971.
7. The Syrian Antiquities Law of 1963,

**International conventions:**

1. Protocol of 1999 supplementing the 1954Hague Convention.
2. Convention between the United Kingdom and Spain in 1960
3. The 1968 Spanish-Brazil Convention
4. The 1968 Brazilian and Costa Rican Convention
5. The 1970 US-Mexico Convention relating to returning of stolen and illegally exported cultural property.
6. 1972 Convention for the Protection of the World Cultural and Natural Heritage.
7. The 1992 European Convention for the Protection of the Archaeological Heritage (Valletta Convention).
8. 1995 UNESCO Convention for the Recovery and Restitution of Stolen and Illegally Exported Cultural Property.
9. 2001 UNESCO Convention.

**Foreign references:**

1. Kifle jote: International legal protection of cultural heritage, chapter seven, 1994.
2. UNESCO, the conservation of cultural property. Paris, 1979.

Websites:

1. http://www.heritagecouncil-ie/publications/cashel/ch1-html
2. http://www.unesco.org/bpi/eng/unescopress/2001/0.18le.shtml
3. http://portal.unesco.org/culture/en/er.php-URL-ID=1551&URL-DO=DO-TOPIC&URL
4. http://www.un.org/arabic/ar/radio/news/2004/no403220.htm
5. https://whc.unesco.org/ar/list/?iso=iq&search



**Professor Dr. Haider Adham Al-Ta'i**

- Specialized in International Law.
- Lecturer in College of Law al-Nahrin University
- Produces many books on Human Rights

# Mechanisms of enforcing international counter-terrorism financing commitments

## Legal readings in the 1999 International Convention for the Suppression of the Financing of Terrorism and its relation to the protection of cultural property

For quite some time now, the international community has been facing the phenomenon of international terrorism, which constitutes a distinct type of urgent challenges that require confronting, which prompted the countries of the world to conclude international conventions to combat terrorism in its various manifestations and its various forms, starting with the Geneva convention on Combating Terrorism concluded in 1937, which was not able to It entered into force because not enough countries had ratified it.

With the increasing resort to various forms of violence based on spreading fear, spreading terror and spreading intimidation in the hearts of the targeted parties, more agreements have been concluded to confront the spread of terrorism and the development of its forms. One of them is the international convention to prevent funding terror which was signed in 1999. Iraq joined this convention by the law No. (3) of 2012 published in al-Waqa'i al-Iraqiyah (the official newspaper of the republic of Iraq) No. 4244 issued on 2/7/2012 aimed at suppressing and combating terrorist criminal activities at the national and international levels as an essential tool to achieve the aforementioned goal and because of the importance of funding tools for terrorist activities in the sustainability of this phenomenon for For all aspects of intellectual, economic, political and security, which requires drying up the sources of funding.

The 1999 International Convention for the Suppression of the Funding of Terrorism adopted a set of legislative measures related to criminalization and punishment, judicial measures to determine jurisdiction for judicial authorities,

and executive measures related to funds collected that could be used to finance terrorist operations. All states must must do these procedures because the number of terrorist operations in all countries of the world and its danger are two issues that depend on the funding available to terrorists, and also because the stealing, destroying and illegal trafficking in cultural property is one of the issues that represent an existing challenge, its existence contradicts with multiple agreements devoted to legal protection of cultural property in all countries of the world. The mentioned protection is linked to moral and material justifications that are violated by terrorists by carrying out illegal trafficking, stealing and sabotaging cultural property to fund their dangerous activities. The agreement also adopted detailed references to the necessities of activating the principle of handing over the criminals as well as activating the principle of cooperation to achieve the purposes for which the agreement was found.

The lines of this research represent a reading of the legal texts contained in the International Convention for the Suppression of terror funding and its connection to a special type of properties, which is cultural properties and the possibility of applying its texts on the funds obtained from trafficking, stealing or destroying them with an attempt to identify the existence of some gaps that require submitting recommendations on both the domestic and international levels. In spite of the difficulty of addressing some cases on a large scale, "a journey of a thousand miles begins with a single step," as it is said according to the well-known Chinese proverb. Therefore, we divided this research into two sections, the first part focused on defining the term "cultural properties" with an explanation of the connection of this type of money to the application of the 1999 International Convention for the Suppression of the Funding of Terrorism, while the second part focuses on studying the tools or mechanisms adopted by the convention to achieve the purpose for which it was found, with an evaluation of the effectiveness of these tools or mechanisms and their efficacy.



# Mechanisms of enforcing international counter-terrorism financing commitments Legal readings in the 1999 International Convention for the Suppression of the Financing of Terrorism and its relation to the protection of cultural property

**Professor Dr. Haider Adham Al-Ta'i**
Faculty of Law/University of Al-Nahrin

**Introduction:**

The conservation of cultural property of the peoples plays a key role in consolidating identity as it is an inevitable necessity for the establishment of the national state, under which shade the citizen takes shelter and feels the value of belonging that is necessary for the continued honourable human life, taking into account moderation in his intellectual convictions and directions that are manifested through his behaviour in his relationships with others. The world countries have adopted a set of legal rules at the national and international levels aimed at ensuring the achievement of a kind of protection for cultural property, but the situation de facto indicates the presence of major violations of the provisions of these rules.

The organized theft and deliberate sabotage are still an ongoing matter, and perhaps what Iraqi cultural property has gone through as a consequence of the US forces' invasion of Iraq and gangs of their allied countries in 2003, is the best example that reflects the size of the catastrophe that has started to surface in various forms, which requires addressing this issue and trying to start establishing balanced convictions that are based on the acceptance of the other because an essential aspect of the objective truth of many convictions is still buried under the soil of Mesopotamia and everything related to the religious, economic, social and cultural aspects of human life...etc.

**First: importance of research:**

The importance of the research on the issue of mechanisms for the enforcement of international counter-terrorism commitments in the light of the 1999 International Convention for the Suppression of the Financing of Terrorism and its association with the protection of cultural property, becomes prominent through two factors: A material factor related to the theft and illegal trafficking of cultural property operations that yield financial income that helps in the permanence of terrorist acts. The second factor is a cultural factor represented in that the practices of sabotage, destruction or trafficking in cultural property far from the modern legal systems that control this aspect, would lead in one way or another to the destruction of part of the cultural system of the peoples and obliteration of a manifestation of the objective facts on which human life depends, which eventually helps to adopt ideological orientations that justify the terrorist operations. The factor that is based on cultural considerations, from my point of view, may seem more important than the material factor.

**Second, problem of the research:**

The problem of the research is represented by the existence of organized and random thefts of cultural property that were exploited in financing the terrorist operations. This problem still exists despite the availability of a set of legal frameworks that are aimed at combating the financing of terrorism at the global and regional levels. So, are the mechanisms contained in these texts effective in achieving the purpose for which they were established, as far as the matter relates to cultural property and the necessities of protecting it in the light of what we have indicated in the "importance of the research" section? And is it possible to link the legislative and judicial policies adopted in Iraq between Iraq's international obligations under the 1999 International Convention for the Suppression of the Financing of Terrorism and the protection of cultural property?

The problem that we have addressed in accordance with the foregoing, when being addressed, requires answering some questions as follows:

1. What are the mechanisms for enforcing the commitments set forth in the International Convention for the Suppression of the Financing of Terrorism concluded in 1999?

2. Is it possible to activate the mechanisms for enforcing the commitments contained in the International Convention for the Suppression of the Financing of Terrorism on the funds generated from theft and trafficking of cultural property as long as they will be used in financing terrorism?. We assume in the context of this research that this is possible

3. How effective are the mechanisms adopted by the Convention in protecting cultural property and combating terrorism?

4. What is the attitude of the Republic of Iraq on the said Convention? Is it possible to resort to the mechanisms for enforcing the commitments contained therein in the field of protecting Iraqi cultural property?

**Third: Methodology of the research**

In handling the problem of our research entitled "mechanisms for the enforcement of international commitment to counter-terrorism financing, legal readings in the 1999 International Convention for the Suppression of the Financing of Terrorism" and its association with the necessities of protecting cultural property", we will resort to the analytical approach to identify the possibility of benefiting from the enforcement mechanisms described in the said convention as far as cultural property is concerned, considering that it is a property whose illegal trafficking leads to the financing of terrorism.

**Fourth: Plan of the research**

The plan used in addressing the problem presented includes two topics. The first topic deals with the definition of cultural property, while indicating the extent to which the International Convention for the Suppression of the Financing of Terrorism, concluded in 1999, applies to funds gained from trafficking in this type of property. In the second topic, we will tackle the mechanisms for enforcing the commitments set forth in the Convention by portraying a set of legislative, judicial and executive measures that are considered as an obligation on the part of the state- parties to take measures thereof, as well as some aspects of the work of the principle of extradition of criminals and the principle of cooperation and bringing both of them into effect as follows:

First topic: the definition of cultural property and the extent to which the Convention applies to funds gained from trafficking in such property.

**Second topic: tools for enforcing the commitments set forth in the Convention.**

## First topic: the definition of cultural property and the extent to which the Convention applies to funds gained from trafficking in such property.

The term "cultural property" covers a wide list of movable and immovable property that is lent exceptional importance due to its special nature, which requires defining this legal term in the first requirement, based on the definitions provided in the relevant international conventions, including the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and the 1970 UNESCO Convention concerning the measures to be taken to prohibit the illegal import, export and transfer of cultural property. In the second requirement, we will tackle the extent to which the International Convention for the Suppression of the Financing of Terrorism, concluded in 1999, applies to funds gained from trafficking in cultural property, as follows:





**The first requirement: the definition by international conventions of cultural property**

**The second requirement: the extent to which the Convention applies to funds gained from illegal trafficking in cultural property**

### The first requirement: the definition by international conventions of cultural property

A group of international conventions paid attention to the topic of the protection of cultural property just casually, as in the Hague Conventions concluded in the years 1899 and 1907, the Saint-Germain Convention concluded in 1919, and the Treaty of Paris concluded in 1928 known under the name "Treaty for the Renunciation of War". Other international conventions have been established and focused exclusively on creating an international legal framework that seeks to achieve the protection of cultural property, whether relating to the times of armed conflict or time of peace, as in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, concluded in 1954, and the UNESCO Convention of 1970 on the Prohibition and Prevention of the Import, Export and Transfer of Ownership of Cultural Property by Illegal means[1]. The last two conventions include a definition of cultural property, as Article 1 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 stipulates: (Cultural property, under this convention, regardless of its origin or possessor, shall mean the following:

A- movable or immovable property of great importance to the cultural heritage of peoples, such as architectural, artistic or historical buildings, religious or mundane, archaeological sites, groups of buildings that in their combination acquire historical or artistic value, artifacts, manuscripts, books and other objects of historical and archaeological artistic value, as well as scientific collections and collections of important books, archives, and reproductions of the above mentioned property.

B- Buildings mainly and actually allocated for the protection and display of movable cultural property described in Paragraph "A", such as museums, major bookstores, stores of archives, as well as shelters prepared for the protection of movable cultural property set forth in Paragraph "A" in the event of armed conflict.

C- Centers containing a large collection of cultural property described in paragraphs "A" and "B" and which are called memorial buildings centers).

The definition provided was confirmed in Article (1) of the Second Protocol to the Hague Convention of 1954 and issued in 1999 stipulating that (cultural property means cultural property as defined in Article One of the Convention).

We find another definition of cultural property in Article 1 of the UNESCO Convention concluded in 1970 regarding the prohibition and prevention of the illegal import, export and transfer of ownership of cultural property2, which adopted a detailed definition of what can be considered as cultural property which is (property that each state establishes, for religious or secular considerations , its importance to archeology, prehistory,

*1 The historical roots of the care provided for in the international conventions for the protection of cultural property in the modern era date back to the General Convention for the Protection of Scientific Missions of 1885, and the Berne Convention for the Protection of Literary and Artistic Works of 1886. The two additional protocols dated June 8, 1977 annexed to the Geneva Conventions of 1949 contain provisions that provide a kind of protection for cultural property "Articles 38, 53, 85) of the First Additional Protocol and Article (16) of the Second Additional Protocol. Also, cultural property is covered by protection as being civilian objects pursuant to (Article 52/2) of the Second Additional Protocol. On the other hand, we refer to the interest of the national legislation to adopt definitions of "antiquities" or "cultural property." See in this regard, Ameen Ahmed Al-Hudhaifi, "Criminal Protection of Antiquities", Dar Al-Nahdha Al-Arabiya, Cairo, 2007, p.94-107.*

*Actually, caring for antiquities is a deep-rooted issue in the history of mankind if we look on the motives for the said attention from the material side, as it is a tool that expresses boasting and bragging. The Babylonian king "Nebuchadnezzar" (604-562 BC) was the first to possess an archaeological collection that included statues and artifacts which he kept on display in one of his palaces that he built in the late years of his rule. The German researcher "Onscher" called this palace "The Museum Palace," ibid, p. 36-37. The jurisprudents of Islamic doctrines also paid attention to antiquities and considered them as "treasures,". Peope during the pre-Islamic and Islamic periods had buried such properties underground, which the Ahnafi sect called "Rakaz" while the Maliki and Shafi'e sects called the properties buried during the pre-Islamic era "Al-Rakaz" and called the properties buried during the Islamic era "Luqta," ibid, p. 59. As for the Iraqi Constitution of 2005, it stipulated in Article (35): "The state shall sponsor cultural activities and institutions in a manner commensurate with Iraq's civilizational and cultural history, and is keen to pursue genuine Iraqi cultural orientations."*

*2 The UNESCO Convention on the Prohibition and Prevention of Illegal Import, Export and Transfer of Cultural Property, approved in Paris during the Sixteenth General Conference of UNESCO on November 14, 1970, is considered as the first convention that seeks to combat the illegal trading in cultural property and entered into force on April 24, 1972. The number of its state parties until June 2014 was (127) states. Iraq did not ratify this agreement or accede to it, for reasons including*

literature, art, or science, which falls under one of the following categories:

Rare collections and models from fauna and flora, minerals, anatomy, and important pieces related to palaeontology.

Property related to history, including the history of science and technology, war history, social history, the biographies of leaders, thinkers, scientists, artists, and patriots, and the important events that the country has gone through.

Results of archaeological excavations, legal and illegal, and archaeological discoveries.

Pieces that were part of dismantled artistic or historical antiquities or archaeological sites.

Antiquities that are more than one hundred years old, such as inscriptions, coins and engraved seals.

Objects of ethnological importance.

Property of technical importance, including:

1. Pictures, paintings and drawings that are totally hand-made, regardless of the materials on which they are drawn or used in drawing them, with the exception of industrial drawings and hand-decorated crafts.

2. The original statues and sculptures, whatever materials were used in their making.

3. The original images engraved, drawn or printed on stone.

4. The original assemblies or compounds, whatever the materials from which they are made.

H- Rare manuscripts and books printed during the first printing era, old books, documents and prints of special importance, historically, artistically, scientifically, literary...etc, whether they were single or in collection.

I- Postage stamps, financial stamps and the like, as single or in collection.

J- Archives, including audio, photographic and cinematic archives.

K- Pieces of furniture that are more than a hundred years old, and old musical instruments.

Concerning the definition adopted in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, it is noted that it introduced the term "cultural property" that is unprecedented in use in the legal field1. The definition covers various forms of different objects and properties with common content, so that it can be said that this definition has expressed an overall and comprehensive nature. Also, Article (1) of the Convention resorted to several criteria or bases to determine the important protected properties of peoples, and which form part of the living memory of the peoples and humanity as a whole. The definition of the "cultural property" located within the territory of the state that is worthy of protection for its importance, falls within the scope of the internal jurisdiction of each individual state.

An opinion has been put forward that the aforementioned definition is no longer appropriate due to its inaccuracy, but this criticism was not adopted as it did not amend the definition adopted in the 1954 Hague Convention2, while a researcher argues that the term "cultural property" falls within the concept or term "cultural heritage" with two other terms, which are "antiquities" and "heritage". The term "antiquities" is

*the adoption by the convention of the forfeiture of the right to recovery or the claim of prescription, as well as its dedication to the idea of recovery in exchange for cash.*

*1 The term "cultural property" was also used in the 1970 UNESCO Convention on the Prohibition and Prevention of the Illegal Import, Export, and Transfer of Cultural Property as well as the use of the term in the 1999 Second Protocol to the 1954 Hague Convention.*

*2 This is indicated by Vittorio Minti in "New Horizons for the Protection of Cultural Property in the Event of Armed Conflict, Entry into Force of the Second Protocol to the 1954 Hague Convention", p. 6, research available on the website of the International Committee of the Red Cross. It is also indicated by Haidar Adham Abdul Hadi in " Theft of Iraqi Cultural Property in the Light of International Law", Jurist Journal, College of Law, Al-Mustansiriya University, Sixth Year, Volume Four, Issues 16-17, 2011, p. 49. It is worthy of noting that the existence of two protocols annexed to the 1954 Hague Convention, the first protocol was adopted in 1954 regarding the protection of cultural property during the occupation, while the second protocol was adopted on March 26, 1999*





often used with the intention of referring to material objects that belong to ancient periods of time associated with human activity. As for the term "heritage", it is a linguistic wording expressing a broader concept than the two concepts of "cultural property" and "antiquities" on the basis that it includes cultural and natural elements plus tangible and intangible elements1.

As for the valid Antiquities and Heritage Law No. (55) of 2002 in Iraq, it adopted three terms, which are: "Antiquities, heritage resources and historical sites", where the term "Antiquities" is defined in Article (4 / Seventh) as (the movable and immovable property that is built, made or sculpted, produced, written, drawn, or photographed by humans and is not less than 200 years old, as well as human, animal and plant structures), while "heritage materials" are defined in Article (4/Eighth) as (movable and immovable property that is less than 200 years old and has a historical, national, religious or artistic value that is declared by a decision of the Minister), while the "historic site" is defined in Article (4 / Ninth) as (the site that was the scene of an important historical event or has historical importance, regardless of its age).

**The second requirement: the extent to which the Convention applies to funds gained from illegal trafficking in cultural property**

The topic of conclusive decision is related to the extent to which the International Convention for the Suppression of the Financing of Terrorism of 19992 applies to funds that may constitute material income gained through illegal trading in cultural property and are used in financing terrorism by identifying the character of the funds. Are there restrictions related to the nature of funds that are stipulated in the said convention? In other words, does the character of property "cultural or other property" affect the scope of application of the convention? Or the issue is not related to this aspect, but rather the scope of validity is related to the standard of the quality of use of the funds gained?

Actually, Article (1) of the Convention expressly defines what is meant by three terms that are associated with the Convention, namely the term "properties", the term "governmental or public facility" and the term "revenues". In Paragraph (1) of Article (1), the following is stipulated (for the purposes of this Convention, 1: the term "property" shall mean any type of tangible or intangible property, movable or immovable obtained by any means, and legal documents or instruments in whatever form, including electronic or digital form, which indicates the ownership of such properties. or interest therein, including, but not limited to, bank credits, travel cheques, bank cheques, remittances, shares, securities, bonds, bills of exchange and letters of credit), where the nature of the broad name adopted in determining the type of property to which the provisions of the agreement can apply, seems to be a broad determination as the Convention applies to various properties, regardless of whether they are tangible or intangible, movable or immovable, and regardless of the means of obtaining them.

Also, the term "property" indicates the legal documents and instruments without regard to their form whether traditional or digital, which means that the Convention can be applied to property obtained from illegal

*1 See the reference to these terms and their meanings in Husam Abdul Ameer's" The Legal System of Cultural Heritage in Iraq", Al-Saisaban Bookstore, Baghdad, 2014, p. 55-70. He adds another term that is not given explicit support in the law, that is the term "Al-arakeeb" that is used in practice (to denote a special type of immovable archaeological property exclusively and that does not fall within the above-mentioned categories. It is defined as being old river banks whose age ranges from "1000-1400" years AD, i.e. dating back to Islamic eras in particular.*
*These banks are considered important archaeological places or settlements that must be preserved due to the possible existence of archaeological settlements within the vicinity of these rivers, and they are subject, with regard to their protection, to the current Antiquities and Heritage Law No. 55 of 2002. These archaeological properties are divided into two main types. The first type includes major or large Arakeebs whose size is approximately 3-20 km and bear their own names. The other type includes small or secondary Arakeebs whose area is estimated only in meters and they do not bear their own names.....etc ), ibid, p. 69-70. The question raised regarding the term "Arakeebs" will focus on the necessity of taking into account the existence of such concepts with special significance when conducting any review of the valid Antiquities and Heritage Law No. 55 of 2002 as long as the care we refer to will be directed towards providing clearer and more effective protection of cultural property.*

*2 The Republic of Iraq acceded to the International Convention for the Suppression of the Financing of Terrorism of 1999 under Article (1) of Law No. (3) of 2012 published in the Iraqi Gazette, Issue 4244 issued on 2/7/2012. The aforementioned convention was adopted by the General Assembly of the United Nations in its session ( 54) in accordance with its Resolution No. (54/109) on December 9, 1999, that entered into force on 10/4/2002. In accordance with Article (2) of Law No. (3) above, the Republic of Iraq had reservations about the conventions and protocol stipulated in clauses (4), (5), (6), (7), (8) and (9) of the appendixes to this convention until Iraq ratifies or accedes to it.*

trafficking in cultural property as long as this property will be used in accordance with the stipulation of Article 2 of the Convention that specified The fields or scope of its application1 by stipulating the following:

1- A crime within the concept of this convention is committed by any person who, by any means, directly or indirectly, illegally and wilfully to provide or collect funds with the intention of using them, or knowing that they will be used in whole or in part.

(A) in an act that constitutes a crime in the scope of one of the treaties set out in the appendix and with the definition set forth in those treaties.

(B) any other act aimed at causing death or serious bodily injury to a civilian or any other person when such person is not involved in hostile acts in the event of an armed conflict when the purpose of such act is, by its nature or context, directed to intimidate the residents or to compel a government or an international organization to do or to abstain from doing any act.

2- (a) When depositing the instrument of ratification, acceptance, approval or accession, a state- party that is not a party to one of the treaties included in the appendix may declare, when applying this Convention to the state party, that this treaty is considered not included in the appendix referred to in the sub paragraph (a) of paragraph "1", and that the declaration will cease to be valid as soon as the treaty enters into force for the state party that will inform the depositary entity of this matter.

(b) If a state party is no longer a party to a treaty included in the appendix, this state may make a declaration, as provided in this Article, in respect of that treaty.

3- For an act to be constituting one of the crimes described in Paragraph 1, it shall not be necessary that the properties are actually used to carry out one of the crimes referred to in Paragraph 1, Subparagraph A or B.

4- Every person who attempts to commit one of the crimes specified in Paragraph 1 of this Article shall also be considered as committing a crime.

5- A person shall be considered as committing a crime:

(a) participating as an accomplice in a crime stipulated in paragraphs "1" or" 4" of this Article,.

(b) Organizing the commission of a crime within the concept of Paragraph " 1" or "4" of this Article or ordering other persons to commit it.

(c) Participating in the perpetration of one or more of the crimes referred to in paragraphs "1" or "4" of this Article by a group of persons who are acting with a common intent to commit one or more of the crimes referred to in paragraphs "1" or "4" of this Article. This participation is intentional and is carried out:

1- Either with the aim of expanding the criminal activity or the criminal purpose of the group when that activity or purpose involves committing one of the crimes referred to in paragraph "1" of this article, or

2- With knowledge of the group's intention to commit one of the crimes referred to in paragraph "1" of this Article)2.

Acknowledging the foregoing result, i.e. the possibility of resorting to special enforcement mechanisms or tools provided by the International Convention for the Suppression of the Financing of Terrorism if the funds used to

*1 The above-mentioned result is applicable, in our point of view even under the Arab Convention for Anti-Money Laundering and Countering Terrorism Financing signed in Cairo on 21/12/2010 and ratified by the Republic of Iraq under Law No. 62 of 2012 and published in the Iraqi Gazette, Issue No. (4270) ) issued on 4/3/2013. It is a convention that defines terrorist financing in Article 1 thereof as (In this convention, each of the following words and phrases shall have the meaning indicated against to each of them:…… Terrorist financing: knowingly collecting, offering, or transferring property by a direct or indirect means for use in whole or in part in financing terrorism according to the definition of terrorism provided in the Arab Counter-terrorism Convention.*

*2 Article (3) is introduced to come out of the scope of the Convention's application to a crime that is committed within one state if the person who committed it is a national of that state and is present in its territory at a time when there is no other state that is proved to have jurisdiction to exercise its jurisdiction in accordance with paragraphs 1 and 2 of Article 7, noting that this shall not prejudice the applicability of Articles 12-18, as necessary.*





finance terrorism have been gained from the category of cultural property, should not be interpreted in any way as prejudicing any other rights, obligations and responsibilities of states and individuals in accordance with international law, particularly the purposes of the Charter of the United Nations1, international humanitarian law, and other relevant conventions, as confirmed by Article 21 of the Convention2.

Addition may be made to the foregoing so that the aforementioned provision specifically includes the established rights and obligations in accordance with the 1970 UNESCO Convention on the Prohibition and Prevention of the Illicit Import, Export and Transfer of Ownership of Cultural Property, where the space is open for the proceedings of the two conventions while maintaining the unity of the topic represented by the protection of cultural property even if this goal is achieved as it is a direct objective of the 1970 UNESCO Convention, and an indirect objective in accordance with the 1999 International Convention for the Suppression of the Financing of Terrorism. In addition, the possibility of enforcing the stipulations of the 1999 International Convention for the Suppression of the Financing of Terrorism, according to what we have mentioned in the field of cultural property protection, is a trend that is consistent with the direction of resolutions issued by the Security Council that explicitly indicated that the illegal trafficking in this type of property constituted a source of financing for terrorists, especially the operations of recruiting individuals and strengthening the capacity of terrorist groups, as in Resolution (2199) issued in 20153 and Resolution (2347) issued in 20174, which included the adoption by the Council of ten measures which it considered as new tools that better suit the violations that harm the cultural property whatever their forms are.

Also, Resolution 2462 issued in 20195, which included three references to combating the illicit trafficking of cultural property in order to combat terrorism, in which the Council referred to the recommendations adopted on countering the financing of terrorism by the Madrid Guiding Principles related to foreign terrorist fighters6. The aforementioned direction is also consistent with a set of resolutions issued by the General Assembly related to counter- terrorism financing.

**Second topic: tools for enforcing the obligations under the agreement**

The international conventions include a set of legal tools that range based on their generality and detail, through which the state artiest aim to put the texts of the Convention into effective practice. The mechanisms adopted in the International Convention for the Suppression of the Financing of Terrorism of 1999 appear to have allocated tools or enforcement or a commitment to enforcement in order to achieve the objectives of the Convention of a general character. It does not include obligatory means of an oversight nature between the member states. To study these tools, we will address in the first requirement the tools for enforcing the

*1 Article 1 of the Charter has enshrined the purposes of the United Nations, stipulating (1): To maintain international peace and security. To achieve this end, the UN shall take effective joint measures to prevent and eliminate threats to peace, suppress acts of aggression and other breaches of the peace, and invoke peaceful means, in accordance with the principles of justice and international law, to resolve international disputes that may lead to a breach of the peace or to settle them (2) To develop friendly relations among nations on the basis of respect for the principle that requires equal rights among peoples and that each of them has self-determination, as well as taking other appropriate measures to promote public peace (3) To achieve international cooperation on solving international problems of an economic, social, cultural and humanitarian character and to promote and encourage respect for human rights and fundamental liberties for everyone without discrimination on the grounds of gender, language or religion and no distinction between men and women (4) To make the UN a reference for coordinating the work of nations and directing them towards the realization of these common goals)*

*2 See Article (21) of the International Convention for the Suppression of the Financing of Terrorism.*

*3 Resolution (2199) was issued by the Security Council in its session held on February 12, 2015 under Chapter Seven of the Charter. In paragraphs "16, 17, 15" thereof, it referred to cultural heritage and expressed, in accordance with paragraph 16, its concern over the revenues generated by terrorist groups as a result of looting and sabotaging the cultural heritage in Iraq and Syria, While the Council affirmed, in paragraph 17 of the Resolution, what the Council had already taken in paragraph (7) of its Resolution No. 1483 adopted in 2003, the need for member states to take appropriate measures to prevent trafficking in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare*
*scientific, and religious importance, that were illegally transferred from Iraq starting as of August 6, 1990, and from Syria since March 15, 2011, in manners including prohibiting cross-border trading in these categories. The resolution in "Paragraph 16" also called upon international organizations to provide assistance, including, in particular, the UNESCO and the International Criminal Police Organization. S/RES/2199 "2015")) on February 12, 2015.*

*4 Resolution (2347) was issued by the Security Council in its session held on March 24, 2017, which is a resolution submitted by the French and Italian sides and is the first resolution entirely dedicated to the protection of cultural property, in which the Council refers, in paragraph (23) thereof, to keeping the issue under its actual consideration. S/RES/2347 "2017")) on March 24, 2017.*

*5 Resolution 2462 was issued by the Security Council in its session held on March 28, 2019, which is a decision issued in accordance with Chapter Seven of the Charter. See the text of Resolution (S/RES/2462 "2019")) dated March 28, 2019.*

*6 See the texts of the Madrid Guiding Principles adopted on December 27, 2018 by the Security Council Counter-Terrorism Committee formed pursuant to Council Resolution 1373 of 2001, in the document (S/2015/939)*

obligations adopted by the provisions of the convention of a subjective nature, meaning that the state parties must adopt it on their own in fulfilment of the commitments stipulated in the convention. We will present in the second requirement the means of resorting to arbitration when a dispute arises regarding the application or interpretation of the agreement, as follows:

The first requirement: tools for enforcing commitments in fulfilment of basic legal principles "self-commitment"

The second requirement: resorting to arbitration in the event of a dispute arising over the application or interpretation of the convention.

The first requirement: tools for enforcing commitments in fulfilment of basic legal principles "self-commitment"

The International Convention for the Suppression of the Financing of Terrorism, concluded in 1999, enshrined a set of commitments on the state parties, which can be viewed as constituting tools for putting the convention into effective practice from a legal point of view, in fulfilment of the principle of "the contract is pacta sunt servanda". We refer to the most important ones as follows:

First: The convention in Article 4/1 thereof requires the state parties to take legislative1 measures aimed at considering the crimes stipulated in Article (2) of the convention as criminal offenses under the national legislation of the state parties. In fact, the text of the said paragraph (Article 4/1) requires that those whom its provisions address should review the national legislation related to the crimes stipulated in Article (2) if there are texts handling these criminal acts. If there are no such stipulations in the internal legislation of the state party, it must take legislative measures conducive to criminalizing the acts stipulated in Article (2) of the Convention.

On the other hand, Article (4/2) of the same Convention commits the state parties to take measures to punish the crimes stipulated in Article (2) of the Convention, so that, when approving certain penalties, they take into account the seriousness of the criminal acts, which appears from the wording of the text of Article (4/) 2) to be tending to urge the national legislature in the party-states to adopt deterrent penalties against the perpetrators of the acts stipulated in Article (2).

The issue of the obligation to hold the state party liable and in accordance with the internal legal principles for whoever commits any of the acts stipulated in Article (2), whether a natural or legal person, as long as the legal person is present on its territory or organized according to its internal laws, and a person responsible for managing the legal person or conducting its business in this capacity, committed one of the crimes stipulated in Article (2)2, without this matter leading to prejudicing the criminal liability of the individuals who have committed these crimes3, as well as ensuring that the legal persons responsible in accordance with Article (5/1) are subject to "effective, appropriate and deterrent" criminal, civil or administrative penalties, so that these penalties may include monetary penalties4.

It can be said in the light of the foregoing that the enforcement of the commitments stipulated in Articles (4-5) of the Convention requires the development of effective consolidation mechanisms for the established international commitments under the international conventions in particular to which the state is a party, where the attitudes of the world countries vary on this topic that requires starting to establish the supremacy of international law in some form over national legislation, even if this dedication is limited in the counter-

*1 It is necessary to indicate that the Security Council, in paragraph (9) of its Resolution No. 2347 issued in 2017, had urged the member states to take legislative and executive measures of a national character when needed, in a manner consistent with international conventions and national legislation with the aim of preventing and combating trafficking in cultural property and associated crimes so that this includes considering the activities that organized crime groups and terrorists or terrorist groups can benefit from, as a serious crime in accordance with Article (2/b) of the United Nations Convention against Transnational Organized Crime.*
*In the above context, it is useful to note that the Republic of Iraq has acceded to the United Nations Convention against Transnational Organized Crime and the two protocols annexed thereto approved by the United Nations General Assembly in its two resolutions No. 55/25) on November 15, 2000, and (55/255) on 31 May 2001, which entered into force on September 29, 2003, the first protocol on December 25, 2003, and the second protocol on January 28, 2004, under Law No. (20) of 2007, published in the Iraqi Gazette, Issue No. 4041 on June 17, 2007.*
*2 See text of Article 5/1 of the Convention*
*3 See text of Article 5/2 of the Convention*
*4 See text of Article 5/3 of the Convention*





terrorism scope1.

Second: Article (6) of the Convention commits the state parties to take measures that might include measures of a legislative character, as long as this is necessary, ensuring that no justifications are created for the criminal acts stipulated in the convention in any way based on political, philosophical, ideological, racial, ethnic, religious or any other similar character. While it is clear that the Convention has adopted a very flexible wording regarding the determination of the considerations justifying the criminal acts stipulated in the Convention and the obligation to criminalize them, Article (6)2 raises the necessity of defining clear legal boundaries between the concept of "terrorism", which should not be used for political purposes on the one hand, and the concept of "resistance" on the other hand3, because defining the concept of terrorism at the level of international law was linked at the beginning of its criminalization to attempts on the lives of political or diplomatic figures starting with the Geneva Convention on the Prevention and Combating of Terrorism concluded under the League of Nations in 19374.

The process continued according to the advanced concept in a set of international conventions that are among the conventions for combating some forms of terrorism, including, for example, the Convention on Prevention of Crimes Perpetrated Against Persons Enjoying International Protection Including Diplomats, and Their Punishment concluded in 19735. Determining the meanings of similar or confusing concepts is an issue of great legal importance, especially since the International Convention for the Suppression of the Financing of Terrorism does not adopt mechanisms for legal enforcement and oversight which are similar, for example, to those mechanisms or means adopted in the Convention on Civil and Political Rights concluded in 1966, which places the application of the Convention at the mercy of political directions and interests due to the nature of self-commitment that it has adopted, and these directions are often based on selectivity, which means the weakness of the legal enforcement mechanisms adopted in the International Convention for the Suppression of the Financing of Terrorism of 1999 due to the weakness of mutual oversight tools and the absence of any institutional mechanism that guarantee putting its texts into practice.

Third: The convention, in its Article (7), commits the state parties to determine their jurisdiction with regard to the crimes referred to in its Article (2) if the crime has been committed in the territory of a state which is a party to the convention6 or on board a ship bearing the flag of that state or on board an aircraft registered in accordance with the laws of that state at the time on which the crime was committed7 or by a person holding the nationality of that country8. Also, Article (7/2/a, b, c, d, e) of the Convention authorized the state- parties to determine their jurisdiction in other cases, while Article (7/3) commits any state that becomes a party to the convention to notify the Secretary-General of the United Nations of its jurisdiction decided by it in accordance with paragraph (2) of Article (7), and the State party shall be committed to notify immediately upon any change being made by it in connection with the determination of jurisdiction.

*1 See, regarding the supremacy of international law over domestic law including the position of the constitutions of the world's countries on this aspect, our professor, Dr. Essam Al-Attiyah's " Public International Law", Sixth Edition, Al-Aatik Company for Printing, Publishing, and Distribution, Legal Bookstore, Cairo, Baghdad, 2006, pp. 71-87.*
*2 See text of Article 6 of the Convention*
*3 See, regarding the distinction between the term "terrorism" on the one hand, and the terms "political violence," "aggression," "war," "guerrilla warfare," "organized crime" and "liberation movements," the point of view of one of the writers, Yousif Hassan Yousif, "International Organized Crime and International Terrorism", first edition, The National Center for Legal Publications, Cairo, 2010, pp. 46-50.*
*4 Through reading the text of Article 2 of the 1937 Geneva Convention on Preventing and Combating Terrorism, it appears that it adopted an approach based on the adoption of a list of what is considered as a terrorist act, in particular paragraphs (1/a, b, c) thereof. Also, it links the description of a specific act by considering it a terrorist on the one hand, and the job positions occupied by the victims of these acts or the targets in accordance with them, which gives them a kind of description or narrow definition, which is a trend that is also linked to some extent with traditional concepts or the logic of old theories of the basis of diplomatic immunities and privileges, which cannot be considered acceptable within the modern legal concepts which respond to objective considerations and reflect respect for the level of awareness reached by the peoples.*
*5 The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Personnel, was adopted by the General Assembly on December 14, 1973. it is a convention referred to in the annex to the 1999 International Convention for the Suppression of the Financing of Terrorism.*
*6 See text of Article 7/1/a of the convention*
*7 See text of Article 7/1/b of the convention*
*8 See text of Article 7/1/c of the convention*

Article (7/4) indicated that the State party must take measures to determine its jurisdiction over the crimes stipulated in Article 2 of the Convention if the person accused of committing a crime in accordance with the Convention is present in its territory and in cases where the state does not extradite him to any state party that has determined its jurisdiction according to Article (7/1-2) of the convention, while Article (7/5) commits the state parties to coordinate their procedures in an appropriate manner, especially with regard to the conditions of trial and the methods of mutual legal assistance when there is jurisdiction for more than one state party1.

It is noted that Article (7) introduced basic and obligatory cases for determining the jurisdiction of each state party to the Convention enshrined in paragraph (1) and paragraph (4) thereof, while the same Article in paragraph (2) of them established permissible cases for determining the jurisdiction. Also, Article (7/6) adopts a flexible approach that opens a wide space for the state parties to determine their jurisdiction in accordance with their internal laws without prejudice to the general rules of international law.

The second note relates to Article (7/3) of the Convention, which referred to the principle of "notification" addressed to the Secretary-General of the United Nations, where there is nothing but notification, i.e. poor institutional system of the Convention regarding this aspect related to the follow-up of the issue of the determination of jurisdiction when a state becomes a party thereto, as well as the Convention leaving the subject of international responsibility that results from non-compliance in whole or in part by a state party with its provisions of the general rules resulting from the violation of an international obligation. However, we refer to Security Council Resolution No. 2462 of 2019, in which it called on UN member states to increase the effectiveness of investigation and prosecution for issues related to terrorism financing and for applying "effective, appropriate and deterrent criminal penalties, as appropriate," against individuals and entities who have been convicted of involvement in terrorist financing activities2.

Fourth: Article (8) of the convention enshrined a commitment on the states that are parties to the convention to take measures consistent with the legal principles applicable in these states to identify, disclose, freeze or seize any funds used or allocated with the intent to commit the crimes stipulated in Article (2) of the Convention as well as the proceeds generated from such crimes with the aim of confiscating them when necessary3 while paragraph (2) of the same article indicated that the state parties must take appropriate measures that are consistent with applicable domestic legal principles, to confiscate funds used or allocated to commit the crimes set forth in Article (2), in addition to the proceeds derived from such crimes.

Article (8/3) of the convention has permitted each state party to conclude conventions to share with other states the funds derived from the confiscations in all cases or on case-by-case basis4. Each state party to the Convention considers establishing mechanisms to allocate the amounts generated from cases of confiscation to compensate the victims of the crimes stipulated in Article (2/1/a, b) or to compensate their families5. In the context of the application of Article (8), it is necessary to point out that the proceedings of this Article with its paragraphs (1-4) are restricted by virtue of paragraph (5) of the same Article, and its content is that the application of the provisions of this Article should not prejudice the rights of bona fide third parties6. It shall not be permissible for the states that are parties to this convention to adhere to the confidentiality of banking information with the aim of rejecting the request for exchange for the provision of legal assistance7.

Fifth: The convention has committed the state parties to provide legal assistance to the maximum possible extent in connection with any investigations, criminal procedures, or any other procedures related to extradition of criminals related to the crimes stipulated in Article (2), including assistance in obtaining evidence available to

*1 See text of Article 7/5 of the convention*
*2 The Security Council welcomed in the same resolution 2462, the adoption of its Counter-Terrorism Committee, as well as the Madrid Guiding Principles for the Treatment of Foreign Terrorist Fighters, which included, inter alia, specific recommendations related to combating the financing of terrorism. The Council stressed the importance of enforcing these principles fully and effectively.*
*3 See Article 8/1 of the convention*
*4 See Article 8/3 of the convention*
*5 See Article 8/4 of the convention*
*6 See Article 8/5 of the convention stipulates that (the provisions of this article shall apply without prejudice the rights of bona fide third parties*
*7 See Article 12/2 of the convention*





them that is necessary for these procedures1. The convention also affirmed the commitment to the enforcement of the principle of extradition of criminals for the crimes stipulated in Article (2)2, where it is not permissible, for the purposes of extradition of criminals or providing legal assistance, to invoke the financial or political character or to deem a crime as being related to a political crime or a crime that is perpetrated for political motives for the crimes stipulated in Article (2) of the Convention to refuse providing legal assistance or extraditing criminals simply because of such pretexts being available3.

However, it is noted that there are restrictions set forth in the Convention limiting the legal assistance required to be provided or enforcement of the principle of extradition if the state party requested to provide legal assistance or to make extradition has good reasons to believe that the request for providing the legal assistance or extradition of persons on the pretext that they have committed crimes stipulated in Article (2), aimed at prosecuting or punishing a person on account of race, religion, nationality, ethnic origin, or political opinions, or the that fulfilling such requests would prejudice the status of the said person for the aforementioned reasons4. Would such limitations or restrictions contribute to weakening the degree of compliance with this convention?

The answer to this question requires, first, recognition that the text of Article (15) of the Convention, which enshrined the aforementioned determinants, adopts a restriction on basic commitments that are enshrined in the provisions of the Convention. Determining the existence of such determinants is up to the discretion of the state requested to provide legal assistance or carry out the extradition process in light of the existence of "Good reasons" for it to say that there are justifications for not providing assistance or enforcing the principle of extradition, which requires deciding on such issues by competent, honest and professional entities.

Sixth: The convention commits all state parties to enforce the principle of cooperation in all areas related to achieving the convention objectives including the use of the most efficient measures in the field of financial transactions to verify the identities of their frequent and transient customers, and to pay special attention to unusual or suspicious transactions and to report transactions that are suspected to be related to criminal activities.

According to Article (18) of the Convention, the state parties should consider, in order to achieve the foregoing, taking a set of specific measures, such as implementing regulations that prevent the opening of accounts whose owners or beneficiaries are unidentified or whose identity cannot be verified. Also, the state parties shall cooperate in the field of verifying the identity of juridical characters, such as ensuring that the company is registered, and availability of information relating to the client's name, legal status, address and the names of its executives, as well as provisions related to the authority of binding the legal entity. There is also an obligation to put in place regulations that commit the financial institutions to immediately tip the competent authorities on unusual complex large transactions and unusual patterns of transactions that do not have a clear economic or legal purpose. In this case, the financial institutions shall not bear any civil or criminal liability so long they have reported their doubts in good faith. The financial institutions shall be committed to keep records of local and international transactions for at least five years.5

Article (18/2) also enshrined other commitments on the state parties to prevent the perpetration of the crimes specified in Article (2) through enforcing the principle of cooperation with the possibility of adopting measures to supervise all money transfer agencies, including, for example, licensing them as well as the possibility of applying measures that would allow detecting or monitoring the physical trans-border transfer of funds, whether cash or in the form of bearer negotiable instruments, while adopting strict measures to ensure the

*1 See Article 12/1 of the convention*
*2 See Article 11 of the convention*
*3 See Article (13) and Article (14) of the Convention. It is necessary to note the impermissibility of extradition or the provision of legal assistance if the motive for this is based on the purpose of prosecuting or punishing a person on grounds of race, religion, nationality, ethnic origin, political opinions or beliefs as long as the state party requested to extradite or provide legal assistance has good reasons o believe in the foregoing or believe that its response would prejudice the status of the person in question for any of the aforementioned reasons.*
*4 See Article 15 of the convention*
*5 See text of Article 18/1 of the Convention*

appropriate use of information without prejudice to the free movement of capital1.

Countries also cooperate on the exchange of accurate and verified information in accordance with their domestic legislation and work to coordinate their administrative procedures related to the foregoing, in particular by establishing and maintaining communication channels between their relevant agencies and departments to facilitate the safe and rapid exchange of information related to the crimes stipulated in Article 2 of the Convention, as well as cooperation among them to conduct investigations into the aforementioned crimes regarding the disclosure of the identity of suspects, their whereabouts, their activities, and the movement of funds related to these crimes. The state parties may also exchange information through the International Criminal Police Organization "Interpol"2.

Seventh: The state party to the convention shall be committed under Article (19) to report the outcome of the final procedures they have undertaken with respect to the prosecution of criminals, which were carried out as per their domestic legislation or their applicable measures, to the UN Secretary-General, who in turn shall undertake to pass this information over to the state parties.

**The second requirement: resorting to international arbitration and judiciary in the event of dispute over the application or interpretation of the Convention**

Arbitration is defined as (a means of resolving disputes that may arise between international law persons, through judges who are selected based on legal rules that must be respected and applied)[3]. International arbitration is currently characterized as private arbitration, and it is distinguished from the judiciary according to what the Romans in ancient time used to believe. In their words, "the judiciary is one thing and arbitration is another thing"[4]. Article (24) of the International Convention for the Suppression of the Financing of Terrorism provides for the possibility of resorting to this means of settling international disputes if a dispute has arisen between two or more states which are parties to the convention, related to its interpretation or application, and the parties concerned have not been able to settle it through negotiation within a reasonable period of time. This judicial means of the means of settling international disputes is sought at the request of one of the states. In the event that the states which are parties to the dispute are unable to reach an agreement on organizing arbitration within a period of six months from the date of filing the arbitration request, either of them may refer the dispute to the International Court of Justice by submitting a petition in this regard in accordance with the provisions of the Statute of the International Court of Justice[5].

In fact, the importance of this article which provides the opportunity to resort to settlement of the dispute through arbitration or the international judiciary represented by the International Court of Justice, stems from the lack of determination of the distance separating between what some states consider as terrorism and other states that believe that some practices or behaviours fall within the concept of legitimate resistance and legitimate self-defence and perhaps also the right to self-determination. For example, within the framework of Arab jurisprudence which is concerned with studying international law, "Abdul Aziz Mohammad Sarhan" presents his concept of international terrorism as every attack that affects lives, money, and public or private property in contravention of the provisions of public international law with its various sources, including the basic principles of the International Court of Justice. He believes that it is not possible to deem an act as a terrorist or to label it in the above description if the motive that led to its perpetration was to defend the rights of individuals and peoples, the right to self-determination, the right to liberate occupied lands, and to resist

*1 See text of Article 18/2 of the Convention*
*2 See text of Article 18//3-4 of the Convention*
*3 Ahmed Abu Al-Wafa, "Book of Identification of the Rules of International Law and International Relations in the (Sharia) Law of Islam, Resolving International Disputes by Peaceful Means in Islamic Law", Part Nine, Second Edition, Dar Al-Nahdha Al-Arabiya, Cairo, 2007, p. 68.*
*4 Ibid, p 67*
*5 See Article (24/1) of the Convention. It is necessary to pay attention, in the context of a sound understanding of reading Article (24/1), to observe paragraphs (2-3) of the same article. Under paragraph (2), any state shall be permitted, when signing, ratifying, accepting, approving, or acceding to the convention, to declare that it does not consider itself bound by the provisions of paragraph (1). The other states shall not be bound by these provisions toward any state party that has expressed such a reservation. Under paragraph (3), a state which has had a reservation under the provisions of paragraph (2) may withdraw its reservation at any time by sending a notice to the UN Secretary-General.*



Legal aspects on the Protection of Iraqi Cultural Heritage, Baghdad, 28th February - 1st March 2022

Mechanisms of enforcing international counter-terrorism financing commitments
Legal readings in the 1999 International Convention for the Suppression of the Financing of Terrorism and its relation to the protection of cultural property, Professor Dr. Haider Adham Al-Ta'i

occupation.

These acts correspond to rights established by international law, and are recognized for individuals and states, as terrorism is related in this case to the legitimate use of force permitted by the convention and customary rules of the international legal system[1]. It is clear from the opinion of the aforementioned jurist that he does not attach importance to the means used nor does he care about the consequences of using certain methods as long as the motive that led to the perpetration of violence is related to the defence of the rights of individuals and peoples, the right to self-determination, the right to liberate occupied lands, and resist occupation, a matter for which we do not find a justification in this broad statement which he used as long as we accept that the war is taking place between two groups of fighters, not between two groups of killers. In addition to the foregoing, if we accept the opinion of Dr. "Majeedd Khaddouri" that the time of "Al-Farabi" may be the beginning of Islamic propositions in justifying waging war based on the idea of justice rather than the idea of jihad, then "Al-Farabi" was the first Muslim philosopher to divide wars into just wars and unjust wars. Wars that lead to the killing of innocents because of the ruler's inclination to do so or that he enjoys killing, shall be a model of an unjust war.[2] It can be said that terrorist practices meet the aforementioned descriptions, as their wars do not have a description of justice, which is reflected in the practices of terrorists in Iraq in particular.

Another writer adopts a viewpoint that makes terrorism and the revolutionary struggle have one content, saying: (Terror or rather the revolutionary struggle is an ideology, a principle, a thought, an establishment, a charter that justifies violence or a strategy that gives preference to these acts) and he bases his notion on the thought of the French philosopher Jean-Paul Sartre who believes that terrorism represents the driving force of social organization, and a tool of freedom in achieving its goals, and it is a sublime human practice that constitutes one of the conditions of freedom[3]!!!.

The aforementioned issues entail obstacles to compliance with the provisions of the International Convention for the Suppression of the Financing of Terrorism, arising from the different meanings of legal concepts between the state parties, which necessitates resorting to the means of settlement provided by the convention itself with the aim of ending the dispute over the presence or absence of a breach of the provisions of the Convention.

Among the recent examples that have devoted recourse to the International Court of Justice regarding the violation of the 1999 International Convention for the Suppression of the Financing of Terrorism, we refer to Ukraine's filing of a complaint against the Russian Federation before the International Court of Justice on January 16, 2017, relating to alleged violations of the Convention, specifically articles (8, 9, 10, 11, 12, 18) thereof, in addition to violating the International Convention on the Elimination of Racial Discrimination In All Its Forms, adopted on December 21, 1965. The court responded to the Ukrainian request to take precautionary measures by virtue of an order issued by the court in 2017[4], then the court accepted the jurisdiction to look into the case on 8 November 2019 after the Russian Federation argued that the jurisdiction was not available at the "primary pleading stage", which is a jurisdiction established by Ukraine with regard to violating the International Convention for the Suppression of the Financing of Terrorism on Article (24) thereof, and on Article (22) of the International Convention on the Elimination of All Forms of Racial Discrimination[5].

Linked to the foregoing issue is the problem of "state terrorism", the most violent and organized that is

*1 Abdel Aziz Mohammad Sarhan, "on the definition of international terrorism and determining its content from the reality of the rules of international law and the resolutions of international organizations", The Egyptian Journal of International Law, Volume 29, 1973, pp. 173-174. It is clear that Dr. Abdel Aziz Muhammad Sarhan's opinion goes back to a previous period in which his opinion was associated with limited manifestations of violence.*
*2 See the models of just wars and unjust wars according to Al-Farabi's point of view, Majeed Khaddouri, " the Concept of Justice in Islam", translated by: Adeeb Yousif Shish, first edition, Dar Al-Takween for compilation, translation and publishing, Damascus, 2011, pp. 200-201,*
*3 A reference has been made by Ahmed Mohammad Rifaat, Salih Bakir Al-Tayyar in " International Terrorism", first edition, Arab-European Studies Center, 1998, p. 224.*
*4 See the Report of the International Court of Justice 1 August 2016 - 31 July 2017, General Assembly, Official Records, Seventy-second Session, Annex No. "4", United Nations, New York, 2017, pp. 54 - 59.*
*5 See Report of the International Court of Justice 1 August - 31 July 2021, General Assembly, Official Records, Seventy-sixth Session, Annex No. "4", United Nations, New York, 2021, pp. 32-54.*

prohibited by United Nations General Assembly Resolution No. (39/159) adopted on December 17, 1984, on "not accepting the policy of state terrorism and any other acts aimed at undermining the political and social system in the other sovereign states." A juristic opinion opts to accept the existence of manifestations of "state terrorism" and consider it as one of the most dangerous forms of terrorism. According to this point of view, state terrorism is exercised at a lower rate than terrorism of individuals, and is characterized by its secret undeclared nature, but it takes distinct forms such as the planting of mines or explosives by the intelligence services within the territory of a state, whose blast could lead to civilian deaths or intimidating and terrorizing the people, or that the state carries this out indirectly by providing funds to some persons and directing them to commit terrorist acts. In general, the states practicing terrorism deny any connection with these acts.[1]

## Conclusion

The world countries, at different levels of severity, are facing a real challenge represented by terrorist operations whose perpetrators do not take any steps to distinguish between the word "killer" and "combatant," as the possibilities of carrying out various terrorist operations have expanded given the potentials available to access up-to-date technology. What helps in this is connected to the availability of terrorist financing operations that come from a variety of sources, the source of which is trafficking in different materials such as drugs and cultural property, which requires efforts to dry up the resources available to terrorists, as the possession of money is a manifestation of strength, and in the Arab tradition, it is said, "He who holds strong grip must be obeyed," which requires that terrorists not be allowed to enjoy the aforementioned advantage. which is a direction that the 1999 International Convention for the Suppression of the Financing of Terrorism is seeking to achieve, a matter which we have explored some aspects of it through a research into the mechanisms of enforcing the commitments for terrorist financing adopted by the aforementioned convention. We also aim to evaluate these mechanisms as they relate to the protection of cultural property, since illegal trafficking in cultural property provides financial income for terrorists that helps them achieve their illicit goals. Whoever has money will acquire an important manifestation of strength. We have reached a set of conclusions and recommendations:

**First: the conclusions**

1. The 1999 International Convention for the Suppression of the Financing of Terrorism has brought forward a set of binding legal tools to achieve its goals. These mechanisms can be enforced with respect to funds obtained from illegal theft of and trafficking in cultural property, as long as these funds will be used in the perpetration of crimes described in Article (2) of the Convention, which means that the aforementioned convention may provide a sort of protection for cultural property, though indirectly, on the basis that the direct objective of this convention is to suppress the financing of terrorism not to protect cultural property as a direct goal.

Also, compliance with the International Convention for the Suppression of Financing of Terrorism and its enforcement mechanisms would not lead to prejudicing any rights, obligations and other responsibilities of states and individuals in accordance with international law, and in particular the purposes of the Charter of the United Nations, international humanitarian law, and other relevant conventions, and this is confirmed in Article 21 of the International Convention for the Suppression of the Financing of Terrorism, as well as any rights, obligations or responsibilities arising from the 1970 UNESCO Convention on the Prohibition and Prevention of Import, Export and Illegal Transfer of Ownership of Cultural Property.

2. The International Convention for the Suppression of the Financing of Terrorism lacks in enforcement mechanisms of an institutional nature, meaning that the enforcement tools that the convention has enshrined their existence have come within the traditional level of enforcement mechanisms stipulated in most of the counter-terrorism conventions, which is represented in stipulating a set of legislative, judicial and executive measures to be taken in addition to enforcement of the principle of extradition of criminals and the principle

*1 Ahmed Abu Al-Wafa, "Book of Identification of the Rules of International Law and International Relations in the Law (Sharia) of Islam", Part Eleven, Second Edition, Dar Al-Nahdha Al-Arabiya, Cairo, 2007, pp. 42-43.*



Legal aspects on the Protection of Iraqi Cultural Heritage, Baghdad, 28th February - 1st March 2022
Mechanisms of enforcing international counter-terrorism financing commitments
Legal readings in the 1999 International Convention for the Suppression of the Financing of Terrorism and its relation to the protection of cultural property, Professor Dr. Haider Adham Al-Ta'i

of cooperation to achieve the objective of the Convention, which is to suppress the financing of terrorism. In the words, the level of efficacy of the convention in achieving the goals for which it was established will be linked to the level or degree of cooperation of the state parties exclusively, each of which according to its free will without thinking about the possibility of resorting to mechanisms of a permanent institutional nature that reflect the existence of a higher level of cooperation due to the convention lacking in these tools. We do not find Any institutional formations created by its texts that follow the steps of commitment to its content and operates through an organized oversight role through which a higher level of cooperation and compliance can be achieved. While the Security Council is forming a committee affiliated to it that handles aspects of the goals of combating terrorism, is it possible to imagine the establishment of a specialized international organization that will follow up on all aspects related to the issue of combating terrorism and violent extremism, acting upon legal formulas based on objective considerations that are far from political conflicts?

3. Iraq is a party to a number of international counter-terrorism conventions, including the 1999 International Convention for the Suppression of the Financing of Terrorism. This convention can help provide a sort of legal protection against illegal trafficking in cultural property if we take into account the issuance of a number of relevant decisions by the Security Council in this aspect, according to Chapter Seven of the Charter, linking countering terrorism and its financing on the one hand, and the necessities of protecting cultural property on the other hand, as this property is a source of funding sought by the terrorists and terrorist groups. Linking this convention to cultural property will help provide effective and appropriate deterrence for the parties engaged in illegal trafficking of this type of property, which reflects the necessity of adopting such a relationship within the scope of adaptations that may be adopted by national judicial institutions in particular. This approach will represent a solution to the problem of the lack of deterrent penalties for illegal trafficking in cultural property provided that the aforementioned direction does not prejudice the considerations of human rights protection.

**Second: Recommendations**

1. It is necessary to expand the scope of applying the International Convention for the Suppression of the Financing of Terrorism to include other conventions in addition to the conventions mentioned in the appendix to the convention, in accordance with the provisions of Article (23) thereof relating to the amendment of the appendix or any other conventions related to the protection of cultural property as in the 1954 Hague Convention and the 1970 UNESCO Convention, as long as the illegal trafficking in cultural property is carried out in contravention of the provisions of these conventions, with the use of generated funds in committing the crimes stipulated in Article (2) of the International Convention for the Suppression of the Financing of Terrorism.

2. Seeking to commit the states that are a good market for the illegal trading in Iraqi cultural property, including specifically, accession to the International Convention for the Suppression of the Financing of Terrorism, given the extent of vandalism and organized looting of Iraqi cultural property. It is possible to perceive a role for the Security Council related to the foregoing topic as long as we have witnessed its remarkable activity in the various counter-terrorism fields, as issuing important resolutions, some of which were described as representing a standalone international convention, with the influence of the strong political will of the United States of America after the September 11, 2001 events, as in Resolution No. 1368 of 2001 adopted In the Council's session No. 4370 and Resolution 1373 of 2001 adopted in the Council's session No. 4385 as well. Also, some even considered the role played by the aforementioned body through the details included in these resolutions as a direction on the part of the Council that seeks to impose international legislation binding on all world countries[1].

3. At the legal level, it is important to pay attention to the development of effective mechanisms for integrating

1 These views regarding the Security Council resolutions referred to above have been indicated by Basim Sheesh Abbas, "competence of the Security Council in combating terrorism", a master's thesis submitted to the Al-Alamein Institute for Post-graduate Studies, Najaf, 2021, pp. 77-78.

the commitments stipulated in Articles (4-5) of the International Convention for the Suppression of the Financing of Terrorism, as the attitudes of the world countries vary on this topic, which requires starting to dedicate a sort of supremacy of the international law in some form over the national legislation, even if this dedication is limited in the scope of combating terrorism. The adoption of such an orientation will lead to a search into the adoption of specific meanings of terms such as "terrorism, resistance, the right to self-determination.... etc." that constitute tools for political controversies at the international level he price for which was paid by the citizen of all countries.

4. The need for linking illegal trafficking in cultural property and forms of terrorist crimes at the level of handling by the judicial authorities of the cases presented before them, which is a relationship that already exists, as the aforementioned trafficking has been generating significant income to terrorists and terrorist operations for years. The said linkage process can find a constitutional basis for it in Article (7/Second) of the Valid Iraqi Constitution, which stipulates:

(.....Second: The state shall be committed to fighting terrorism in all its forms, and works to protect its lands from being a base, passage or arena for terrorist activity)

provided that this action is preceded by the adoption of wide-ranging awareness steps at grass-roots level, stating that dealing at the level of legal adaptations for crimes of illegal trafficking in cultural property will be done in accordance in accordance with the aforementioned judicial directions or policies as well as taking into account the involvement of local communities in areas where there are archaeological sites, especially in remote places, by providing protection for them according to disciplined rules that operate on the basis of the principle of reward and punishment, while taking care of the issue of making the audience understand the provisions of these rules and the importance of preserving Iraqi cultural property as it concerns all Iraqis with their different religious convictions and national origins....etc, and dedicating a distinguished role to Iraqi minorities in the aforementioned areas of protection. We believe that spreading the spirit of tolerance is an important goal in this field as well as combating corruption because this would lead to zeroing in on the reasons for committing crimes against cultural property.

5. It is important that the legislative and judicial policies in countries that are popular markets for trafficking in Iraqi cultural property … etc. are directed to what would lead to dealing with the mentioned trafficking cases as being related to the financing of terrorists and terrorist activities in any form. It shall not be possible to accept only such charges are directed against citizens of countries such as Iraq, Syria, Libya, Yemen...etc, while others escape punishment for their crimes despite the clear relationship that exists between trafficking in these properties belonging to civilizations that existed in countries including Iraq that suffers from terrorist activities on the one hand, and the financing of terrorism on the other hand. In the event of non-response of countries in which the trading in cultural property flourishes, the Republic of Iraq shall have the opportunity to resort to the International Court of Justice and file a complaint before it. The jurisdiction of the Court in this case is in accordance with Article (24) of the International Convention for the Suppression of the Financing of Terrorism of 1999, and there is a precedent represented by the complaint filed by Ukraine against the Russian Federation in 2017, in which the Court accepted jurisdiction based on the aforementioned article of the Convention. Rather, the mentioned recommendation could include countries that do not cooperate with the Republic of Iraq in the field of recovery of Iraqi cultural property. It is also possible to imagine another contribution by the International Court of Justice in the aforementioned field by setting in motion its advisory jurisdiction in the face of international organizations that do not cooperate as required in the areas of respect for the aspects of international protection for stolen Iraqi cultural property.

6. On the level of remarks that can be made regarding the revision of the valid Antiquities and Heritage Law in Iraq, it is important to pay attention to a set of considerations that are important in achieving a greater degree of effective protection for Iraqi cultural property, according to the following:



Legal aspects on the Protection of Iraqi Cultural Heritage, Baghdad, 28th February - 1st March 2022

Mechanisms of enforcing international counter-terrorism financing commitments
Legal readings in the 1999 International Convention for the Suppression of the Financing of Terrorism and its relation to the protection of cultural property, Professor Dr. Haider Adham Al-Ta'i

a. Legislating a legal article to be added to the provisions of the Law of Antiquities and Heritage in force that prevents the inclusion of perpetrators of crimes related to cultural property and stipulated in all Iraqi legislation, in any amnesty decisions that may be issued by the competent authorities, provided that this approach takes into account the provisions contained in the valid Iraqi Constitution to ensure that there is no inconsistency with the said Constitution .

b. Adopting some considerations as aggravating circumstances for crimes related to cultural property, including, but not limited to, if the crime is committed in an organized manner rather than in an individual or unorganized manner, or if explosive materials are used to destroy cultural property, or if the crimes related to cultural property are committed either as a principal or as an accomplice by a public employee or a person entrusted with a public service or by any person in charge of providing protection to such property to whom the capacity of a public employee or a public servant may not apply, or if such crimes are committed during situations of armed conflict internationally or non-internationally, or during states of emergency ("exceptional circumstances").

c. Considering crimes under felonies category related to the protection of cultural property as crimes involving moral turpitude.

d. It is important to detail the forms of crimes related to the protection of cultural property and to adopt a legislative policy that grants the competent judge, when imposing punishment, the powers to aggravate and mitigate them according to the circumstances of each crime separately, which requires the adoption of flexible legislative wording, in addition to taking into account that the punitive legislative texts that will be drafted accommodate recent developments. in the areas of the "digital" virtual world, which allow the commission of various forms of crimes using the means of the "digital" virtual world, where artefacts that were acquired illegally are offered for sale by displaying them on the Internet.

## List of sources

**First: Books**

1. Ahmed Abu Al-Wafa, "Book of Identification of the Rules of International Law and International Relations in the Islamic Law (Sharia), Part Eleven, Second Edition, Dar Al-Nahdha Al-Arabiya, Cairo, 2007.

2. Ahmed Abu Al-Wafa, "Book of Identification of the Rules of International Law and International Relations in the Islamic Law, Resolving International Disputes by Peaceful Means in Islamic Sharia", Part Nine, Second Edition, Dar Al-Nahdha Al-Arabiya, Cairo, 2007.

3. Ahmed Ameen Al-Hudhaifi, "Criminal Protection of Antiquities", Dar Al-Nahdha Al-Arabiya, Cairo, 2007.

4. Ahmed Mohammad Rifaat, Salih Bakr Al-Tayyar, "International Terrorism", first edition, Arab-European Studies Center, 1988.

5. Husam Abdul Ameer, "The Legal System of Cultural Heritage in Iraq", Al-Saisaban Bookstore, Baghdad, 2014.

6. Esam Al-Attiyah, "Public International Law", Sixth Edition, Al-Atak Company for Printing, Publishing and Distribution, Legal Bookstore, Cairo, Baghdad, 2006.

7.Yousif Hassan Yousif, "International Organized Crime and International Terrorism", First Edition, The National Center for Legal Publications, Cairo, 2006.

Second: Researches and websites

1. Haider Adham Abdul Hadi, "Theft of Iraqi cultural property in light of the rules of international law", Journal of Law, College of Law at Al-Mustansiriya University, Sixth Year, Volume Four, Issues 16-17, 2011.

2. Abdul Aziz Mohammad Sarhan, "The Principles of Defining International Terrorism and Determining Its Content from the Reality of the Rules of International Law and Resolutions of International Organizations", The Egyptian Journal of International Law, Volume 29, Year 1973.

3. Vittorio Minniti, "New perspectives for the protection of cultural property in the event of armed conflict, entry into force of the Second Protocol to the 1954 Hague Convention", the official website of the International Committee of the Red Cross.

**Third: Theses and letters**

1. Basim Sheesh Abbas, "The Jurisdiction of the Security Council in combating terrorism", a master's thesis submitted to the Al-Alamein Institute for Post-graduate Studies, Holy Najaf, 2021.

**Fourth: Resolutions and documents of the Security Council and the General Assembly**

**A. Security Council resolutions and documents**

1. (S/RES/2199 "2015") on 12 February 2015

2. (S/RES/2347 "2017") on 24 March 2017

3. (S/RES/2354 "2017") on 24 May 2017

4.(S/RES/2379 "2017") on September 21, 2017

5.(S/RES/2462 "2019") on March 28, 2019

**B. Resolutions of the General Assembly**

1.(R/E/Res/72/194)) on December 23, 2018

2.(A/Res/72/172)) on December 7, 2017

**C. reports**

1. Report of the International Court of Justice 1 August 2016 - 31 July 2017, General Assembly, Official Records, Seventy-Second Session, Annex No. "4", United Nations, New York, 2017

2. See Report of the International Court of Justice August 1 – July 31, 2021, General Assembly, Official Records, Seventy-sixth Session, Annex No. "4", United Nations, New York, 2021



Professor. Dr. Ahmed Shakir Salman

# The Role of the International Criminal Court in Protecting Cultural Heritage

Cultural heritage is one of the most affected by armed conflicts, especially the recent conflicts, which are of a non-international character or mixed between international and internal conflicts, state wide conflicts. As the practical reality of these conflicts has proven that the conflicted parties rarely abide by the rules of international humanitarian law that guarantee protection for people and objects of a civilian nature. Therefore, the violations that fall on the rules of protecting cultural heritage are many and various, some of which may be in the form of deliberate damage, such as violations committed by armed groups, especially extremist ones, against cultural heritage. Including what is in the form of looting for the purpose of trading or in the form of using the sites of heritage subjects such as archaeological sites as military sites or military objectives

Therefore, it is necessary to seek the adaptation of laws for these violations by the International Criminal Courts. The role of this adaptation in conferring protection on the cultural heritage of the peoples. Especially since most international courts have classified these violations as war crimes. Although some see it may also fall within the crimes against humanity. It is covered in this research.

# The Role of the International Criminal Court in Protecting Cultural Heritage

**Dr. Ahmed Shakir Salman, Mr. Hazim Faris Habeeb**
Karbala University- College of Law

## Introduction:

Cultural heritage forms a symbol, identity and history of all peoples of the world, and occupies an important place not only in the consciousness but also in the subconscious of every people of the world. Therefore, any assault on cultural heritage is an assault on the dignity and history of all peoples. So, we find that it is awarded special protection in international humanitarian law approved by many treaties, to be added to the protection granted to them as civilian objects (Article 52 of Protocol I to the Geneva Convention).

Among the treaties that have protected this cultural heritage are the 1907 Hague Convention, the 1923 Hague Convention on Air Warfare, the 1935 Roerich-Washington Pact, the UNESCO Charter, the 1954 Hague Convention and its First Protocol, the 1970 and 1972 UNESCO treaties, the two Additional Protocols to the four Geneva Conventions 1977, and the Statute of The International Criminal Court, the Second Protocol to the Hague Convention, and the 2003 Universal Declaration for the Protection of the Cultural Heritage from Intentional Destruction.

The international criminal responsibility for violating the provisions of the protection of cultural heritage during the armed conflict has seen a remarkable development, despite that it is subject to the balance of power in the world community. The beginning was an attempt to bring World War I criminals to trial, then the World War II criminals in the Nuremberg Courts, which was described as victor's justice because it was applied to the Germans alone, although the Allied countries had committed crimes that exceeded the crimes of the Axis Powers. The legal basis for international criminal responsibility for the violation of provisions of the protection of cultural heritage during armed conflict in the light of the rules of international humanitarian law, is the theory of error or illicit act and the theory of abuse of use of right.

Given the extensive destruction caused by the recurrent wars that included everything, even the cultural heritage, it was necessary to take deterrent action against the recurrence of these consequences, by finding a kind of international pacts, according to which war criminals are brought to trial, so that these criminals cannot invoke the absence of international criminal law to disclaim their responsibility. Based on that, the international system and the world community had provided a definition of the international criminal courts, including the International Criminal Tribunals for the former Yugoslavia and Rwanda, and then established the International Criminal Court in Rome in 2002.

We will discuss in this research three courts that have prosecuted the perpetrators of international crimes for violating the international protection of cultural heritage that is of concern to humanity and is truly considered as a talking history of human civilization. We address in the first requirement the jurisdiction of Nuremberg Court in two branches, the first of which is the establishment of the court and the second is the jurisdiction of the court in prosecuting the violators of the international criminal protection for cultural heritage. We address in the second requirement the International Criminal Court for the former Yugoslavia of 1993 in two branches too, the first of which is the establishment of the court and the second is the jurisdiction of the court in prosecuting the perpetrators of crime in question. In the third requirement, we discuss the jurisdiction of the International Criminal Court to prosecute perpetrators of international crimes against cultural heritage in two branches, the first of which is the establishment of the court, and the second is to state the court's jurisdiction over crimes against cultural heritage.





## The first requirement

## Nuremberg Court

Not long after the defeat and collapse of Germany, delegates from France, England, the United States and the Soviet Union met in London for consultations on the measures to be taken against war criminals in implementation of the international obligations of the Allies by which they were bound during the war towards the peoples of the world, especially Moscow Declaration of 1943. These consultations ended up in concluding the London Convention on 8/8/1945, which stipulates in its first article that "an international military tribunal shall be established after consultation with the Supervisory Board in Germany to try the war criminals whose crimes have no specific geographical location, whether they are accused individually or as members of organizations or groups or as both capacities". In order to state the role of this court in protecting cultural heritage, this requirement will be divided into two sections. The first is the stages of establishing the court, and the second is the role of the court in the special protection of cultural property in accordance with the Hague Convention of 1907, on which base the Court tried and punished the perpetrators of international crimes that were committed during the Second World War of 1945.

### First branch

### Establishment of the Nuremberg Tribunal

The International Military Tribunal was established in Nuremberg, pursuant to the London Convention of 8/8/1945, to try the World War II criminals whose crimes do not have a specific geographical location, whether in their personal capacity or as members of criminal organizations or both. The statute of that court was attached to the agreement and was considered an integral part of it. This statute stipulated the formation of the court, its jurisdictions, authority, the applicable law and the procedures to be followed before the court, and all that is necessary to facilitate the work of the court and the performance of its role in trying the war criminals from the Axis countries not the Allied countries, although the Allied countries committed more serious crimes and more criminal than the Axis countries, but it was the trial of the victor over the defeated[1].

The second article of the court's statute stipulates that the court shall consist of four judges. Each state which is a party to the London Agreement shall appoint an original judge and another reserve judge to attend in the event of the absence of the original judge for any reason. The formation of the court was confined to the countries which had won the war, which were the Allied countries and which bestowed the military status on that court, to speed up adjudicating the cases before it and to evade the principle of territoriality[2]. The judgments are rendered by a majority of votes, and in the event of a tie vote, the chairman's vote shall rule.

The indictment ruling issued by the court's attorney general included twenty-three members of the Nazi party who were senior leaders of the Second World War. Twenty-one defendants were tried only due to the suicide of one of the accused and the escape of the other. The court began its proceedings on November 20, 1945 after about six months from the handover of Germany, and the court issued death sentences to twelve defendants and prison sentences ranging from seven years to life imprisonment for seven defendants, and acquitted three defendants. The court's jurisdiction was to try the defendants who played an essential role in the war, and other courts were set up for the rest of the defendants. The defendants were classified into three classes, the first for the major criminals with Nuremberg Tribunal having jurisdiction for their trial, the second being war criminals for whom there is no geographical location for their crimes, and the third for lower ranking officers[3].

As for the substantive jurisdiction of the court, Article 6 of the Court's statute stipulated crimes against peace or aggression, crimes against humanity, war crimes, and the crime of involvement in the formation or implementation of a general plan or conspiracy to commit any of these crimes. As for the proceedings before the court, they are stipulated in Article 13 of the court statute of the court system, and it was stipulated to form an investigation and prosecution committee consisting of four members, one for each member state of the London Agreement. This committee is concerned with distributing the work among prosecutors, identifying major criminals, preparing the indictment and referring it to the court, as well as drafting the rules of procedures

*1 Dr. Ali Abdul Qadir Al-Qahwaji, International Criminal Law, Al-Halabi Legal Publications, Beirut, 2001, p. 246*
*2 Dr. Mahfoudh Sayyid Abdul Hameed Muhammad, "Role of the International Criminal Tribunal for the Former Yugoslavia in the Development of International Humanitarian Law, An Applied Fundamental Study of Judgments", Dar Al-Nahdha Al-Arabiya, Cairo, 2009, p. 12.*
*3 Dr. Ahmed Muhammad Al-Muhtada Billah, the "General Theory of the international criminal judiciary", Dar Al-Nahdha Al-Arabiya, 2010, Cairo, pp. 71-73.*

to be followed before the court as stated in Article (14) of the Court Statute. The Court had adopted general principles in criminal procedure laws in general, such as the principle of a fair trial, guarantees of defence and the court's discretion in evaluating evidence [1].

**Second requirement**

**Court's jurisdiction over crimes against cultural heritage**

Article 6 of the Nuremberg Court statute determined its jurisdiction over a number of felonies, among which are: War crimes that include looting public or private property, ravaging cities and villages without reason, or invading them without military necessity. In indicting a violation of the laws of war by the Axis Powers, the court was based on the rules established by the Hague Conventions of 1907[2], and accordingly the jurisdiction of the Nuremberg Court was decided to try those who were responsible for the destruction and confiscation of cultural property during the war.

A number of members of the Axis powers were indicted for their responsibility for the destruction, looting and theft of cultural property. The indictment was established on the basis of the destruction of public and private property as per Article 56, which stipulates that the property of municipalities and property of institutions dedicated to worship, charitable and educational works and foundations must be treated as private property even this property is owned by the state. It also stipulates that it is prohibited to seize, destroy or intentionally damage such institutions, and historical, artistic and scientific monuments, and that judicial measures shall be taken against the perpetrators of these acts.

The court issued its death sentence against the accused and considered the acts of destruction and looting committed against cultural heritage as war crimes, in accordance with Article 56 of the Fourth Hague Convention of 1907 [3]. Despite the criticism directed at the Nuremberg trials regarding the judges' lack of impartiality because their nationality is from the Coalition countries, and despite some saying that these trials constitute the trial of the victor over the defeated, and it is far from impartiality and justice. For the first time in modern history, war criminals who committed crimes of destroying cultural heritage are tried, but we have to point out that this court is temporary and not permanent, as its mission ended on the day it issued its ruling on October 1, 1946.

**Second requirement**

**International Criminal Tribunal for the former Yugoslavia**

This requirement is concerned with discussing the role of the 1993 International Criminal Tribunal for the former Yugoslavia in protecting cultural heritage. This protection was included in the statute of that court. This topic consists of two requirements regarding the stages of establishing the court, and the second is to state the scope of protection decided by that court for the cultural heritage.

**First branch**

**Establishment of the court**

This court (the International Criminal Tribunal for the former Yugoslavia) was established by Security Council Resolution No. 808 of 1993 in accordance with Chapter VII of the Charter of the United Nations and determines the court's spatial jurisdiction over all of the territory of the former Socialist Federal Yugoslavia. Earlier, the Security Council issued Resolution No. 780 on 6/10/1992 according to which it had set up a committee of experts to investigate and collect information and evidence related to the gross violations of the four Geneva Conventions of 1949 and other grave violations of international humanitarian law in the territory of the former Yugoslavia. This means that this spatial jurisdiction covers all the crimes described in the court statute, which

*1 Dr. Amjad Haikal, "Individual criminal responsibility before the international criminal justice, a study within the framework of international humanitarian law", Dar Al-Nahdha Al-Arabiya, second edition, 2009, Cairo, pp. 32-33.*
*2 Article 23 stipulates that: "In addition to the prohibitions stipulated in special agreements, it is prohibited in particular to: ...g- Destroy or seize enemy property, unless the necessities of war inevitably require such destruction or seizure ...".*
*3 Dr. Sayyed Ramadhan Abdul-Baqi Ismail, "Protection of Cultural Property during Armed Conflict", PhD thesis, Faculty of Law, Cairo University, 2014, p. 420.*





may have been committed in the territories of the former Yugoslav republics[1].

In addition to spatial jurisdiction, this tribunal is concerned with crimes that occur during a specific period of time, which was specified by the statute in its eighth article for the court in the period starting from January 1 1991, but did not specify the end of this period and left it to the Security Council in a later decision. The tribunal is temporary and not permanent and has the special task of prosecuting persons who have committed serious international crimes in the former Yugoslavia only.

The tribunal consisted of three entities[2]:

- Two circles of the first degree, each consisting of three judges, and the General Appeals circle consisting of five judges, to look into appeals in judgments issued by circles of the first degree. The number of judges reached eleven, and the Security Council decided on May 13, 1998 to increase the number of the judges to fourteen judges in a manner that allows the establishment of three circles for the court.

-The Public Prosecution Service: It is concerned with investigation and initiation of lawsuits and it consists of the Public Prosecutor and bureau staff. The Prosecutor General was appointed by the Security Council based on the proposal of the Secretary-General of the United Nations, for a term of four years, renewable only once, and the Public Prosecution exercises its jurisdiction on its own or based on information provided to it.

Court Registry: It consists of the registrar and a number of employees, selected after consultation with the registrar- Article (17) of the court statute.

**Second branch**

**Court jurisdiction over crimes against cultural heritage**

Article (1) of the Statute of the former Yugoslavia Court of 1993 stipulates that this court has the jurisdiction to try those accused of serious violations of international humanitarian law in the former Yugoslavia since 1991. The Court will apply Geneva Law, Hague Law and the Nuremberg Tribunal Statute of 1945 in the exercise of these jurisdictions, in addition to the 1948 Convention on the Prevention of Genocide. Article (3) of the statute of the Criminal Tribunal for the former Yugoslavia on war crimes was inspired by Article (6) of the Nuremberg Tribunal Statute, the Geneva Conventions of 1949 and the Hague Conventions relating to the laws and norms of war. Paragraph ( D) thereof stipulated the jurisdiction of the court to look into accusations against individuals of committing acts of seizure, destruction or wilful damage directed against institutions designated for religious, charitable, educational and artistic purposes, historical monuments, and artistic and scientific works but did not refer to the term "cultural heritage', but referred to the property that falls under the cultural heritage concept. It did not refer to the application of the provisions of the Hague Convention of 1954, but was based on the texts contained in the Hague Conventions of 1907 and the provisions contained in Article (3/d) that included international and non-international armed conflicts, and its interpretation of criminal intent was expanded in the crimes against cultural heritage, and explicitly referred to cultural heritage.

The statute of that court stipulated three types of measures for the protection of cultural heritage represented by direct protection. Article (3/D) of this statute included indirect protection, represented by the laws and norms of war, which provide protection for civilian objects in general, which includes the cultural property mentioned in the previous international conventions, including the Hague law conventions or the Geneva law and other conventions, and finally the subsequent protection stipulated in the third paragraph of Article twenty-four of the Court's statute, represented by the obligation to return the cultural property which has been exposed to theft or illegal export.

These have been subject to violations of the provisions of protecting cultural heritage during the armed conflict through looting or destruction, including looking into accusations of assaults against cultural property in the Tadic case based on the text of Article 3 of its statute, which the Court considered as grave violations of the rules of international humanitarian law, which warrant punishment against the perpetrators. The court also

*1 Dr. Mahfoudh Sayyed Abdul Hameed Muhammad, "The Role of the International Criminal Tribunal for the Former Yugoslavia in the Development of International Humanitarian Law," a thorough study of provisions, ibid, p. 112.*
*2 Dr. Muhammad Hosni Ali Shaaban, "International Criminal Jurisprudence with an Applied and Contemporary Study of the International Criminal Court (Historical Development - The Statute of the International Criminal Court and its Role in Contemporary Challenges), Dar Al-Nahdha Al-Arabiya, 2010, Cairo, p. 89.*

confirmed in its judgment in the Blaskic case that his intentional attacks against institutions designated for religious or educational purposes, constitute a punishable crime.

Although the indictment against Blaskic dealt mainly with religious institutions, paragraph (d) of Article (3) of the Court Statute in its entirety and with the same logic can be applied to institutions devoted to charitable works, art, science, historical monuments, works of art and science. Blaskic was sentenced for a crime against humanity, which is, persecution against Muslim civilians in Bosnia, including attacks on towns and villages and the destruction and looting of property, in particular religious and cultural institutions, the court statute did not include any indication of compensation that must be paid for the property that cannot be recovered, and sufficed with returning the money and property that had been seized [1].

The Court considered the attack on cultural heritage as a war crime according to Geneva law, especially the four Geneva Conventions of 1949, and the two Additional Protocols of 1977, especially the Fourth Convention on the Protection of Civilians during International Armed Conflict, and then the Additional Protocol I of 1977 in Chapter Three thereof, Article (53) Concerning the General Protection of Cultural Objects and Places of Worship, which stipulates that "the following acts shall be prohibited, without prejudice to the provisions of the Hague Convention for the Protection of Cultural Objects in Case of Armed Conflict, concluded on May 14, 1954, and the provisions of other international covenants on the subject: A- Committing any of the hostile acts directed against historical monuments, works of art, or places of worship that constitute the cultural or spiritual heritage of peoples, B- The use of such objects in support of the war effort, C- The use of such objects as a place for deterrent attacks[2].

Although this court sets an important precedent in order to enhance the protection prescribed for cultural heritage by considering crimes against this heritage as war crimes, the penalties it issued against the criminals were not severe enough to reflect the importance of this cultural heritage.

## Third requirement

## International Criminal Court

We deal in this requirement the role of the International Criminal Court in protecting cultural heritage by dividing this requirement into two branches. In the first branch, we address the emergence of the Court in its various stages, until the establishment of the Court, and we address in the second branch the legal protection imposed by the Court by criminalizing the attack on cultural heritage as a war crime in accordance with Article (8) of its Statute.

### First branch

### Establishment of the court

Previous experiences in the investigation committees and temporary international courts, it shows the urgent and necessary need of the international community for a system and a permanent mechanism to achieve international criminal justice, because the previous courts were established to try specific defendants in certain conflicts. Some considered them as the trial of the triumphant over the defeated in the war or (revenge of the victors) pursuant to the Roman rule which says (what is legitimate for the victors is not legitimate for the defeated). There are also several practical reasons for claiming the necessity of a permanent system of international criminal justice, as such a permanent system will obviate the establishment of special courts whenever needed[3]. Therefore, the issue of establishing an international criminal court was the most important issue on the agenda of the United Nations in its first session after its establishment, based on the growing attention by all UN member states, including the five permanent members of the Security Council.

France had submitted to the International Law Committee of the General Assembly a project to establish an international criminal court and give it the power of deciding on international crimes. The French project

*1 Dr. Sayyed Ramadhan Abdul-Baqi Ismail, "Protection of Cultural Property During Armed Conflict", ibid, pg. 422 and beyond.*
*2 Dr. Mr. Mustafa Ahmed Abu al-Khair, "The Future of Wars, Studies and Documents: The Four Geneva Conventions of 1949 and the Additional Protocols of 1977", Misr Al-Arabia House for Publishing and Distribution, Cairo, 2009*
*3 Dr. Ahmed Al-Rashidi, "The International Criminal System from the Temporary Investigation Committees to the International Criminal Court", International Policy Journal, Cairo, No. (150), 2002, p. 8.*





was supported by the majority of the members of the previous committee on developing the international law and codifying it. The General Assembly's resolution 0260/3/B was passed on December 9/1948 and included a call for the International Law Commission to study the possibility of establishing a permanent and independent international criminal court and bestowing on it the necessary powers to try those accused of war crimes, genocide or any other international crime, or the possibility of establishing an international criminal court within the framework of the International Court of Justice.
In 1950, the aforementioned Commission accomplished its tasks, and said in its report presented to the General Assembly (that the establishment of an international criminal court to try those accused of committing genocide or other international crimes is desirable and enforceable. As for the establishment of an international criminal court within the framework of the International Court of Justice, it is possible after amending the Statute of the International Court of Justice, but the Commission does not recommend this project, nor favours it).
In 1951, the International Law Commission referred the task of developing the draft statute for the proposed court to a special committee. In the same year, this committee completed the draft statute for the court and submitted it to the General Assembly and had it discussed by the General Assembly in the previous session, where some states provided their remarks and proposals thereon.
On the fifth of December 1952, the General Assembly issued Resolution No. (687), according to which a new Commission was formed, which began its business in 1953, and its task was studying the implications of establishing an international criminal court and exploring other ways by which this court can be established, and studying the nature of the relationship between the United Nations and the court proposed to be established, as well as reconsidering the draft statute of the proposed court by adding and deleting whatever need to be developed.
In 1953, the Preparatory Committee of the General Assembly submitted a new draft statute for the court to be presented for discussion and comments thereon. This draft was supported by most members of the General Assembly, but some members requested a definition of aggression before approving the statute of the permanent international criminal court proposed to be established. The twelfth session of the General Assembly postponed looking into the definition of aggression for the year 1957, did not discuss this subject and thus postponed deciding on the Statute indefinitely.
In 1982, the Rapporteur of the International Law Commission presented his first report on the draft canonizing of crimes against peace and human security, and the draft was finalized in 1991. The draft remained under study and deliberation until was approved in 1996, while the topic of establishing the Permanent International Criminal Court high on the agenda to be discussed by the International Law Commission in its thirty-eighth session (1986), thirty-ninth session (1987), forty session (1988) and the forty-first session (1989). Then the International Law Commission discussed the nature of the International Criminal Court, its jurisdiction and course of procedures for filing lawsuits with it.
In 1990, the General Assembly issued Resolution No. 45/41 on November 28, 1990 and Resolution No. (46/54) on December 9, 1990, in which it called on the International Law Commission to continue discussing the issue of establishing a permanent international criminal court, and then issued Resolution No. (47/33) dated 25/11/1992 and Resolution No. (82/31) on 9/12/1993 in which the International Law Commission urges the need to keep the issue of establishing a permanent international criminal court high on the agenda to be examined by the Committee. In 1994, the Committee submitted to the General Assembly the draft statute of the Criminal Court, after amending it, in response to the questions raised by some great powers.
On the ninth of December 1994, the General Assembly established a specialized committee to discuss the main administrative and technical issues and the necessary arrangements for concluding an international convention on the establishment of the International Criminal Court. The committee concerned met from the period (3-13) April to (14-25) August 1995 to discuss the foregoing issues[1]. On the eleventh of December 1999, the General Assembly, in its resolution No. (49/50), established a preparatory committee to conduct further discussions on the technical and administrative issues related to the draft statute which was prepared by the International Law Commission and to draft the stipulations of the Convention in the light of the various opinions on the statute[2] .

*1 Dr. Ibraheem Muhammad Al-Anani, "The International Security Order", Cairo, 1997, p. 287.*
*2 Dr. Ali Yousif Al Shukry, "International Criminal Law in a Changing World", Itrac House for Printing, Publishing and Distribution, Cairo, 2005, p. 7*

In 1996, from 12 to 20 August, the Preparatory Committee met to study the draft of establishing the International Criminal Court, and discussed all issues related to the unified text of the statute of the International Criminal Court. On the seventeenth of 1996, the General Assembly issued its resolution No. (51/207) by holding a diplomatic conference of plenipotentiaries in 1998 to adopt the convention on establishing the International Criminal Court, on condition it is preceded by the meeting of the Preparatory Committee during the years 1997 and 1998. The committee held several meetings over the past two years, the latest of which was during the period 16 March to 13 April 1998 with the aim of finalizing the final draft statute and presenting it to the conference[1].

On December 1, 1997, the United Nations General Assembly issued Resolution No. (52/162) convening the International Conference of Plenipotentiaries at the headquarters of the UN's Food and Agriculture Organization (FAO) in Rome, Italy. In 1998, from June 15 to June 17, the International Conference of Plenipotentiaries was held in which delegates of (160) countries participated, in addition to (31) intergovernmental organizations, (14) specialized international agencies, and (238) non-governmental organizations. The conference was also attended by representatives of relevant governmental and regional sectors, including the two International Tribunals for the former Yugoslavia. and Rwanda[2]. The Statute of the International Criminal Court was approved by (120) states, while seven states (the United States - Israel - China - India - Iraq - Libya and Qatar) objected to it, and 21 countries abstained from voting. On July 18, 1998, the door for signature of the treaty was opened (Pal Campidoglio) in Rome, and within two hours, twenty-six states and governments signed the convention which remained available for signature at the Italian Ministry of Foreign Affairs.

On the first of April 2002, the states which ratified the Statute of the Court reached 66, which is the number required for the Convention to be in force, and thus it was brought into effect on the first of July 2002. The Assembly of the State Parties convened in early September 2002, and the number of states reached that had ratified the Statute of the International Criminal Court was 123 states as of January 6, 2015[3], and among Arab states, only Jordan and Djibouti had ratified it.

The statute of the International Criminal Court consisted of a preamble and (128) articles, in addition to the final draft text of the procedural rules and the rules of evidence with an explanatory note in the beginning. The number of rules is 225 in addition to the final wording of a draft text on crimes which fall under the jurisdiction of the court in Articles 6, 7, 8 and 8 bis) of the Statute. This draft consists of a general introduction and a detailed statement of the elements of those foregoing crimes.

## Second requirement

## International crimes against cultural heritage in the Statute of the Court

With regard to the jurisdiction of the Court for crimes against cultural heritage during the armed conflict, it is covered by Article (8) of the Statute on war crimes, as the Court considered them as war crimes, especially when they are committed within the framework of a plan or a public policy or as part of a large-scale commission of these crimes. Article (8, Paragraph 6/a) of the Statute of the International Criminal Court defines war crimes as (grave violations of the Geneva Conventions of August 12, 1949, as well as other grave violations of the valid laws and norms that are applicable to international armed conflicts within the established scope of the international law)[4].

The jurisdiction of the court over crimes committed against cultural property was indicated in more than one of the paragraphs of Article (8). The court has jurisdiction over crimes related to widespread destruction and appropriation of property without a military necessity justifying the violation of the law and in a random manner, and deliberately directing attacks against civilian locations i.e. locations that do not constitute military targets, attacking or bombarding defenceless cities, villages, residences or buildings that are not military

*1 Dr. Abu al-Khair Ahmed Attia, "The International Criminal Court, a study of the statute of the court and the crimes that the court is competent to look into", Dar al-Nahdha al-Arabiya, Cairo, 1999, p. 15.*
*2 Dr. Ali Yousif Al Shukri, ibid, p. 84.*
*3 Encyclopedia of the International Criminal Court, Constitutional and Legislative Alignments, Draft Model Law, Publications of the International Committee of the Red Cross, Cairo Branch, Prepared by Counselor / Shareef Atlam, Cairo, 2004 AD, p. 295.*
*4 Dr. Mr. Mustafa Ahmed Abu al-Khair, "The Statute of the Criminal Court, the Procedural Rules, the Rules of Evidence and the Elements of International Crimes", Itrak House for Printing, Publishing and Distribution, Cairo, 2005.*



Legal aspects on the Protection of Iraqi Cultural Heritage, Baghdad, 28th February - 1st March 2022
The Role of the International Criminal Court in Protecting Cultural Heritage
Assistant professor Dr. Ahmed Shakir Salman Al-Jarrah, Hazim Faris Habeeb

targets by whatever means, and destroying or seizing enemy property unless such destruction or seizure is warranted by the war necessities. Though cultural targets are not explicitly indicated in these paragraphs, still they fall within civilian property and objects that do not constitute military targets.

Cultural property was expressly stipulated in Article (8/9/b) which states (directing attacks against buildings designated for religious, educational, artistic, scientific or charitable purposes, historical monuments, hospitals and places where the sick and wounded are assembled, provided that they are not military targets). The jurisdiction of the International Criminal Court includes crimes against cultural property, whether committed in an international armed conflict or having a non-international character. Article (8/e) stipulates the jurisdiction of the Court for other serious violations of the laws and norms that are applicable to armed conflicts that have a non-international character, within the established scope of international law, any of the following acts: ( 4 - Intentionally directing attacks against buildings designated for religious, educational, artistic, scientific or… charitable purposes, historical monuments, hospitals, and places where the sick and wounded are assembled, provided that they are not military objectives. 5 - Looting any township or a place, even if it was seized by force.13- Destroying or seizing enemy property, unless such destruction or seizure is warranted by war necessities).

To summarize the foregoing, the statute of the International Criminal Court considered acts that violate the international criminal protection of cultural heritage as war crimes under Article 8 of this statute.

## Conclusion

We have addressed in this research the role of international criminal courts in protecting cultural heritage in the case of armed types, whether international or non-international. The international criminal tribunals that have addressed this issue were selected, with judgments on this subject issued. Accordingly, we have concluded the following: -

1- The Nuremberg Tribunal, which was set up after the end of World War II in 1945, which criminalized the assault on cultural heritage in accordance with the Hague Convention of 1907, i.e. the Court applied the Hague Law and considered the violation of international protection of heritage and history which it expressed as cultural property as war crimes because they had occurred during the war, whether international or non-international.

2- The International Criminal Tribunal for the Former Yugoslavia, established by the Security Council Resolution No. (808 / of 1993. The Court considered the assault on cultural heritage as a war crime in accordance with Geneva law, especially the four Geneva Conventions of 1949 and the two additional protocols of 1977, particularly the Fourth Convention on the Protection of Civilians during international armed conflict and then the first Additional Protocol of 1977 in its third chapter, Article (53) on the general protection of cultural objects and places of worship.

3- The International Criminal Court stipulated the protection of cultural heritage, and the Court considered the assault against it as a war crime in accordance with Article 8 of the Statute of the International Criminal Court. Thus, the Court has established the principle of protecting hr cultural heritage due to the great importance of these properties, some of which may amount to being a common heritage of humanity as a whole.

We conclude here that the temporary and permanent international tribunals have imposed international criminal protection on heritage and history within the cultural property for which protection is imposed. All the courts that have looked into the attacks on cultural heritage considered such attacks as war crimes, and issued sentences including death sentences, such as the Nuremberg Tribunal, and prison sentences such as the Court of the former Yugoslavia of 1993. As for the International Criminal Court, it considered the attack on these properties, including those related to cultural heritage, as a war crime as per Article 8 of its statute.

**Sources**

1) Dr. Ibraheem Mohamed El-Anany, The International Security Order, Cairo, 1997.

2) Dr. Abu Al-Khair Ahmed Attia, The International Criminal Court, a study of the statute of the court and the crimes over which the court has jurisdiction, Dar Al-Nahdha Al-Arabiya, Cairo, 1999.

3) Dr. Ahmed Al-Rashidi, The International Criminal System from the Temporary Investigation Committees to the International Criminal Court, International Policy Journal, Cairo, Issue No. (150) October 2002.

4) Dr. Ahmed Muhammad Al-Muhtada Billah, the General View of the International Criminal Jurisprudence, Dar Al-Nahdha Al-Arabiya, 2010, Cairo.

5) Dr. Amjad Haikal, Individual Criminal Responsibility Before the International Criminal Jurisprudence, a study within the framework of international humanitarian law, Dar Al-Nahdha Al-Arabiya, second edition, 2009, Cairo, pp. 32-33.

6) Dr. Sayed Ramadan Abdul Baqi Ismail, Protection of Cultural Property during the Armed Conflict, PhD thesis, Faculty of Law, Cairo University, 2014, p. 420.

7) Dr. Ali Yousif Al Shukri, International Criminal Law in a Changing World, Itrac House for Printing, Publishing and Distribution, Cairo, 2005.

8) Dr. Mahfoudh Sayyed Abdul Hameed Muhammad, The Role of the International Criminal Tribunal for the Former Yugoslavia in the Development of International Humanitarian Law, a fundamental applied study of the provisions, Dar Al-Nahdha Al-Arabiya, Cairo, 2009, p. 12.

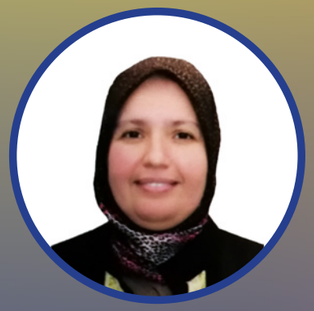
9) Dr. Muhammad Hosni Ali Shaaban, International Criminal Jurisprudence with an Applied and Contemporary Study of the International Criminal Court (Historical Development - The Statute of the International Criminal Court and its Role in the Light of Contemporary Challenges), Dar Al-Nahdha Al-Arabiya, 2010, Cairo, p. 89.

10) Dr. Mr. Mustafa Ahmed Abu al-Khair, The Statute of the Criminal Court, the Procedural Rules, the Rules of Evidence and the Elements of International Crimes, Itrak House for Printing, Publishing and Distribution, Cairo, 2005.

11) Dr. Sayyed Mustafa Ahmed Abu al-Khair, The Future of Wars and Documents, Misr Al-Arabiya House for Publishing and Distribution, Cairo, 2009.

12) Encyclopedia of the International Criminal Court, Constitutional and Legislative Harmonies, Draft Model Law, Publications of the International Committee of the Red Cross, Cairo Branch, Prepared by Counselor / Shareef Atlam, Cairo, 2004.





**Assistant Prof. Dr. Sabah Sami**

- Specialized in Criminal Law
- Lecturer in many academic institutes including College of Law- Baghdad University, MoI High Institute, and the Iraqi Judicial Institute.
- Produced many types of research on criminal proceedings and gender-based violence.

# Criminal Protection of the Iraqi Cultural Heritage
# The crime of vandalism as a model

The cultural heritage of any country or people represents a great wealth because of the values, ideas, beliefs, customs and traditions of that country or people it represents. Heritage is a collection of values, beliefs, etiquette, arts, knowledge and all the material and moral activities of man. It is the product of the accumulation of cultural experiences in its parts and details. The value and importance of cultural heritage also lies in the fact that it represents human genius and constitutes a cycle of human cultural, intellectual and civilized development. Losing or missing any heritage constitutes a major and irreparable loss not only for the state but for all humanity, which confirms its importance because the heritage of any country is a continuous link in a continuous series of episodes from the story of man since the first appearance of mankind on the earth until now.

Cultural heritage and the environment are two sides of the same coin because they are linked to the human being and his activities and movements on planet Earth. The environment is the comprehensive framework for human life in the universe in its natural and artificial form. As for the cultural heritage, it is the product of human movement and its intellectual, spiritual and scientific activities in different aspects of life, and the relationship between environment and man is an inevitable and interactive relationship. This relationship is reflected negatively and positively affects man and his society according to the way man deals with it in a good or bad way. Man is the first beneficiary of its existence and sustainability, and he is also the first affected by its degradation and extinction.

Cultural heritage at different levels and in all parts of the world has been subjected to destruction and devastation for many reasons, the most important of which is pollution resulting from industrialization and its negative impact in the dissemination of destructive chemical toxins, the reconstruction and cement sprawl among other factors that strongly affect cultural heritage as well as human material waste and its impact on historical monuments. and archaeological sites in general, but Iraqi heritage has been exposed, in addition, to other aspects of

destruction, which were represented by the attacks that targeted the sites from terrorist groups that caused destruction and vandalism to these sites in a random manner once and in an organized manner again.

The importance of cultural heritage and its role in the dynamics of nations from their spiritual side is what prompted states in the modern era to take care of cultural properties and enact laws and regulations to protect them. This care was not limited to the national level only but extended to the international one considering that cultural property is a common heritage for all of humanity.

In the context of our search for criminal protection of cultural heritage, it was necessary for us to start with identifying the concept of cultural heritage, then we move to the provisions of legal protection of cultural heritage at the level of international legislation. As for protection at the internal level and national laws that dealt with the aspects of this protection through criminal texts whether in the general penal code or within the scope of special punitive laws, it will be discussed in the third part of our study, especially valuable ones related to the Antiquities and Heritage Law No. 55 of 2002, with an explanation of the specificity of the situation in Iraq due to the sabotage and destruction of these properties and objects, which is almost in most cases systematically organized within the framework of the wars and attacks that he witnessed, which had serious effects on all aspects of human, environmental and urban life, including cultural properties.



# Criminal Protection of Iraq's Cultural Heritage The Crime of Vandalism as a Model

**Assistant Professor Dr. Sabah Sami Dawood**
College of Law - University of Baghdad

## Introduction

The cultural heritage of any country or people represents a great wealth, because it represents the values, ideas, beliefs, customs and traditions of that country or people. It is a combination of values, beliefs, literature, arts, knowledge and all man's material and moral activities. It is the product of the accumulated cultural experiences in its smallest parts and details as it is the act of man in his environment. Also, the value and importance of cultural heritage lies in that it represents human genius and constitutes a link of man's cultural, intellectual and civilized development links. What confirms this importance is that the squandering or loss of any heritage constitutes a major and irreplaceable loss not only for the state but for all humanity too, because the heritage of any state in fact is a continuous link in a continuous series of links of the story of man since his appearance on the surface of the earth until now.

Cultural heritage and environment are two sides of the same coin because they are both associated with man, his activities and action on the earth planet. Environment is the comprehensive framework for human life in the universe in its natural and artificial form, while cultural heritage is the product of human action and his intellectual, spiritual and scientific activities in different aspects of life. The relationship between man and environment is an inevitable and reciprocal relationship, and it negatively and positively impacts man and his surroundings depending on how man deals with it, whether in good or evil manner as man is the first beneficiary of its survival and continuity, and is greatly affected by its deterioration and annihilation.

Therefore, the violations that take place against our archaeological and heritage landmarks, such as smuggling, theft, destruction or damage, would lead to the discontinuity of part of our history, and the obliteration of something from our memory that will never be compensated. As the value of antiquities and heritage does not stop at the pleasure of seeing the place alone, but means restoration of history, so if the place falls down or disappears, the symbols of history and the memory of the nation and its heritage will fall down together.

Cultural objects have been given the protection of international law and conventions due to them being a common human heritage for all humanity. But, this protection may become an object of threat, especially at the time of armed conflicts, as it becomes difficult to curb these abuses these objects may be exposed to, especially if armed terrorist groups are involved in such abuses as happened in Iraq when the terrorist Islamic State organization in Iraq and the Levant known as Da'sh Organization, publicly assaulted antiquities and cultural and historical objects, destroying, damaging and looting, and systematically attacking these landmarks.

The importance of the topic: Mesopotamia is among the regions in the Arab world that most containing these diverse cultural treasures such as temples, monuments of successive civilizations, tombs of prophets, and natural museums represented by entire cities, not to mention small artifacts, most of which are protected by the international law. However, ISIS, by virtue of its position and control over a large part of the Iraqi territory, has attacked these objects and destroyed a large part of them, including statues and sculptures belonging to ancient Assyrian, Hellenistic and Parthian civilizations, cities and museums, and huge statues, in what is described as damage that cannot be confined to part of the human heritage. . The destruction of antiquities was carried out about two weeks after the United Nations Security Council adopted a resolution aimed at drying up the sources of funding for the Islamic State, including limiting the smuggling of antiquities, which is Resolution 2199, which leads to question the argument by which the Organization justified its actions toward these antiquities that they are idols that used to be worshipped not Allah, and that they should be destroyed, although when Islam had entered these countries, these monuments were still and did not order the honourable companions of the Prophet who were closest to the Messenger of Allah to destroy them.

The problem of the research: what Da'sh and the groups associated with it, whether individuals or groups, have done, sabotaging and destroying these cultural monuments, gives rise to internal and international criminal responsibility, which prompted us to discuss the forms of penal protection for these cultural objects, whether at the level of internal law or at the level of international law as an international crime that holds it responsible

and for this purpose we will discuss the internal protection of cultural heritage against acts of destruction and destruction in the internal law in light of the Iraqi Antiquities and Heritage Protection Law No. 55 of 2002. We will also address this protection in light of international conventions, especially the Rome Statute and the UN Security Council's resolutions regarding this terrorist organization.

Dividing the research: In light of the previous problematic issue, we will divide the research into two topics. Will allocate the first topic to defining the cultural heritage and its distinction from other concepts that are mixed with it and also the most important conventions that have addressed this heritage. We will address in the second topic, the crime of attacking cultural heritage in terms of explaining the elements of this crime and the forms of committing criminal behaviour, including demolishing, damage and destruction. We will also address the responsibility of the perpetrator as a crime stipulated in national law, as well as an international crime in light of the Rome Statute and UN Security Council resolutions.

## First topic: Definition of cultural heritage

It is the importance of cultural heritage and its role in the dynamics of peoples from their spiritual side that has prompted the states in the modern era to take care of cultural properties and promulgate laws and regulations to protect them. This care was not limited to the national level only, but extended to the international level, considering that cultural property is a common heritage for the entire humanity. In the context of our search into criminal protection of cultural heritage by choosing the crime of vandalizing cultural heritage as a model, we had to first address the concept of cultural heritage, in the first requirement by defining it as well as clarifying its subjectivity in this requirement. We will address in the second requirement the crime of vandalism against the heritage monuments and the forms of committing criminal behaviour therein, as well as the position of international law on the crimes committed against Iraqi cultural monuments by the terrorist Da'sh Organization.

### First requirement: definition of heritage

Cultural property in any country bears witness to the rise of civilization and construction, and is a tool from which the ancestors' heritage draws inspiration and identifies their efforts and positive contribution to supporting human civilization. The importance of cultural history in the life of the society lies in that it measures the society's capability to live and support the cultures, and therefore the legislations found it necessary to put in place legal mechanisms to preserve cultural property, which are humans actions attributed to his creative activities in the present and the past, scientifically, artistically and educationally, which are important for interpreting the culture of the past and for developing it now and in the future and have a relationship with human heritage. Its era dates back to more than a hundred years, and cultural property is given great attention and a serious effort to protect it, so all societies are keen on protecting and preserving heritage from a legal perspective, including the Iraqi legislator. It is an integral part of public properties in accordance with the provisions of the Iraqi Civil Code No. (40) for the year 1951. It is impermissible to make any disposition of cultural heritage that leads to the transfer of its ownership to individuals. Therefore, we will address in this requirement the definition of heritage through the following two paragraphs:

#### Branch one - Defining heritage in terms of language:

Heritage is a gerund of "inherited", and its origin is "inherited, inherits an inheritance: the property of so-and-so has been transferred after his death. They say: The folks have been inheriting, each leaves inheritance to another. The folks have inherited money and glory: inheritance from one to another (from ancestor to successor) from old times.[1]

Heritage is what a man leaves behind to his heirs[2]. Heritage constitutes a distinct wealth system that defines the well-established foundations of historical rooting for the identity of peoples and an existing tool of manifestation of the nature of achievement of the past which had been pursued by the peoples through their material and moral behaviours announcing their image and way of coexisting with the rubble of life experiences and a formulation through being impacted and impacting the relationship as a result of human coexistence.

Also, heritage is defined as everything that the ancestor leaves behind, such as the father to the sons, and it means the origin, which is the old thing, and it means bequeathing fire on the flame of its lighting, which is the

*1 Al-Munjid in Language< ibid, p 895*
*2 Muhammad Bin Makram, , the African Egyptian Perspective, Lisan Al Arab lexicon, Volume 2, Edition 1, Dar Sadir, Beirut, Lebanon, pp. 200-201.*





closest meaning as it links between the kindling of fire and the civilized and cultural renaissance.

#### Branch Two - Defining heritage as a term:

The concept of heritage is also defined as a term with its broad connotation, as it is the inheritance of the past with which you interact and pass on to future generations.

At the level of jurisprudence, the term heritage has a broad connotation, as it gives a dimension to human production that has value and an artistic, literary, scientific, historical or religious character in the past and the present. It is not subject to a specific period of time but an expression of all that has an artistic, literary, scientific or historical value. So, heritage expresses the customs, traditions, practices and acts that prevail in every country in the world and that make this or that country different from other countries.

It was also defined as the inherited civilization with its establishment and all its material and cultural materials, as well as the products of the present, and it also means the culture that changes hands. The contemporary concept of heritage does not differ much from the concept in the past, as those interested agree that heritage is what the predecessors has left behind, as it is the essence of knowledge, feelings and experiences that each generation puts forward to the coming generation.

[1]While others opted to define heritage as that active part only of what the predecessor left behind, and it is that good part of it only and that is required to be adhered to[2]. Others also opted to say that the concept of heritage is not the legal and moral rules regulating the behaviour of people which differ from one environment to another. Rather, it is an invariable of the values from which these rules have come forth and which time and the evolution of circumstances have been unable to change[3].

At the level of legislation, the interest in heritage is very slight compared to that given to antiquities. If most countries have their own laws on antiquities, in contrast, the interest in heritage does not reach the extent of enacting especial legislation to protect it between generations, which represents the real criterion for being different from the civilizations and advancement of nations[4].

Even before the issuance of the current law on antiquities and heritage, Iraq was among the countries that did not enact legislation on heritage. However, with the issuance of this law, the legislator enacted explicit provisions for criminal protection required for heritage, so even if it does not exceed antiquities in importance, it is still no less important than it in terms of the obligation of providing the necessary protection for it through legal legislation that enshrines that.

Article (4), paragraph (8) of the current law defines heritage or heritage item as movable and immovable property that is less than (200) years old and has a historical, national, pan-nation, religious or artistic value announced by a decision of the Minister.

It seems that the legislator, through this text, has used the term "heritage" to express things that have an artistic, scientific, historical or pan-nation nature, but he presumed the same assumptions on the subject of antiquities in terms of time and objective determinants when he subjected heritage to the time period specified by the law, although it differs from the period that the legislator specified for antiquities, this period is less than (200) years, but in our opinion, this determinant is not justifiable, especially since the subject of heritage differs from antiquities in terms of moral value and the moral value antiquities leave to individuals and that it indicates everything having artistic literary, scientific, or historical value regardless of the time period that has passed since that thing vanished.

As for the concept of heritage at the international or global level, it is everything that belongs to humanity and has an exceptional value. For this reason, we find that UNESCO in 1972 enshrined in many agreements the protection of heritage, especially the Convention on the Protection of the World Cultural and Natural Heritage and the Preservation of Cultural Diversity of Ethnicities and Minorities that have a culture and heritage of its own and the total of this diversity and cultures accumulated through a course of historical coexistence that

*1 Ahmed Al-Jabali, Globalization and Identity in Yemen, Research Presented inat the Research Symposium on Unity and Globalization, Yemen Studies and Research Center, Sana'a, 2002, p. 27.*
*2 UNESCO, Research and Discussions of Arab Society Development Technology Seminar in the Light of Identity and Heritage, Arab Regional Center for Research and Documentation in the Social Sciences - Cairo, Dar Nafi' for Printing and Publishing, 1985, pp. 29-46.*
*3 Dr. Aun Shareef Qasim, Battle of Heritage, Dar Al Qalam, Beirut, 1980, p. 67.*
*4 Dr. Behnam Abu Al-Souf, Shadows of the Ancient Valley, The Small Encyclopedia, House of Cultural Affairs, Baghdad, 1992, pp. 7-12.*

constitutes the heritage value that the organization seeks to preserve as part of the world heritage.

**Branch Three: Types of Heritage**

Heritage can be divided in general into cultural heritage and natural heritage. Cultural heritage means the creative expression resulting from the existence and life of a people in the recent and present past, and it is possible to distinguish between two types: the first relates to material or tangible cultural heritage, and the second relates to intangible or living cultural heritage and includes cultural heritage of material monuments, buildings, artworks, artifacts and drawings, and this tangible cultural heritage contains movable tangible cultural heritage such as artifacts and others, and immovable tangible cultural heritage such as archaeological and memorial constructions and others.

This heritage is also formed through the tangible material aspect, heritage sites, architectural fashion and tangible material antiquity that is out of the archaeological classification, which has not passed the time period that was adopted as an age criterion for the material entity so that it falls within the scope of heritage not within the scope of antiquities. The time age of heritage has been set at less than 200 years. Also, the artistic, literary, religious and historical values produced by humanity are one of the most important sources of the tangible heritage.

As for the intangible or immaterial cultural heritage, it includes, for example, music, folk dance, literature, theatrical performances, languages, sciences and folklore[1].

It is also defined as a product that has artistic, literary, scientific, historical and religious value. The Convention (Safeguarding of the Intangible Cultural Heritage) defined it as the total traditional and popular cultural creations emanating from a certain group and transmitted through traditions, such as languages, stories, tales, music, martial sports arts, festivals, medicine. Peoples always try to manifest their heritage alongside the archaeological side.

There is another term that is now used at the international level, that is, the world heritage, and it means the heritage that has exceptional universal value from the cultural or natural heritage and included in the UNESCO World Heritage List, and that all countries of the world must take part in preserving and caring for it[2]

**Second requirement: Similarities and differences between antiquities and heritage**

Antiquities and heritage share the formulation of the identity of the community, as the position of each of them, in the formation of identity of that community, is directly proportional to the tradition of the community[3]. So, we found that part of the legislation concerned with antiquities, whether national or international, used the term "heritage" to denote antiquities, as a term equivalent to antiquities [4]or inclusive of it, given that antiquities are implicitly included in the scope of heritage, while there are those who separated the provisions between them[5].

Accordingly, we had, for the purpose of clarifying the similarities and dissimilarities between each of the two terms, to clarify what is meant by antiquities before explaining the subjectivity of cultural heritage.

**Branch one: Defining the antiquities**

We will discuss in this branch the definition of antiquities, linguistically and as a term, in order to identify it real meaning.

First: Definition of antiquities: antiquities are defined in the language as the plural of the word antiquity, which is what the predecessors have left behind, and antiquity is one of the ancient things that are a legacy, and the legacy is what the successor has inherited from the predecessor[6]. It was also defined as the mark, which is also called for the shining of the sword. As at the field of jurisprudence, the term antiquities is used to refer to everything that man left behind such as tangible materials made by his hand in the past since Allah created

*1 Introducing young people to the protection and management of heritage sites, UNESCO Publications 2003, p. 13, website: www.iccrom.org*
*2 Saeed Bin Abdullah Bin Muhammad Al Malik, World Heritage, (concept and importance). website: www.alburath.com*
*3 Dr. Ameen Ahmed Al-Hudhaifi, Criminal Protection of Antiquities, ibid, p. 151.*
*4 An example of this is the Omani project, which was called for the Law on the Protection of Antiquities, the Heritage Protection Law No. 6/80 issued in 1980, and the International Convention for the Protection of the World Cultural and Natural Heritage of 1972.*
*5 There is archaeological legislation that made the law on the protection of antiquities two parts, for example, the Canadian legislator, who called the law on the protection of antiquities, the Antiquities and Art Treasures Act of 1972 , separating the provisions between them.. he made the second part as the ancient treasures that are not considered as antiquities unless a decision is issued thereof and published in the Official Gazette.*
*6 Dr. Ibraheem Anees and others, Al-Mu'jam Al-Waseet, Volume I, 2nd Edition, Dar Al Maarif in Egypt, 1973, p. 5.*





Adam, peace be upon him, and these antiquities may be fixed such as dwellings, fortresses, temples and dams and ay be mobile or movable, such as pottery, stone and glass vessels[1]. Arguebly, in general, the term antiquity applies to every art work that represents a historical value, regardless of its importance, whether it is related to real estate or movable property[2]. We can derive a definition of antiquities through the references and concepts that are contained in the books of linguistic lexicons that lead to the term archaeology. The Arabic Language Academy defined it as ((the science of documents and ancient remains))[3], while others defined it as the knowledge of the people's remains such as buildings, statues, mummifications, coins and the like[4].

Second: As for the defining antiquities as a term, it has been stated in some laws that antiquities or antiquity are everything that man created that is fixed by its nature, and all that he produced with his hand or idea, and the remains that he left behind and are related to human heritage, dating back to more than a hundred years, in addition to the remains of human and animal botanical species, real estate antiquities, creative arts and folk collections.

Among the terminological definitions of antiquities by archaeologists, is (the structure that has an architectural and historical value and its age is more than a hundred years, meaning that over time the buildings enter the circle of antiquities or archaeological buildings)[5]. Others defined it as (not a piece of stone or a masterpiece or a coloured inscription, but a narrator of history as a manifestation of the various civilizations that existed on the land of the homeland or had a historical association with it)[6]. There is another meaning for it which is ( all that is left behind by the old human such as tools, caves or palaces in which he was living or temples where he was brought up, ornaments or adorning necklaces or vows he had offered, writings or weapons he used or drawings or art he made immortal[7].

Among the terminological definitions of antiquities is what is presented by our Iraqi legislator. He defined antiquity in Article (4/Seventh) of the valid Law of Antiquities and Heritage No. 55 of 2002 "Antiquities are the movable and immovable properties that were built, made, carved, written, drawn, or painted whose age is no less than 200 years and those constructed or made by man, as well as the achievements, i.e. the remains of human and animal species)).

Thus, in the current antiquities law, the Iraqi legislator has adopted the trend adopted by most Arab and Western laws of antiquities, as the prevailing trend in most legislation does not confine the scope of tangible antiquity to human production, but rather makes this scope include in addition to the things that man has made or produced, the remains of human, animal and plant species. Meanwhile, we note that the legislator, through the repealed Antiquities Law No. 59 of 1936, stipulated in Paragraph (5) of Article (1) that antiquities are "movable and immovable property that is built, produced, carved, written or, drawn or pictured by man if its age is two hundred years or more).

The significance of antiquities according to the definitions provided above requires the availability of a time determiner to achieve the intactness of the antiquity, and it must be noted that the legislation on antiquities in dealing with this issue, was divided into two sections or two directions: The first refrains from specifying a period of time that passes on the tangible thing so that it can be considered as an antiquity, as the legislator determines the objects that are considered as antiquities on the basis of their inclusion in special lists prepared for this purpose. Thus, the real estate property that was built two hundred years ago, as well as the movable property that still exists since that period, are considered, according to this time determiner an antiquity.

The second trend specifies a period of time that must pass on the object in order to consider it as an antiquity, as not every human product or human, animal or plant remains are considered antiquities, but rather the period specified by the law must pass in order to consider them as antiquities[8].

Reference to the current law of antiquities and heritage, we find that our Iraqi legislator has adopted the second

*1 Dr. Shawqi Shaath, Historical Monuments in the Arab world, means of protecting, maintaining, and restoring them.*
*2 (Rapport dem. Reinach du14 juin 1912, Doc. Parl . Ch.Dep., Cite par olphe calliard, les interventions administratives relatives a lentretien et a la protection des immeubles urbins , these dactyl 1. , bardea ux , 1969, p131, note.*
*3 The Arabic Language Academy, "Al-Waseet Lexicon", "Part I", Dar Al-Maarif, 1972, p. 5.*
*4 Al-Munjid, ibid, p 3*
*5 Major General Ahmed Helmy Ameen, Protection of Antiquities and ArtWorks, Al-Ameen Publishing and Training House, Riyadh, Saudi Arabia, p. 126.*
*6 Major General Ahmed Helmy Ameen, ibid, p 138*
*7 Professor Muhammad Ahmed Qasim, Archaeological Media, Research Presented to the Scientific Symposium on Yemeni Antiquities, Sana'a, 1996, p. 1.*
*8 Firas Yawz Abdul Qadir, Uji, Criminal Protection of Antiquities, Master's thesis submitted to the Council of the College of Law, University of Baghdad, 1998, pp. 54-55.*

trend, as he specified in paragraph (7) of Article (4) of this law the time period necessary to pass on the object so that it could be described as an antiquity, and set this period at (200) years or more. If the age of the object is less than 200 years, it cannot be counted as an antiquity, but falls within the scope of heritage [1]. What can be deduced here is that the Iraqi legislator was successful in determining the antiquities, since, as we said above, he did not confine this scope to human production, but rather made it extend to represent the remains of humans, animals and plants.

It should be noted here that the repealed Iraqi Antiquities Law No. 59 of 1936, even though it required the passage of two hundred years for tangible objects that are considered antiquities[2], but it introduced an exception where it permitted the Department of Antiquities and Heritage to consider movable and immovable property whose age is less than two hundred years as antiquities if public interest of the state requires preserving them, whether for their historical, national or artistic value, provided that this is done by a decision of the Minister of Culture after the issue has been presented to him by the Department of Antiquities and Heritage [3] noting that the Ministry of Culture is now no longer responsible for this issue after the Ministry of Tourism and Antiquities assumed this responsibility at the present time.

The definition of antiquities as a term was also indicated in some laws, which is "everything created by man, which is fixed by its nature, and all that he produced with his hand or his thought, and the remains that he left behind and related to human heritage which date back to more than a hundred years, in addition to the remains of human, animal and plant species, real estate antiquities, creative arts and popular collections[4].

As for the second determiner, it is everything whether immovable or movable that has a historical, religious, literary, artistic or cultural value that necessitates its preservation and draws attention to it. If any of the two determiners is achieved, the object in which it was established shall be entitled to be called an antiquity and then covered by the protection prescribed for antiquities.

The definition of cultural property[5] (or antiquities) was also provided in the Hague Convention, which defined it as including movable and immovable property that has great importance to the cultural heritage of peoples, buildings, archaeological sites, manuscripts, books and all things that have historical and archaeological value, as well as buildings designated for the protection of cultural property itself, such as museums, book houses, stores of archives and other related places which require, according to the conventions, safeguarding, respect and continuous protection in times of peace and war, and not to expose them to damage and destruction, and to prohibit their theft, looting or squandering[6].

**Branch Two - Distinguishing between antiquities and heritage**

After we have stated what is meant by heritage and antiquities, it becomes clear to us that the term "heritage" bears a broad connotation as it expresses the total values, customs, traditions, practices and works that prevail in any country of the world. For example, we mean by the Arab heritage all the customs, habits and professions which distinguish the Arab states from the rest of the world countries. The term "heritage" is actually used to express things that have an artistic, scientific or intellectual character[7], so the material and temporal criteria are the basis for distinguishing between them. Moreover, heritage and antiquities share in fashioning the identity of the community, both of which give a dimension to the human production that has value and artistic, literary, scientific or historical character. They both share a basic feature in that they are both named foe the ancient object that is bequeathed by one generation to the successive generation, and both share the same character and include immovable and movable property if the state has a national interest in its preservation and safeguarding.

*1 See paragraphs Seventh and Eighth of Article (4) of the Iraqi Antiquities and Heritage Law No. 55 of 2002.*
*2 See the text of the first article 1/1/ of the repealed Iraqi Antiquities Law No. 59 of 1936*
*3 See the second paragraph of Article One of the Iraqi Antiquities Law No. 59 of 1936, the annex.*
*4 Quoting Dr. Ameen Ahmed Al-Hudhaifi, Criminal Protection of Antiquities, a comparative study, Dar Al-Nahdha, 2007, p. 98.*
*5 There are some legislations that use the term cultural property to denote ancient tangible monuments that are considered antiquities, among which is the legislation of the Democratic Republic of the Congo (formerly Zaire) (Cultural Property Protection Act of 1971) and Canadian legislation (Control and Seizure of Cultural Property Act of 1992, see.*
*UNESCO, the protection of movable cultural property, Paris, 1984, p.219*
*6 The Convention on the Protection of the World Cultural and Natural Heritage was approved by the General Conference of the UNESCO Conference held in Paris on October 17 to November 21, 1972 at its seventeenth session held in Paris, adopted on November 16, 1972, (UNESCO) Paris 1972, p. 82 Journal of Cultural Heritage For Humanity No. 18 of 1982 Supplement (1) The Convention Concerning the Protection of the World Cultural and Natural Heritage issued by UNESCO, Paris 1982 p. 30, as well as Dr. Rashad Aref El-Sayyed, A Study of the Hague Convention of 1954, The Egyptian Journal of International Law, Volume Forty, Cairo, 1984, p. 63.*
*7 Firas Yawz Abdul Qadir Oji, Criminal Protection of Antiquities, ibid, p. 19.*





However, despite these commonalities between them, there are clear dissimilarities, as the antiquity is something that is moral and does not have a material entity such as intellectual production or customs and traditions that are counted as heritage of a certain society. Also, heritage is not subject to a specific time period as it includes all that of artistic, literary, scientific or historical value, which the new generation can inherit from the old generation, while antiquities are restricted by a specific time period. Therefore, we find that the Iraqi legislator used this same criterion, which is the temporal standard to distinguish between antiquities and heritage, so if the time period that passed on the object is (200) years or more, then that object falls within the scope of antiquities, but if that time period is less than (200) years, then that object falls within the scope of heritage [1].

In addition, the term "heritage" covers capacity and flexibility, as it includes the term "antiquities" and other knowledge, literature, arts, customs and traditions, and this is what makes antiquities part of heritage, as it is the product of man expressing his loftiness and civilization at different ages and thus it is not bound by a specific time period as is the case for antiquities. So, we find the interest in heritage at the level of legislation very slight compared to that given to antiquities. If most countries have their own laws on antiquities, in contrast, the interest in heritage does not reach the extent of enacting special legislation to protect it, and the interest is confined to forming administrative bodies concerned with heritage without developing a law for it, which generally means that there is no enough criminal protection for heritage as that provided for antiquities.

Iraq was, even before the issuance of the current law on antiquities and heritage, among the countries that did not enact legislation related to heritage, but after the issuance of this law, the Iraqi legislator provided, with these texts, the necessary criminal protection for heritage, as it is no less important and significant than antiquities in terms of the need for providing the necessary protection for it. It is worth noting that every heritage can be transformed into antiquities if the temporal element is available, which is the elapse of the necessary time period.

**Second topic: legal protection against the crime of compromising the integrity of cultural heritage**

Cultural heritage is an important component of the cultural identity of individuals and communities, and its deliberate destruction carries harmful consequences. Therefore, states, when involved in an armed conflict, whether of an international or non-international character, including a state of total or partial occupation, should take all appropriate measures to undertake their activities in a manner that would ensure the protection of cultural property in accordance with the international principles, conventions and customary international law. As is known to everyone, wars were, until not long ago, a legitimate right of states at will without restriction or condition, but international treaties concluded at the beginning of the last century introduced international rules to curb the abuses against cultural property of states such as striking and demolishing historical monuments, and this protection is one of the applied principles of distinguishing between civilian objects and military targets.

The crime of compromising the integrity of the cultural heritage means the crimes of vandalism that are directed against these monuments, which may be represented by several forms, including destruction, damage, causing defects, demolition, and damage, which we will explain in stating the meaning of the previous forms of behaviour first, and then we will address the elements of this crime in a second requirement. As for the third requirement, we will devote it to clarifying the criminal liability of Da'sh members for this crime in accordance with international criminal law.

**First requirement - compromising the integrity of the cultural heritage**

The crime of compromising the integrity of the cultural heritage is represented by the crime of destroying the heritage, as well as by any act that includes all forms of aggression that would harm the heritage landmark and render it unfit. Therefore, arguably, the crimes against the integrity of the cultural heritage take several forms, including vandalism, destruction, damage, and causing defects, demolition, and damage, each of which constitutes a pattern of criminal behaviour in the crime of assaulting the integrity of the cultural heritage of the state. For the purpose of clarifying the meaning of each of these forms of behaviour, we must define these terms from the linguistic and idiomatic perspective in the following branches:

*1 Paragraph 7 and 8 of Article (4) of the Iraqi Antiquities and Heritage Law, No. 55, of 2002.*

**First branch: linguistic meaning**

The linguistic definition of each of the above terms refers to the following:

1- linguistic definition of vandalism: It is derived from to vandalise, against construction. Ruin means (flaw and corruption in religion)[1].

2- linguistic definition of destruction: - It means eradication, annihilation.

3- linguistic definition of harm: harm, the antonym of benefit[2]

4- linguistic definition of causing defect:- Fault[3]

5- linguistic definition of demolishing: demolishing is antonym of construction[4].

6- linguistic definition of damage: Damage is destruction and breakdown[5]

**Second branch: the meaning of sabotage as a term**

We will discuss in this section the meaning of sabotage in jurisprudence and law, then we will look at the meaning of terms synonymous with the term sabotage in jurisprudence:

First: the meaning of sabotage in jurisprudence and law:

1- The meaning of sabotage in jurisprudence: Many criminal law jurists have provided definitions of the term "sabotage". Some of them defined it as: (the destruction of the substance of an object, or at least the introduction of comprehensive changes to it so that it becomes completely unsuitable for use in the purpose for which it would be used, and consequently its value will be lost, and this type of vandalism is called (destruction).

An object may be partially destroyed or that limited changes made to it, which means that the efficiency of the object decreases in its use in the purpose for which it was intended and its value will also decrease accordingly. This type of sabotage is called (causing defects). It also means (total or partial destruction, i.e. the destruction which affects a substance quantitatively, in whole or in part. Some jurisprudence defined it as (corrupting a substance or an object quantitatively or partly, so that it affects its effectiveness to achieve its purpose).

2- legal definition of sabotage: The crime of sabotage was set forth in the Iraqi Antiquities and Heritage Law No. (55) for the year 2002, in the texts of Articles 22, 35, 39 and 43. It did not provide an explicit definition of the crime of sabotage, but sufficed with only including forms of this crime.

**Second requirement - the elements of the crime of sabotaging heritage in the Antiquities and Heritage Protection Law No. 55 of 2002.**

Every crime in general, has two pillars, the material pillar, which is the materiality of the crime or the objective requirements. This pillar is represented by the criminal behaviour and its consequence and the presence of a causal relationship or association between them. The other pillar is the moral pillar, psychological pillar or moral requirements. The moral pillar is the criminal intent in intentional crimes, and by mistake in non-intentional crimes, and accordingly we will study these two pillars in the light of the text of Article 42 of the Antiquities and Heritage Protection Law No. 55 of 2002.

**<u>Branch one - the material pillar.</u>**

The elements of the material pillar of the crime of vandalizing heritage, like any other criminal offense, are represented by the criminal behaviour (the act), which may be positive and called (commission) or negative, called (abstention), in addition to the criminal consequence of this behaviour. The third and final element is the presence of a relationship or the causal link that links the first and second elements[6], so we will discuss

*1 Al-Zubaidi Muhammad Murtadha Al-Hussaini: The Crown of the Bride (Taj Al-Arous) from the Jewels of the Lexicon, Volume 2, authenticated by: Ali Hilal, Kuwait Government Press, 2004, pp. 340-341.*
*2 Al-Ansari Jamal Al-Deen Abi Al-Fadl Muhammad Bin Makram Bin Mandhoor, Lisan Al-Arab Lexicon, Volume 1, Dar Sadir, Beirut, 1955, p. 347.*
*3 Al-Zubaidi Muhammad Murtadha Al-Hussaini, The Crown of the Bride from the Jewels of the Dictionary, Volume 3, authenticated by: Abdul Kareem Al-Gharbawi, Kuwait Government Press, 1972, pp. 349-350.*
*4 Al-Ansari Jamal Al-Deen Abi Al-Fadl Muhammad bin Makram bin Manzur, Lisan Al-Arab, ibid, Vol. 12, pp. 603-605.*
*5 Al-Jawhari Ismail Bin Hammad, ibid, volume (4) (4), pg. 1333.*
*6 Dr.Sameer Alia, Explanation of the Penal Code, General Section (a comparative study), University Foundation for Studies, Publishing and Distribution, Beirut, Lebanon, 2002, p. 210.*





these elements in three paragraphs, where we dedicate the first paragraph to examining the criminal behaviour in the crime of vandalizing heritage, and we devote the second element to examining the consequence of this behaviour, while we devote the third and final paragraph to examining the causal relationship between behaviour and the criminal consequence .

**First - Criminal behaviour**: In general, criminal behaviour in the crime of sabotaging heritage can be defined in the light of Article 39 of the Iraqi Antiquities and Heritage Protection Law as any behaviour criminalized by the law, whether positive or negative, that negatively affects heritage[1]. The criminal behaviour in this crime is realized in several forms, including sabotage, damage, setting fire, placing hand, distorting, causing defects or changing the features of the heritage object, whether movable or immovable. Legislation tends to expand the use of these words and encompass them all within the forms of criminal activity. Article 39 of the Antiquities and Heritage Law stipulates that: (Any possessor of a manuscript, coin, or registered heritage material who causes it to be lost or damaged in whole or in part, in bad faith or by neglect, shall be punishable by imprisonment for a period not exceeding ten years and a compensation of twice the estimated value of the antiquity), and depicted the forms of criminal activity in the crime of erasing antiquities and heritage item when mentioning the words of destruction, vandalism, distortion, breakage and change in the features of the heritage landmark, whether movable or immovable, with the aim of its annihilation from existence or the danger of its annihilation in the future over time.

The legislation that protects antiquities and heritage from expansion in the use of these words and encompassing them all within the forms of criminal activity, aims to punish all acts of total erasure, and it is clear that the criminal activity in this crime can be a positive activity such as breaking, damaging or distortion, or a negative activity, such as refraining from carrying out maintenance work for the heritage object, which leads to its destruction. The consequence, in some forms of the crime of erasing heritage landmarks represents a harm crime such as destruction, demolition and breaking, while forms of distortion, inscription, engraving, placing posters or immersion in water are dangerous crimes in which the danger represents the element of the consequence in them[2].

So, it is not required that immediate and direct actual damage be achieved that entails erasure of this heritage and its material removal from existence as it used to be before the act of damaging, breaking or demolishing but by simply committing an act of deformation by inscribing, engraving or placing posters on this heritage landmark or immersing the heritage area with water, and the crime is realized by completing its material element even if no harm of total or partial erasure is achieved, and then the result will be the risk of exposing these antiquities to the possible erasure of these heritage landmarks.

**Second - the criminal consequence** The criminal result is the second element of the material pillar of the crime, and it is also termed "criminal harm or harmful result", and it is also known as (the effect that results from the criminal act, but it is separated from it, given that the fulfilment of the activity does not inevitably lead to the achievement of the result)[3]. In a crime of heritage sabotage, the harmful result is the destruction and deformation of the heritage item, and this is the material significance of the consequence, while the legal significance of the consequence is the aggression against the state's heritage property as it has a material and moral value representing a historical, civil and social value. The harmful criminal consequence is the cause for criminalizing criminal behaviour in general[4], and since the criminal consequence is an element of the material pillar, the fulfilment of this consequence is an element that must be achieved for the occurrence of the crime of heritage sabotage.

**Third - Causal- relationship:** It is in general the attribution of a matter of life to its source. Attribution in the Penal Code is of two types: material and moral. The material attribution requires attributing the crime to a specific perpetrator, and attributing the criminal consequence to a certain act, and this is the double attribution, which in both cases does not fall outside the scope of the material attribution as in both cases, it requires availability of the casual relationship or or the cause with the affected item between a certain criminal conduct and its consequences for which it entails punishment, while moral attribution is attributing the crime to a

*1 Muhammad Ibraheem Al-Desouki, Ali, Legal Protection of Property, Dar Al-Nahdha Al-Arabiya, Cairo, 2111, p. 86.*
*2 Dr. Muhammad Oudah, "Crimes against State Security and Terrorism Crimes in Jordanian and Arab Laws", House of Culture for Publishing and Distribution, Amman, Jordan, 2119, p. 147.*
*3 Dr. Jamal Ibraheem Al-Haidari, Provisions of Criminal Liability, first edition, Zain Legal Publications, 2010, p. 64.*
*4 Dr. Ahmed Fathi Al-Surour, Al-Waseet in the Penal Code, Part One, General Section, Dar Al-Nahdha Al-Arabiya, Beirut, 1981, pg. 434.*

person who meets eligibility required for bearing penal liability, i.e. he has recognition and has the freedom to choose[1].

As for the relationship of causation in the crime of heritage vandalism, it is intended to ascertain the existence of the cause or the linkage that links the criminal act, whatever its form, whether demolition, damage, breakage or vandalism, with the criminal consequence of destroying and sabotaging the heritage item, whether it is total or partial destruction.

**Second Branch: moral pillar**

After completing the study of the material pillar of the crime of sabotaging the heritage in the previous paragraph, we will be studying the moral pillar of this crime. The moral element is represented by error in its general sense and is the basis of criminal liability[2]. It is not sufficient to determine the criminal liability of the perpetrator to commit a criminal behaviour with a material appearance, but there must be a moral, literary or psychological pillar, that is, this material criminal behaviour must come out from a willpower. The crime of sabotaging heritage is not merely a material entity that is based on behaviour and its effects, but at the same time, it is a personal (psychological) entity as well, consisting of the psychological elements that make up it.

We will study in this branch the forms of the moral pillar of the crime of sabotaging heritage in two paragraphs. We dedicate the first paragraph to discussing the first form of the moral pillar represented by (criminal intent). We will dedicate the second paragraph of this branch to the second form of this pillar, which is the (error) form as follows: -

**First - Criminal intent**: The crime of vandalizing and destroying heritage in its various forms as specified above is considered a intentional crime whose realization requires the presence of criminal intent of the perpetrator, and his will being directed to demolishing, damaging, breaking or deforming and knowing about the heritage capacity of the object which is the subject of demolishing, damaging, breaking because the criminal intent is the intention to conduct the behaviour described in the crime model with awareness of the circumstances required by this model to be surrounded by that behaviour, so that the crime elements are fulfilled.

**Second - Unintentional error**: After completing stating the form of deliberately destroying the heritage item, this crime may occur in an unintentional way, i.e. by mistake. Mistake means (any wilful act or behaviour that entails consequences which the offender did not directly or indirectly ward off but nevertheless he could have avoided it) [3]. With regard to the crime of unintentionally vandalizing heritage, neglect, lack of attention, recklessness, and failure to perform the duties of caution and hedging which are achieved when the possessor or those in charge of protecting heritage objects or the custodian neglects to observe the laws and instructions, which leads to the destruction, demolition or sabotaging of the heritage item. In this case, the liability for this crime shall also befall him.

As for the penalty imposed by law on the perpetrator of the crime of damaging heritage objects, it is imprisonment for a period not exceeding ten years and a compensation of twice the estimated value of these objects. The Iraqi legislator equated, in this case, between the deliberate commission of damaging and the unintentional mistake that is conducive to the damaging or sabotaging of these heritage objects, thus he has departed from the general rules of the Penal Code that impose a less severe penalty for non-intentional crimes than the penalty for intentional crimes, with the intention of giving greater protection to these objects as they represent the history of the nation and bear witness to the values of civilization and construction.

**The third requirement - the international liability of Da'sh for violating the protection of world heritage in Iraq.**

As a result of the terrorist activities of Da'sh, Iraq was exposed to crimes that reached the level of war crimes, crimes against humanity and genocide, due to which Iraq made human sacrifices and great material losses, in addition to the severe crises left behind until the time of preparing this study, such as displacement, forced migration, loss of human dignity and children without families. This matter has prompted the Iraqi government

*1 Dr. Raouf Obeid, "Causation in Criminal Law (a Comparative Analytical Study", Al-Nahdha Press, Egypt, Cairo, 1959, p. 453).*
*2 Dr. Mahmoud Suleiman Mousa, "Criminal Liability in Arab Legislation and French and Italian Laws (a comparative study)", Mansha'at al-Maarif, Alexandria, 2011, p. 317.*
*3 Ahmed Jawad Al-Bahadli, "Neglect and its Sharia Implications(a Comparative Study between Law and Sharia), research published in the Kufa Journal of Legal and Political Sciences, No. 2, 2009, p. 177.*





to make maximum efforts to pressure the United Nations to urge it to issue explicit decisions that would oblige the countries of the world, especially the countries surrounding Iraq, to follow up on, prosecute and hold accountable all those who had supported, financed or facilitated the movement of the terrorist organization's members into the country for more than (100) nationalities, as well as associations that adopt the mission of raising funds for the terrorist (Da'sh) organization and employing money in private investments in order to ensure the conduct of its terrorist activities and perpetuate its chain of criminal acts, with the role of some countries promoting trade exchange as is the case in smuggling oil, antiquities and weapons of all kinds, in addition to the most important thing, which is the media support that many countries and entities contributed to providing through what was circulated by some Arab and non-Arab media outlets.

The Security Council has issued several resolutions on combating terrorism in Iraq since 2014, and upwards until the present time, the most prominent of which was Security Council Resolution No. 2379 of 2017, which is one of the most important international resolutions issued by the Council towards Iraq[1]

*1 The aforementioned decision came to several main points:*

*1- Reparation: Achieving post-armed conflict transitional justice requires holding accountable the perpetrators of terrorist crimes against humanity within the framework of the public interest to achieve the two goals of fairness, reparation and reinstatement of those who were affected, harmed and died because of the terrorist crimes committed against individuals or groups, which is a goal that is necessary for any human group that wants to live under a system based on accountability and punishment for behaviour that is hostile to human values, especially with the qualitative and quantitative crimes that the terrorist Da'esh Organization launched against civilians.*

*The violations of international humanitarian law and human rights law were continuing, especially since the resolution recognized that the acts that are committed by the terrorist Daesh are related to either war crimes, crimes against humanity or genocide. It also stipulated a clear list of related acts, and thus the resolution requests the world community to move forward and ensure that members of these terrorist groups are held accountable for their acts. The Secretary-General should establish an independent investigation team headed by a special adviser, with the aim of supporting national efforts to hold Da'esh accountable.*

*According to the decision, this legal team will work to collect all evidence based on the acts committed by terrorist groups in Iraq, which can then be used before a court of law. The national courts and Iraqi authorities will cooperate with those in charge from third countries to collect, preserve and store existing evidence, which can be used in any lawsuit against ISIS fighters around the world such as killings, kidnappings, hostage taking, suicide bombings, enslavement, selling or forcing women into marriage, human trafficking, rape, sexual slavery, recruitment and exploitation of children, attacks on critical infrastructure, and destruction of religious, historical and cultural heritage landmarks, including archaeological sites, trading in cultural property, and to refer them to national or international courts instead of referrals to the International Criminal Court or to establish international courts to so that they are meted out just punishment for the heinous and repressive criminal acts and abuses against innocent citizens, which is reparation and doing justice to the victims and their families at the same time as a result of brutal crimes and barbaric violations they were subjected to at the hands of the Organization members.*

*These are crimes that constitute part of the ideology of the terrorist ISIS Organization and its strategic goals. The terrorist organization uses these acts as a method of terrorism, so the resolution confirms that the Special Adviser who heads the investigation team promotes global accountability for the terrorist acts by working with survivors of the brutality of terrorist organization crimes, in a manner consistent with relevant national laws, to ensure full recognition of their interests in achieving accountability of the Organization members, while avoiding duplication of efforts with other relevant United Nations bodies.*

*The Council also requests the Secretary-General of the United Nations to submit to the Security Council judicial and criminal jurisdictions that are acceptable to the Government of Iraq in order to ensure that the UN team fulfills its mandate, in accordance with the provisions of the aforementioned resolution.*

*2- Financial and human assistance: the resolution calls for the establishment of a fund to receive donations to enable it to better enforce the resolution at the national level. Also, the countries and regional organizations are invited to contribute in any way to funds, equipment or services that may be necessary to the team in order to accomplish its work, including providing experienced staff to support enforcement of this resolution. The Council would request the Special Adviser to complete the first report on the team's activities within (90) days from the date the team started its activities, as informed by the Secretary-General, and to complete subsequent reports every 180 days thereafter. Whenever the international donations are halted, even before the end of their life, the business of this committee stops, and this is also related to the extent of the seriousness and desire of the international community to move forward with the work of this committee to achieve justice.*

*3- An international trial for those involved in terrorist acts: The idea of deterrence and accountability of individuals or groups that committed criminal behavior in the context of war is to spread a culture that committing more of these crimes in the future will be difficult and hard, or at least will not be met with silence, approval and tolerance, and the so-called escape from punishment, which is a deep term that is based on the fact that tolerance with those who committed crimes will inevitably lead to opening the door to committing more crimes.*

*Therefore, the Iraqi government sent a letter on August 9, 2017, to the Secretary-General of the United Nations and its Security Council, requesting help of the world community to ensure that ISIS terrorist elements are held accountable for their crimes in Iraq and in particular those who bear the greatest responsibility, including their leadership, which could include regional or middle-ranking leaders, and ordering and committing crimes, and this will increase exposing these acts, and can help combat terrorism and violent extremism that lead to terrorism, and stop the ongoing funding and flow of international recruits to the terrorist Organization.*

*At the same context, the Security Council welcomes the great efforts made by the Government of Iraq to defeat the Organization, and hold it accountable by collecting, preserving and storing evidence condemning it in Iraq for perpetration of criminal acts on its territory, while adhering to the highest possible standards, to ensure that such evidence is used as widely as possible before national courts. and to complete investigations carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at Iraq's request.*

*4- International judicial cooperation: The resolution has come to confirm the sovereignty of Iraq, full respect for its sovereignty and jurisdiction over the crimes committed in its territory. The jurisdictions of the team established thereunder stipulate the appointment of Iraqi investigative judges, criminal experts and members of experienced Public Prosecution Office, to work on an equal footing along with the international experts, and the team should be impartial, independent and credible.*

*The Security Council resolution called on other countries to cooperate with the team, including through mutual arrangements on legal assistance, provided that the evidence the team collects and stores on crimes in Iraq should be ultimately used within the framework of fair and independent criminal procedures to be conducted by the competent courts at the national level, in accordance with valid international law, and that the concerned Iraqi authorities represent the primary intended recipient of such evidence in accordance with the jurisdictions, provided that any other uses for it are determined in agreement with the Government of Iraq alone on a case-by-case basis.*

It is the first UN resolution that is related to preserving and storing and documenting the crimes of the terrorist Da'esh Organization in Iraq in a Security Council attempt to support and strengthen local efforts to prosecute and hold the terrorist organization accountable for its crimes in Iraq, which amount to genocide, crimes against humanity and war crimes.

The abuses against the Iraqi antiquities and heritage by Da'esh and terrorist elements constitute not only a violation of national laws, but rather a violation of the rules of protection in international law, which entails the liability of the abuser under these laws as well, and to examine the extent to which the terrorist Da'esh organizations are responsible for crimes against cultural objects in Iraq and Syria. It is necessary first to determine the legal description of this organization and then look into the acts it carried out, whether they constitute a crime in the concept of international law, and if so, their nature must be determined. This is what we will discuss in the following branches:

**Branch one - legal description of Da'esh Organization.**

The legal nature of Da'esh means the extent to which it has the status of a state within the concept of international law, a liberation movement, or an international organization, or others. In this regard and by examining the subject, it can be asserted that the state, being the most prominent persons in public international law, must have pillars on which it is built, and the loss of any pillar would deprive it of the status of the state. The pillars are: the people, the territory, the sovereign authority, in addition to another pillar of controversy among the jurists, which is recognition. The ISIS organization lacks these elements, for example, with regard to the territory pillar, despite the multiplicity of ways of acquiring it, some of them are no longer possible because what is observed in the modern international organization that the means of conquest or seizure is no longer possible, rather it has become an illegal means in international law and in the UN Charter. The text has been explicitly stated on their international relations, regarding the threatened use of force or using it against territorial integrity or independence of any state in a manner that is not consistent with the purposes of the United Nations[1] .

Also, the Organization's elements come from different countries which cannot be considered as a people or one nation, nor they are bonded by nationality. Also, the authority pillar does not exist in a correct legal manner as they lack in the element of stability and continuous residency, which the Organization cannot have. Also, the Organization cannot be considered as a liberation movement because it lacks the conditions of liberation movements that are linked to armed popular resistance, and therefore cannot be considered a liberation movement in any way[2]. So, we have to examine the particulars of international criminal law for a legal description of them, and the Organization's members can be classified from the international law perspective as mercenaries.

*At the same time, the Council requests the Secretary-General, after the Security Council has approved the jurisdictions is acceptable to Iraq, starts without delay taking necessary steps, arrangements and measures to speed up forming the special UN team so that they commence performing their tasks fully, in accordance with their terms of reference, and to inform it when the team begins its work. The Council also stresses that the team should ensure that its Iraqi members benefit from the existing international expertise and to make every effort to share knowledge with the Government of Iraq and provide assistance to it.*

*The Security Council encourages its member states, regional organizations and intergovernmental organizations to provide appropriate legal assistance to the Government of Iraq, to build its capacity to strengthen its courts and judicial system, and calls upon all other states to cooperate with the team through mutual legal assistance arrangements, as and when required, in particular, providing the Iraqi government with any relevant information the team may have regarding the mandate entrusted to them under this resolution.*

*The Council also stresses that any other member state of the United Nations, in whose territory the terrorist organization had committed acts that may amount to the level of war crimes, crimes against humanity or genocide, may ask the investigation team to collect evidence of these acts, subject to the approval of the Security Council, which may request the Secretary-General to provide separate terms of reference in relation to the work of the team in that state, and in a related context, the Security Council requests the team to cooperate, as appropriate, in line with its investigative functions, with the Analytical Support and Sanctions Monitoring Team established under Resolutions (1526) of 2004, (2368) for 2017, and with other relevant monitoring bodies, and to work with other UN bodies, each within the framework of its mandate .*

*The Security Council also wants the head of the UN investigation team to submit these reports to it, and that the Council decides to review the mandate of the Special Adviser and the team after a period of two years, provided that any further extension shall be resolved, at the request of the Government of Iraq, or any other government which has requested the team to collect evidence of acts that may amount to war crimes, crimes against humanity or genocide that had been committed by the terrorist organization Daesh in its territory, and the Security Council shall decide whether to keep the matter under its active consideration.*

*1 Paragraph 4-Article 2 of the UN Charter*

*2 Mus̄tafa al-Sayyed Abu al-Khair, "The State in Public International Law", Itrac House for Printing and Publishing, Cairo, Egypt, 2009, pp. 8-14.*





**Branch Two - International criminal law attitude on Da'esh crimes.**

The legal attitude on ISIS's attacks against cultural objects in Iraq and the Levant and what this organization has done against the protected cultural heritage, is that they are unquestionably a full-fledged war crime that falls under Paragraph 1 of Article 8 of the International Criminal Court Statute. The article opens with: "The Court shall have jurisdiction over war crimes when they are committed as part of a plan or public policy or as part of a large-scale commission of such crimes...."

Then, the Article enumerated the forms of war crimes, where we find in it Section E, Paragraph 4, which states: "Deliberately directing attacks against buildings designated for religious, educational, artistic, scientific or charitable purposes, and historical monuments...." In order for us to be in front of a correct description of ISIS crimes against Iraqi cultural objects, we must emphasize whether or not the elements of the war crime are available and to project them, if found, based on what this Organization has committed. The text of Article 8 -Paragraph 4- Item E was clear and explicit, as it counted the attack on cultural objects as a war crime.

The material element of this crime is the material external behaviour which is considered by the law as a crime, and which can be comprehended by using the senses, and which consists of three elements, which are the act, the result and the causal relationship, which may be positive behaviour similar to the acts of abuses or negative by not interfering to prevent that act from being a violation and that the act is illegitimate. As for the result, it is the effect of the criminal act, and the causal relationship element is that the act should be the cause of the direct result.

As for the war crime itself, it is required for its material element the availability of a state of war, the commission of an act that is prohibited by the laws and norms of war[1], and by projecting the elements of the material element on the acts of the Organization, we find that persons affiliated with it, wearing its uniform and bearing its emblem, carried out a positive act represented by manual crushing, by using of hammers, drills and bulldozers, the monuments, temples and heritage landmarks by themselves, in public in a video tape, and statues and historical cities in Iraq and Syria out of personal beliefs, and the result of the act was achieved by the actual destruction of antiquities and huge heritage monuments, looting and theft of what can be carried and sold, and the destruction and theft were the direct causes of the destruction of these objects.

As for the moral pillar: it is the criminal intent represented by the direction of the perpetrator's will to achieve the criminal result knowingly and consciously, and it is clear that they were fully aware of the great archaeological, historical and heritage value of these monuments, which means the availability of the moral pillar and that they are fully aware of the purpose they seek to achieve, declaring their intention explicitly in the recordings that were broadcast while they were destroying and hacking at these heritage and archaeological monuments.

Finally, we clearly and evidently see the international pillar of war crime, which is the existence of an armed conflict that threatens international peace and security, which is a situation that applies to Iraq, which has been suffering from the effects of the war since 2003 and the internal tensions that are almost engulfing it[2]. The abuses curried out by the terrorist Da'esh organization have been classified as per the previous Security Council resolution 2379 of 2017 as war crimes, genocide and crimes against humanity.

Accordingly, the crime of sabotage, destruction and demolition of these archaeological and heritage monuments constitutes a war crime that is subject to the principles governing this crime, and therefore they are crimes that are not subject to statute of limitations over time, and its perpetrators can be held criminally accountable at any time, whether they are perpetrators or accomplices. Also, the states must take all necessary legislative measures to enforce their jurisdiction over their aggressors if the crime is committed on their territory, and in this context, Iraq can intervene to prosecute the members of the organization who are responsible for abusing the protection of its cultural objects, and any state that one of the accused holds its nationality can intervene and prosecute him before its national judiciary.

*1 Brahimi Sofian, "The Role of the International Criminal Court in Combating International Crimes", Master's thesis, Faculty of Law and Political Science, Tizi Ozou University, discussion date 20/10/2011, p. 96.*

*2 Brahimi Sufian, ibid, p101*

**Conclusion**

This study has addressed the national criminal liability for violating the rules of cultural heritage protection, and concluded with a number of results, as follows:

1- The tangible cultural heritage is one of the components of the artificial wild environment of man, where its importance emerges as an element of the territory, distinguished from the rest of the constructions established on it, given its importance, in both material and intangible terms, as one of the factors of achieving moral and material value. Cultural heritage is one of the sustainable development factors, and the current generation bears the responsibility of preserving the cultural heritage for future generations as decided by international conventions since it is the common property of humanity as a whole. So, setting up legal rules that enshrine its protection is not only an internal matter, but rather a matter that concerns the world community. The protection of human cultural heritage constitutes an old and new topic of public international law.

2- The cultural heritage, both material and intangible, is part of the human environment, and is distinguished from the environment by being human creativity. As for the environment, it is divided into a natural environment and an artificial environment, and cultural heritage is one of the elements of the environment, and therefore, protecting it is at the same time like protecting the environment.

3- The issue of securing cultural heritage in international humanitarian law is a matter of great importance, because despite the developments in the legal system for the protection of heritage, this system still receives the attention of scientific academies concerned with the codification and development of international law, especially the UN International Law Commission. This means that the legal system finds its basis in international conventions and norms, or in other words, to protect the cultural heritage in the sources of international law that were agreed upon in writing in the form of a treaty, or a practice as an international custom a long time ago, and then national laws come to derive their provisions from these international sources, due to the importance of the crimes, violations and assaults that have occurred or may occur against it.

4- The international organizations seek to provide more protection for cultural heritage. Also, the crystallization of the legal system is still affecting it, and this is what keeps the legal system for the protection of cultural heritage in constant development to protect this heritage and to strike a balance between the requirements of national sovereignty and the requirements of the public interest of the world community. The issue of enacting national legislation is not limited to the limits of jurisdiction of the state's national authorities, rather such legislation must be consistent with what the world community has decided in this regard.

**Proposals**

1- Supporting associations of the protection of cultural heritage and encouraging their establishment.

2- Classifying the largest possible number of cities and archaeological sites internationally and nationally, so as to cover the largest number of national cultural properties in the protection, through the media.

3- . Disseminating the information contained in international conventions on the protection of cultural property among citizens and increasing their awareness of the need to protect and preserve such property, through visual, print and audio outlets, and that the scientific institutions play a fundamental and significant role in this regard.

4- Tightening the penalty stipulated in Article 39 of the Antiquities and Heritage Protection Law No. 55 of 2002. The following paragraphs shall be added to this Article in the event that the person who committed the crime is an employee or assigned a public service, or that the act was stopped or thwarted, so that this Article is amended as follows (Second) - The penalty shall be imprisonment for a period not exceeding fifteen years if the perpetrator of the crime is one of those charged with managing, preserving or guarding the antiquity or the heritage item, and the penalty shall be life imprisonment if the destruction occurred by using explosives. Fourth: The accomplice in the commission of the stipulated crime shall be deemed as a perpetrator, and the accomplice shall be punished even if the perpetrator was not punished due to the lack of criminal intent or to other circumstances specific to him.



Assistant Prof. **Dr. Ali Hamzah al-Khafaji**

- Specialized in Criminal Law
- Lecturer in College of Law- Kerbala university and Ahal al-Bayit since 1998
- Contributed to drafting many bills in the field of public law
- Produced many types of research on criminal liability and gender-based violence.

# The Criminal Protection of National Heritage During Armed Conflict.

Cultural property is an undivided part of countries heritage and history of civilization. Yet, the phenomenon of destroying the cultural heritage became stronger during the previous decade because of the armed conflicts. Cultural heritages were object to organized robberies and illegal trafficking. These properties can provide terrorists and organized crimes gangs with huge income that help them to recruit new members and enhance their abilities in the field. Reportedly, robbery of cultural heritage in addition to selling oil and kidnapping for ransom are the most common funding resources for terrorists' groups.

Middle East specifically is the most effected by this phenomenon although it includes other areas like north and west Africa and middle Asia. The conflicts in Iraq and Syria are fertile ground for destroying and looting and trafficking cultural properties.

This thing was very clear in the Arabic area generally and specially in Iraq when vicious and deliberate attacks against cultural heritage, by illegal armed groups, It has committed acts of sabotage and destruction of the cultural structure that constitutes the country's heritage and cultural heritage, and Such attacks require special criminal protection of Iraq's cultural heritage.

Therefore, we provided an integrated framework to ensure its respect and proper implementation through Emphasis on overcoming political obstacles and relevant interest considerations that impede the effective implementation of protection Criminal law. This can only be done through the integrated work between the state and its local communities, which are considered as a valve of Safety for the state's policy in this field, and it is the essential element for its protection, preservation and valorization With all legal methods and mechanisms that they use, and the creation of a work cell at the local level To coordinate between all the parties that affect and are affected by the changes that may lead to its demise and extinction By uniting all previous efforts in order to achieve the objectives set in terms of protection at the level local cultural heritage.

**The importance of studying this topic**

The importance of studying the topic of protecting national heritage during armed conflicts comes from organized and intended attacks by armed groups and the goals they want to achieve by these attacks, whether on funding level (the heritage can be a very good fund source) or on spiritual and values level and its effect on specifying the historical characteristics of a state and its cultural heritage. The risks of destruction's impact can't be avoided. Restoring the destroyed objects is not possible because of the originality of antiquities. No matter how accurate and professional the maintenance and restoration work, It cannot give back to the destroyed heritage its original splendor and its carved monuments during history, which expresses the scale and subtlety of past cultures.

Therefore, this study will focus on defining and specifying the authorities responsible for protecting national heritage and the effectiveness of granting these competencies and powers. In addition to that, the study will focus on the level of protection established by legal texts (laws), from strictness and mitigation, and the extent of the feasibility of the imposed penalties because the issue of protecting the national heritage has become one of the priorities that fall on the responsibility of the state to be provide because it is an urgent issue in light of the fierce attack on the heritage of the state and the loss of its cultural features.

**The problem of studying the topic**

Searching and studying this topic required identifying the problem and putting the required solutions of the criminal protection. The value of the topic will lead to some results and suggestions that are adopted by the study in order to submit an integrated plan about the topic "the protection of national heritage during armed conflicts."

No doubt that the main searching problem is about the many and repeated attacks that target both the natural and cultural national heritage and the sites of this heritage. Also, the problem can be specified in the mechanism of countering these attacks on both the legal and security levels, or even on society level, enhancing the ability of Iraqi culture to protect its properties and cultural heritage. In addition, the authorities of the current agencies to achieve the protection, the possibility of establishing new agencies to have these authorities and activating their abilities to achieve more effective protection.

**The search approach of topic**

In the study and research of the topic (criminal protection of the national heritage during the armed forces), we will depend on the analytical approach by studying and analysing texts, clarifying their contents, and clarifying the intention of the legislator and his purposes, explaining the ambiguous texts, the correcting the conflicting texts, and completing the incomplete texts.

In addition to the analytical approach, we will take the method of the comparative approach, through which it is possible to study the experiences of the legally advanced countries in protecting their heritage, especially since the issue of national heritage has not been abandoned by an country in the world. So, it is necessary to take advantage from the experiences of the comparative countries, and to determine the extent of the ability to benefit from those experiences and implement to provide protection for our national heritage.



# Criminal Protection of National Heritage During Armed Conflicts

**Professor Dr. Ali Hamza Asal Al-Khafaji**
Professor of Criminal Law/ University of Karbala/ Post-graduate Studies/ Ph.D.

**Identifying the research topic:**

Cultural property constitutes an integral part of the heritage of countries and history of civilization, but the phenomenon of destroying cultural heritage worldwide has exacerbated over the past decade as a result of the armed conflicts, where the cultural property had been subject to the operations of organized looting, illegal trafficking and sale. This property may generate to the terrorists and organized crime gangs significant revenues that help them to recruit new members and strengthen their capabilities in the field. It is reported that the theft of cultural heritage, in addition to selling oil and ransom-driven kidnapping, constitute the most popular sources of profit for the terrorist groups.

The Middle East region, in particular, is getting more affected than other regions by this phenomenon, although it includes other regions, including North and West Africa and Central Asia. The ongoing conflicts in Iraq and Syria are a fertile ground for the destruction, looting and trading in cultural property.

This is clear from the fierce and intentional attacks against cultural heritage witnessed during the recent period in the Arab arena in general and in Iraq in particular, at the hand of illegal armed groups which have committed acts of sabotage and destroyed the cultural infrastructure that constitutes the heritage of the state and its cultural heritage. Such attacks require special criminal protection for the Iraqi cultural heritage.

Therefore, we have opted to provide an integrated framework to ensure its respect and good implementation by focusing on overcoming the political obstacles and selfish considerations that impede the effective implementation of criminal protection. This can be done only through integrated work between the State and its local groups which are considered as the safety valve for the state's policy in this field and is the essential element to protect, preserve and value it by all legal methods and mechanisms it is using, and to create a work cell at the local level to coordinate between all the entities that influence and are influenced by the variables that may lead to its disappearance and extinction, by bringing together all the previous efforts in order to achieve the objectives set regarding the protection of cultural heritage at the local level.

**The importance of studying the topic:**

The importance of studying the topic of criminal protection of national heritage during armed conflicts, lies in addressing the organized and intended attack by these groups and their intended goals of this attack, both on the material level due to heritage constituting powerful sources of funding for them, or on the moral and value level of heritage and its impact on determining the historical highlights of the State, its cultural heritage, and the implications of destruction and sabotage whose seriousness cannot be avoided, and then it is not possible to repair what has been destroyed because of the archaeological artifice and the original view of the heritage. So, however accurate and technical the operations of maintenance and repair are, the original splendour of the destroyed heritage and its features carved throughout history, which expresses the size and subtlety of past cultures will not be restored.

Therefore, this study will be focusing on indicating and defining the authorities which are entrusted with the responsible for protecting the national heritage, and how effective is the granting of these jurisdictions and powers. In addition, the study will focus on the level of protection established by legal texts, from tightening and mitigation, and the extent of the feasibility of the penalties imposed, because the issue of protecting the national heritage has become a priority that should be given by the state, as it is an urgent issue given the fierce attack on the state's heritage and the loss of its cultural highlights.

**The problematic study of the topic:**

Delving into the research and the study of this topic would require identifying the problem out of its research, and developing the necessary solutions required by the topic of criminal protection. Undoubtedly, the value of the study of this topic would lead to a set of results and proposals that will be addressed by the study, in order to provide an integrated plan about the topic (criminal protection of national heritage during armed conflicts).

There is no doubt that the main research problem revolves around the multiplicity and recurrence of attacks on the national natural and cultural heritage alike, and on the locations of this heritage. Also, the problem is identified by the mechanism of countering these attacks, whether at the legal level, at the security level, or at the community level and consolidating the ability of the Iraqi culture to protect its properties and its cultural impact. In addition, it is necessary to determine the extent of the fitness of the existing entities to achieve the protection, and whether it is possible to create new entities to undertake the powers and activate their ability to achieve protection in a more decisive manner.

**Methodology of the topic research:**

We will rely in studying and researching the subject of (criminal protection of the national heritage during armed forces), on the (analytical) approach through studying and analysing the texts, clarifying their contents, identifying the legislator's intention and purposes, interpreting the nebulous texts, evaluating the conflicting texts, and supplementing the deficient texts.

In addition to the analytical approach, we will pursue the comparative approach method, through which it is possible to study the advanced legal experiences of countries in protecting their heritage, especially since concerning the issue of national heritage, there is no any state in the world that has no regulated texts thereof, or having not taken the correct steps to protect it. So, it is necessary to benefit from experiences from the benchmarked states, and determine the extent of benefiting from those experiences and putting them into actual and effective practice to provide protection for our national heritage.

## The first topic

## Legal concept of national cultural heritage

Cultural property constitutes an important factor in the advancement of peoples, as the heritage of countries and their civilizational history are involved in drawing up the features of cultural identity, in the light of which the traditions, acts, codes and sanctities of society are determined. Recently, the phenomenon of the destruction of cultural heritage worldwide has become one of the most severe pillars of the unjustified attack, and to a large extent, the clearest picture of it became visible during the past decade as a result of armed conflicts of a racist nature. The cultural property has been subjected to organized looting and trafficking, and its illegal sale was noted, given the extensive revenues this property may generate to the terrorists and the organized crime gangs that would help them recruit people, or to enhance their capabilities in the field through getting weapons. So, trading in cultural heritage, along with the sale of oil, kidnapping for ransom, and corruption, may constitute the most common sources of illicit income and profits for the terrorist groups at the present time.

Therefore, the importance of studying the topic of criminal protection of national heritage during armed conflicts, lies in addressing the organized and intended attack by these groups and their intended goals of this attack, both on the material level due to heritage constituting powerful sources of funding for them, or on the moral and value level of heritage and its impact on determining the historical highlights of the State, its cultural heritage, and the implications of destruction and sabotage whose seriousness cannot be avoided, and then it is not possible to repair what has been destroyed because of the archaeological artifice and the original view of the heritage and its features sculpted throughout history which expresses the size and accuracy of the past cultures.

Based on the foregoing, we will divide in our study this topic into two requirements: We will discuss the first requirement: the definition of national heritage and clarification of its concept. we will discuss in the second requirement the subjectivity of the national cultural heritage and its disaggregation.





### The first requirement

### Definition of the national heritage

National cultural heritage has drawn great interest among jurists, as the importance of defining its concept and its meaning hinges on the necessity of identifying its divisions covered by protection. Therefore, we will divide this requirement into two branches. We will discuss in the first branch defining the linguistic meaning of national cultural heritage, while in the second branch, we will discuss the jurisprudential and legal meaning of the national cultural heritage.

#### First branch

#### The meaning of national heritage, in terms of language and jurisprudence

*Heritage: inheritance. He has left a huge legacy: legacy. The heritage of the nation: that which has lasting value of customs, literature, sciences and arts and is passed down from one generation to the next generation such as human heritage, Islamic heritage literary heritage*

Heritage is a gerund derived from the word (inherited), and heritage and inheritance express what has been inherited (), and the term heritage may refer to the meaning of (tangible) heritage, which means transferring assets between different generations of the family, and also the tangible (immaterial) heritage that expresses the idea of the succession and the transfer of knowledge, sciences and customs between previous and current generations ().

The jurisprudential definition of national cultural heritage defines heritage as a term as a concept with a broad and flexible connotation over which meaning legal jurisprudents differs, as it gives a dimension to human production of high value and artistic, literary, scientific, historical or religious nature in the past and present. It is not covered by a specific period of time, but is an expression of everything that has artistic, literary, scientific or historical value, and also expresses the customs, traditions and practices that are prevalent in every country of the world that make this or that country different from other countries.

Some of the jurists define cultural heritage as: (what has been left by the ancestors as forefathers and fathers to their children and grandchildren in various aspects of life and various fields and fields such as culture, history, literature, civilization, art, industry, agriculture, architecture, traditions and customs) (). It was also defined as: A group of reals estate antiquities, archaeological relics, cities, neighbourhoods, historical buildings, artifacts, documents, manuscripts, and everything that is expressive of the history of nations and peoples, and qualifies their experiences and expertise, the phases of their progress, and their cumulative human contribution resulting from social, economic, professional, intellectual and cultural behaviours over periods of time dominated by these behaviours, and which the current generation inherited from the ancestors, and have an extraordinary cultural value and cannot be compensated if lost or damaged) (). It is noted that this definition requires for a thing to be a cultural heritage that it is among a group of buildings, sites or things of extraordinary historical and cultural value and cannot be compensated if lost or damaged.

Some give a broader definition of cultural heritage that includes both its tangible and intangible categories, defining it as: (All that a person recognizes with his senses, such as palaces, temples, castles, stone inscriptions, obelisks, and military installations that have passed a certain period of time and are attributed to ancient eras and civilizations that are deep in history and oldness. Intangible heritage includes all oral traditions and forms of expression, types of arts, social practices, rituals and ceremonies, and skills that are associated with traditional craftsmanship (). We note that this definition, in addition to the tangible cultural heritage, included the intangible or moral cultural heritage that constitutes the features of the general culture of society such as language, tale and popular literature, proverbs - music, singing, fashion, traditional crafts, related experiences, and other arts.

It is worth noting that some legal jurists use the term (cultural property) to express cultural heritage, which is an internationally known term that was used for the first time in the 1954 Hague Convention for the Protection of Cultural Property in Case of Armed Conflict (), defining the cultural property as ( productions generated from creative self-expressions of man, whether in the past or present, in the artistic, scientific, cultural or

educational fields, whose importance lies in confirming the continuity of the cultural process and in confirming the meaning of cultural communication between the past, the present and the future.

Some legal jurisprudents attempt to link the meaning of cultural heritage with the term “culture” itself, defining culture as the means of communication between peoples in the region, which impact the development of peoples from one generation to another and from one period of time to another, elaborating that ancient civilizations are impacted by each other through the transmission of culture between those different civilizations, and also trying to link what is considered as a cultural heritage with the cultural value, that is, looking on the necessity that it should have a high cultural value so that it can be considered a cultural heritage, and then it can be granted the care and protection of the law and authority, and to have human artistic creativity, such as archaeological places and the inscriptions, pictures, sculptures, statues and writings lying therein, as well as a group of buildings of high architectural style that are landscapes of exceptional value from the perspective of history, art or science ().

## Second branch

## Legal definition of national cultural heritage

Legal legislation has not followed a unified approach when clarifying the concepts of cultural heritage and natural heritage, rather, but they differed in this matter in a clear way that they converge at times and diverge at other times. When we shed light on the texts of these legislations, we find that attention paid to heritage is very slight compared to that given to antiquities, and the best evidence is that we find that most countries have their own laws on antiquities, and in contrast, the attention given to heritage does not reach the extent of enacting special legislation to protect and preserve it (). If we look at the French civil law, we find that the legislator has defined the antiquity therein as (a group of immovable and movable property that has historical value for individuals) ().

The French legislator has tended to define the concept of antiquities and historical monuments in Law No. 31 of 1913 AD relating to the protection of antiquities and historic highlights that it is either registered or classified or as a kind of natural antiquities and landmarks that are uncovered on the land or the seabed, while the classified antiquities are buildings that remain the property of their owners and are considered as historical buildings, and these buildings can be owned by the state or a public person().

When the French Heritage Law No. 178 was issued by decree of February 20, 2004, heritage was defined in Article (L1) as (all property, whether movable or immovable, publicly or privately owned, having historical, artistic or archaeological, aesthetic or technical significance). Archaeological heritage is defined in Article (L.510-1) as all artifacts and other antiquities that are part of the elements of the archaeological heritage of the existence of humanity and through which the development of human history and its natural environment relationship to the heart can be traced and is preserved and studied through excavations or discoveries ().

In Egypt, we find that the Egyptian legislator in the Egyptian Antiquities Protection Law No. 117 of 1983 as amended () focuses his attention on antiquities, defining them in its first article as “any reals estate or movable property shall be considered as an antiquity when it fulfils the following conditions: 1) It is a product of Egyptian civilization or successive civilizations or a product of the arts, sciences, literature or religions that have existed on the land of Egypt since prehistoric times until a hundred years ago. 2) That it has archaeological or artistic value or historical significance as a manifestation of Egyptian civilization or other civilizations that had existed on the land of Egypt. 3) That the antiquity was produced or originated on the land of Egypt or has a historical connection with it. The remains of human races and contemporary creatures are considered as antiquity that is registered in accordance with the provisions of this law).

We note here that the Egyptian legislator did not distinguish between antiquities and heritage and did not make mention of a specific definition of heritage, but was satisfied with defining only the antiquities despite the recent amendments that have been introduced to this law. Our view is that heritage is no less important than antiquities in terms of the obligation to achieve the necessary protection for it by enacting legislation that would guarantee that.

As for the Algerian legislator, he secured the protection of cultural heritage through the regulation of Law



Legal aspects on the Protection of Iraqi Cultural Heritage, Baghdad, 28th February - 1st March 2022
The Criminal Protection of National Heritage During Armed Conflict,
Professor Dr. Ali Hamza Asal Al-Khafaji

No. (98-4) in 1998 relating to the protection of the Algerian cultural heritage(), and explained the concept of cultural heritage as: All real estate cultural property and real estate by destination and movable property existing on and inside the land of national property owned by natural or legal persons subject to private law and also existing in the aquifers of the national internal and regional waters inherited from various cultural civilizations since the prehistoric era to the present day, shall be considered as cultural heritage. Also considered as part of cultural heritage of the nation shall be the cultural intangible property resulting from social interactions and the creations of individuals throughout the ages and which still expresses itself since ancient times to this day (). The Algerian legislator in this law, seems to have broadened the scope of the concept of cultural heritage to include intangible cultural heritage in addition to the concept of tangible cultural heritage, which is a positive orientation that keeps pace with the development taking place at the national and international levels, the purpose of which is to expand the scope of legal protection of cultural heritage.

As for the Iraqi legislator, he was, even before the issuance of the current law on antiquities and heritage, among the legislators of countries that had not promulgated a heritage legislation, but with this law having been issued, we find that the legislator has provided explicit texts that would provide the necessary administrative and criminal protection for heritage, and if it does not exceed the antiquities in terms of importance, it is no less important than it in terms of the obligation to provide and maintain the necessary protection through enacting legal legislation that guarantees that (). In Article (4/Eighth) of the Antiquities and Heritage Law No. 55 of 2002(), the Iraqi legislator defined heritage items as: (Movable and immovable property that is less than (200) two hundred years old and has a historical, national or pan-nation religious or artistic value, to be made public by a decision of the Minister). Several things are noted with regard to this definition, including:

1. The Iraqi legislator in this text used the term heritage items to express things of an artistic, scientific, historical or national nature. He also associated them to a period of time even if it differs from the period specified by the legislator for antiquities. Some prefer not to restrict heritage to a specific time period as it indicates everything having artistic, literary, scientific or historical value, regardless of the time period that passed on that thing (). Heritage is a broad term that includes in its scope the inherited civilization, as well as the productions of the present, so it is not tied to a specific time period ().

2. In this text, the Iraqi legislator used the term (heritage items), i.e. movable and immovable heritage property. He meant cultural heritage, but it is noted that he did not refer to the concept of natural heritage despite its importance which is no less than the importance of cultural heritage. In the fourth chapter of this law, under the title (immovable heritage property), he used the term “heritage areas” in Article (23) thereof without clarifying its concept and ascribing a meaning for it. We find that this term is broad and includes the heritage areas of cultural and natural heritage, and it can be said on that the legislator has left the issue of defining the concept of natural heritage to other laws and regulations.

When shedding light Regulation No. 2 of 2014 concerning natural reserves(), we note that the natural heritage is defined in the first article thereof as: (The following terms and expressions are intended for the purposes of this regulation to have the meanings indicated against each of them: ... Eleventh - Natural Heritage: Natural landmarks consisting of physical, biological, geologic or morphological formations, or groups of these formations that have exceptional global value from an aesthetic or scientific perspective, and the precisely specified areas that are habitat to endangered animal and plant species...). It would have been preferable if the Iraqi legislator had adopted this definition in the Antiquities and Heritage Law No. 55 of 2002.

The legislator referred, in the Environment Protection and Improvement Law No. (27) of 2009, to the term cultural and natural heritage in the first article thereof, which stipulated: (The law aims to protect and improve the environment... and to preserve public health, natural resources, bio- diversity, and cultural and natural heritage in cooperation with the competent authorities ....). The legislator indicated in this law that among the tasks entrusted to the Council for the Protection and Improvement of Environment, formed to achieve its objectives, is to prepare a list of natural and cultural heritage sites that will be nominated for the World Heritage List, in coordination and cooperation with the ministries and authorities concerned (). However, it is noted that the legislator in this law is satisfied with including the term “cultural and natural heritage” among the resources and objectives that must be protected and preserved without giving a clear and specific concept of this term.

3. In the Antiquities and Heritage Law, the Iraqi legislator requires, when defining the heritage items, that these items must have a value, whether it is a historical, national, religious, or artistic value. In addition, these items and their material or moral value must be made public by an administrative decision to be issued by the competent minister, who is the Minister of Culture, Tourism and Antiquities, so that they acquire the value of heritage items and are included within the scope of legal protection.

**The second requirement**

**Division of the national cultural heritage**

**First branch**

**Tangible cultural heritage**

This type of heritage represents the tangible cultural aspect, which is called for all that one recognizes with his senses such as architectural and artistic and joint production, which has passed a certain period of time that are attributed to ancient eras and civilizations(), with all that it represents of palaces, temples, ancient castles, obelisks, stone inscriptions and military installations, These buildings and installations may be fully or partially existing. Irrigation and watering systems are considered a tangible heritage. Also, silver, gold and metal products and jewellery are included within the tangible cultural heritage (). Among the most important jurisdictions of the administrative authority in the state is to identify this type of heritage and provide its necessary protection and preservation by taking the measures and administrative decisions that would guarantee that.

The tangible cultural heritage, in turn, is divided into two sections. It is either fixed, real estate or immovable cultural heritage, or it is movable cultural heritage.

1. Immovable cultural heritage: This type of heritage represents movable or immovable cultural heritage that cannot be moved from one place to another without sustaining severe damage, such as immovable antiquities that are considered as part of the cultural and civilizational heritage, produced by ancient civilizations or created by arts, sciences, literature and previous religions, and in this concept, the immovable antiquities are part of the elements of the ecosystem and complement the aesthetic aspect of it (). The urban heritage also represents part of the tangible cultural heritage whenever it is located in an archaeological construction, and is all that man has built such as cities, villages, neighbourhoods, buildings and gardens of archaeological, architectural, urban, historical, economic, scientific or cultural value ().

Included within the fixed tangible heritage are the archaeological sites which are areas of archaeological lands that could have been built or not built and connected to human intervention or interaction with nature, including the sub-soil of the lands connected to it, and have a high value from the historical, archaeological, religious, artistic, scientific or ethnological perspective. In addition, urban or rural groups are considered as immovable cultural heritage. They are established in the form of sectors or real estate groups, urban or rural, such as strips, cities, palaces, villages, and traditional population compounds which are distinguished by their homogeneity and architectural and aesthetic unity, and represent historical, artistic or traditional significance that urges the administrative authority to protect and preserve them().

In France, we find that Law of December 31 of 1913 on the protection of antiquities and historical landmarks whose legal and administrative protection depends on their classification, paid attention to registering what are considered as historical antiquities under special conditions, which is a method for documenting cultural heritage (). With the issuance of the French Heritage Law No. 178 of 2004 , antiquities, historical landmarks and natural sites were classified into immovable and movable things, such as rocky landmarks and buildings classified as historical monuments or historical antiquities, and buildings belonging to the state or its public institutions or belonging to a regional group or to one of its public institutions that are classified by a decision of the administrative authority as historical antiquities () .

With regard to the Egyptian legislator, he has not referred to the tangible or intangible cultural heritage in the amended Antiquities Protection Law No. (117) for the year 1983, but rather adopted a division of cultural heritage that is based on the nature of the antiquity. He distinguishes between movable antiquities and





immovable antiquities and made all real estate and movable antiquities and lands that are considered antiquities, as public property which the administrative authority is responsible for its protection and preservation ().

Among the legislation that divided cultural heritage into tangible cultural heritage and intangible cultural heritage, and also divided tangible heritage into movable and immovable, is the Algerian legislation in the Cultural Heritage Protection Law No. (98-04) for the year 1998, which specified the types of cultural heritage and divided it into: real estate cultural property, movable cultural property, and intangible cultural property () It is a successful specification and a sound direction by the Algerian legislator. But as for the Iraqi legislator, he addressed in the Antiquities and Heritage Law No. 55 of 2002, only the tangible cultural heritage not the intangible cultural heritage, and did not come up with a clear and specific division of the tangible heritage, rather, he expressed it as antiquities and heritage items, whether movable or immovable, and archaeological, heritage and historical sites (). He divided antiquities into movable and immovable property associated with human work and whose age is not less than (200) two hundred years.

He allocated the second chapter of the law to immovable property which includes archaeological and heritage sites and buildings, historical sites, archaeological and heritage areas and heritage hills, in addition to all real estates that contain and includes antiquities (). as for the movable antiquities dealt with by the Iraqi legislator in the third chapter of the law, he did not specify them in a way that may suffice the purpose, but rather referred to some of them, such as manuscripts and archaeological coins registered with the archaeological authority and licensed to be possessed ().

We also note that the Iraqi legislator has divided heritage items into movable and immovable property that is less than (200) two hundred years old and has a historical, national, religious or artistic value (). The fourth chapter of the law is allocated to immovable heritage property, intended for buildings and heritage and historical areas and residential neighbourhoods with a heritage architectural character that have historical or heritage importance or architectural characteristics or possess Arab or Islamic heritage significance. Given the importance of this heritage and the material and moral content it represents and its historical and civil contents, we find that the Iraqi legislator has obligated the archaeological administrative authority to continue documenting this heritage, keeping its records and maps, and taking all measures and administrative decisions that ensure its protection and conservation.

**2. Movable Cultural Heritage:**

It is the heritage that can be moved from one place to another, and is represented by antiquities and heritage items that have been made to be separate by its nature from the land or from heritage and historical buildings, and can be transferred without damage such as antiquities, paintings, coins, manuscripts, sculptures, inscriptions, statues and textiles, whatever their material is, or the purpose of manufacture and ways of uses (). The documentary heritage is considered as part of the movable cultural heritage, as it represents a large percentage of it, and draws a picture of the intellectual development of human society. This heritage includes all works, whether written or printed in various languages, as is the case in manuscripts (). The surface findings represent an important part of the movable cultural heritage, as they are various archaeological finds that are uncovered through archaeological surveys of sites, through excavations or by chance ().

It should be noted that the competent authority can consider the movable heritage or antiquities as a fixed or immovable heritage or antiquity, if it is part of a heritage or fixed antiquity that complements it, associated with it, or ornamented with it, such as writings, inscriptions, architectural elements and tombstones ().

**Second branch**

**Intangible and water-submersed cultural heritage**

It is called the intangible heritage. This type of heritage is no less important than the tangible cultural heritage and the natural heritage, as heritage is not limited to movable and immovable archaeological and heritage items, but rather includes all items that contain intangible cultural contents (). This type of heritage includes traditions, forms of oral expressions, types of arts, social practices, rituals and celebrations, and skills related to traditional craftsmanship, including the language that transmits heritage and forms the features of the general culture of society, including tales, popular literature, proverbs, music, singing, traditional arts and crafts and

related experiences, customs and traditions.

Among the intangible cultural heritage is the (folklore) or popular proverbs that are passed down from one generation to another and are constantly recreated by communities and groups in a manner that is consistent with their environment and nature, as they develop a sense of their identity and a sense of continuity and enhance respect for cultural diversity and popular creativity (). Intangible cultural heritage is in itself a new concept that was used in the 2003 UNESCO Convention on the Preservation and Protection of Intangible Cultural Heritage, which defined it as: The practices, perceptions, forms of expression, knowledge, skills, and their associated tools, pieces, artifacts, and cultural places that are considered by groups, and sometimes by individuals as part of their cultural heritage .... (().

The most significant thing to note on this concept is that it has considered tools and artefacts as intangible heritage and linked them to forms of oral expression and knowledge, and this is not possible, because tolls, artefacts and pieces cannot be included in this type of cultural heritage, but included within the tangible heritage. The concept of intangible cultural heritage appeared in the eighties of the last century, at a time when the world heritage was mainly oriented to the material cultural aspects and after the recommendations made to UNESCO in 1989 on the protection of traditional cultures and the safeguarding of folklore as a result of the neglect and disregard for this heritage, by emphasizing on its material and moral value and ensuring its respect in order to restore the communities' past and transmit it from one generation to another ().

Undoubtedly, it is noted that this type of cultural heritage has not been given adequate care and legal protection by the Iraqi legislator, on a par with the tangible heritage, and is often threatened with extinction and neglect. Therefore, it is necessary to provide the necessary legal and administrative protection to preserve it by enacting legislation that defines it and determines the forms of expression and manifestations which can be considered as intangible cultural heritage and recorded in lists and records documenting them, and then putting in place special measures to protect and preserve them from loss and oblivion.

**As for the water-submersed cultural heritage**: it is the maritime heritage as named by some (), or the sunken or marine antiquities, which includes the water-submerged land sites and the sunken movable property. This heritage has a broader meaning that includes the antiquities found at the seabed, whether they are in the general or regional seas or the adjacent area, as well as the antiquities lying in the bottoms of rivers or floating on their surface, streams, waterways, wells and lakes (). Underwater cultural heritage is also represented by any ancient water-submerged wrecks, whether cities or buildings, or caves artworks inscriptions, lakes or villages dating back to historical ages. It is a speaking and pulsating part of human history and an integral element of human heritage ().

It is noted that the French legislator was the first to note the need to provide the necessary legal protection for this type of heritage, by regulating it in a set of laws, starting with the law issued on November 24, 1961 amended by the law issued on November 23, 1982 relating to the regulation of the coast guard work, and the law issued on November 26 December 1961 regarding marine wrecks, and ending with the current Law No. 89-874 of 1989 regarding marine cultural heritage (), as Article (532/1) of the last law defines marine cultural heritage as (layers, wrecks, relics or anything that has a historical, pre-historic or archaeological value, whenever it is present in the general maritime domain or at seabed until the end of the continental extension ) and this article has been transferred to the French Heritage Law No. 178 of 2004 ().

As for the Iraqi legislator, it is noted that he has not come up with clear texts in the Antiquities and Heritage Law No. 55 of 2002 regulating the so-called under-submersed cultural heritage, but rather he has come up with an absolute general text talking about antiquities and heritage items as antiquities are movable and immovable property related to human work, whose age is less than (200) two hundred years, as well as human, animal and plant structures, while heritage items represent movable and immovable property whose age is less than (200) two hundred years ().

Thus, it can be said that the terms (antiquities), (heritage items) and (historical and heritage sites) set forth in this law have come in absolute general terms as, they include antiquities, heritage items, and historical and heritage sites, whether they are on the surface of the earth or submerged in water. It would be preferable if the Iraqi legislator allocates and specifies texts for the protection of water-submerged cultural heritage because





it is no less important than antiquities, and due to the importance of the water-submerged cultural heritage, which represents all antiquities of ancient human existence and provides humanity and history with valuable information about the customs and traditions of past nations and peoples, so we find that the peoples and states have joined hands in order to draw up an important international convention on the protection of the water-submerged cultural heritage in 2001().

In article(first), this convention defined this heritage as: All traces of human existence that have a cultural, historical or archaeological nature and which have remained partially or completely submerged in water periodically or continuously for a period of at least one hundred years... (()). It is also noted that the International Charter for the Management of Archaeological Heritage issued by the International Council on Historic Monuments and Archaeological Sites (ICOMO) for the year 1990, took care of the water-submerged heritage and covered it in protection when it defined the archaeological heritage in its first article as: "part of the tangible heritage where the archaeological methodology is applied... and includes every trace of human existence, and the various places where human activities were carried out, represented by structures, findings and collectibles of all kinds found on land or submerged under water, and various equipment associated with them (().

## Second topic

## Rules of protection of national heritage during armed conflict

Wars through the ages have been a means of resolving or settling disputes between countries, and the war was comprehensive, not confined by borders and not restricted by rules governing the conduct of warriors during the battle. Due to the disasters caused by wars that afflict humanity, the heavenly religions have legislated many human rules that enshrine protection and respect for these victims, in order to reduce the brutality of its mechanisms and its hardware, so no one goes to fight except for the necessity of pushing back aggression so that the conflict should not continue if signs of peace appear through the positive intervention of parties that are not involved in those wars. Many conventions addressed armed conflict, taking into account the destruction that is left both on the material level and on the human level, so it was regulated by the Hague Convention for the Protection of Cultural Property during Armed Conflicts of 1954, as well as the First Protocol of 1977 annexed to the Geneva Convention of 1947, and the Hague Convention of 1907.

Conflict has been defined in general as: (contradictory claims between two international legal persons that require to be settled under the rules of international law). Hence, its conditions are that it takes place between two international legal persons and between them there are contradictory and continuous political or legal claims and that it is qualified for settlement according to the rules of international law, while conflict is described as armed if military force is used in it with the outbreak of war between two states specifically, which the character of an international armed conflict is lent to any (dispute Armed) if more than one state party are involved in it, in other words (international armed conflict is represented by declared or undeclared war, whether or not the conflict has been acknowledged by the parties to the conflict).

Based on the foregoing, we will divide this topic into two requirements: we will discuss in the first requirement the international protection of the national cultural heritage during armed conflicts, and in the second requirement we will discuss the national criminal protection of the national cultural heritage ().

### The first requirement

### International protection of national cultural heritage during armed conflict

We will discuss in this requirement the rules of international protection established in the Hague Convention for the Protection of Cultural Property during Armed Conflicts of 1954, and we will highlight the rules and details of that protection in a manner that would ensure determining the extent of effectiveness in establishing foundations that guarantee respect for the cultural heritage of countries.

Accordingly, we will divide this requirement into two branches: we will discuss in the first section: the rules of general protection, while in the second section we will discuss the rules of special, enhanced and additional protection.

**First branch**

**General rules of international protection**

**National heritage during armed conflict**

First - Protection while property retains its civil heritage:

Cultural property is considered an ancient civilizational heritage of humanity, meaning that it is paid the attention of the drafters of international humanitarian law, who have tried to enact provisions that protect these properties during armed conflicts. This was evident through the 1954 Hague Convention and its first protocol, but as a result of the many violations to which these rules of protection were subject, new texts were circulated that enhance this protection, and thus the second protocol of 1999 was adopted, which had come with texts confirming the protection established for cultural property during armed conflicts.

The provisions of the convention divided the general protection into two stages:

The first stage - the normal protection stage:

The Hague Convention of 1954 stipulated a set of important provisions to enhance protection, including:

1. (Refraining from using cultural property for any purpose that would expose it to destruction or damage in the event of an armed conflict).

2. (Refraining from directing any hostile act against such cultural property).

3. (Prohibiting and preventing any form of theft, pillage or waste of cultural property, stopping such acts if necessary, and likewise prohibiting any act of sabotage directed against such property).

4. (Not to seize movable cultural property located in the territory of another State Party).

Based on the foregoing, it can be concluded that the general protection in this case is a protection normally established, that is, without exceptions, regarding the protection of the national heritage of the state during the armed conflict, and is assigned to all types of heritage regardless of its nature, location and regardless of the owner ( The aim of this protection is to provide respect for the national heritage and to save it from the scourge of wars and armed conflicts) ().

Therefore, general protection consists of two aspects, first: that the occupying state, in the event of an armed conflict erupting on its territory, takes as many measures as possible, not to use cultural property for any military purpose, or to avoid establishing military targets next to it. On the other hand, the state or other states that are a party to the armed conflict shall refrain from looting, pillage or waste of cultural property, as well as any act of aggression that is aimed at destructing the property ().

The second stage: Exceptional protection: It is decided in this protection that the general protection is not effective in the cases and conditions established for the ordinary case, as well as its second protocol, as the 1954 Hague Convention for the Protection of Cultural Property referred to general protection when required by compelling necessities, and it stipulated some standards and guidelines necessary for the application of this exception as per Article Six of the Protocol to the distinction between directing hostilities to cultural property on the one hand, and the use of such property as compelling military target on the other hand ().

The Convention stipulates that (the obligation to respect all cultural property mentioned above may not be waived except in cases necessitated by compelling military necessities which may not be invoked for abandoning the obligations: 1 - for the use of cultural property for purposes likely to expose it to destruction or damage unless there is no feasible alternative to achieve a similar military advantage. In order to direct an act of hostility against cultural property which, as to its function, has been turned into a military target and that there is no feasible alternative to achieve a similar military advantage. Actual warning should be given in advance where circumstances permit).





Therefore, in order for the obligation to public protection to be forsaken, two combined conditions must be met: 1- That these cultural properties have been transformed in terms of their function into a military target.

2- That there is no feasible alternative to achieving a military advantage similar to the advantage gained by directing a hostile action.

Based on the foregoing, we find that the general protection of the national heritage is decided in an ordinary case and an exceptional case, and if the first ordinary case is clear in meaning, the exceptional protection needs clarification, as the international legislator, though he allows directing the attack on the national heritage in the exceptional case, coming to mind that the exceptional case is not protection, rather a permission or legitimization of aggression, and this meaning is true in a superficial understanding. But in fact, the international legislator provided protection even in special and exceptional cases of the national heritage, by setting combined conditions in order for the attack to be legitimate, and this protection is general protection for all types of national heritage, regardless of its location and owner. So this protection is in fact, protection during the transformation of the nature of the national heritage into a military target in light of the exceptions established, with the need to take necessary precautions as stated in the Convention (The parties to the conflict shall, to the maximum extent possible, keep movable cultural property away from the vicinity of military targets or avoid locating military targets near cultural property. Moreover, the parties to the conflict must do everything in their power to protect cultural property and refrain from launching an attack that might cause incidental damage to it ().

**Second branch**

**Rules of Special and Enhanced International Protection**

**To protect the national cultural heritage during armed conflict**

**First - Special protection**: The Hague Convention provided a special system for the international special protection of the national heritage, ensuring immunity against any hostile act and from its use or the use of the places directly adjacent to it for military purposes. In order for cultural property to have special protection, it must not be used for military purposes and that the state is committed to setting a safe distance away from any military targets .

The convention stipulates placing a limited number of shelters designated for the protection of movable cultural property, memorial building centres, and other fixed property of great importance under special protection, with two conditions: The first condition is that they should be at a sufficient distance from any large industrial centre or any military target, and the second condition is that cultural property shall not be used for military purposes ().

It should be noted that special protection is not decided automatically and just when the conditions established by Article (8) above have been met, but special protection requires that the cultural property is registered in the International Register of Cultural Property, which means that special protection is distinguished from general protection in terms of the requirement of registration in the international registry at the request of the country requesting protection.

Special protection can be removed in two cases: The first case: the use of cultural property as a military target or for military purposes, and therefore the state's use of this property in this way leads to the loss of special protection (). As for the second case: the compelling military necessities stipulated in the Hague Convention, and the requirement that there is a report prepared, that confirms the existence of these circumstances and necessities, prepared by the head of a war body or commander of a military division ().

**Second - Enhanced Protection**: Due to the deficiencies of the special protection system, as it achieves only limited success, a new system of protection called "enhanced protection" has been introduced through the second protocol.

To achieve this type of protection for the national heritage, three conditions are required:

1. the cultural heritage must be of great importance to humanity.

2. It shall be protected by appropriate legal and administrative measures at the national level, and its exceptional cultural and historical value shall be recognized and that the highest level of protection is guaranteed to it.

3. not be used for military purposes or as a shield to protect military sites, and that the party in charge of monitoring it confirms that it will not be used in this manner.

4. States parties wishing to subject cultural property to the enhanced protection system shall submit a list to the committee established under the Second Protocol, and the committee shall take its decision in this regard. In emergency cases, an independent application may be filed for obtaining the enhanced protection system.

It should be noted that there is an additional system for the protection established for the national cultural heritage, called the complementary protection system. This system included adding images for the protection prescribed for cultural heritage or cultural property, represented by the means of transporting this cultural property, the protection of employees charged with protecting cultural property, and the development of a distinctive emblem for this property ().

## The second requirement

## Protection against persons for national heritage during armed conflict

The general texts in the Penal Code did not specifically identified the objects, but rather specified the objects in general, and therefore this means that the provisions of protection in the Penal Code can be applied to the national heritage, because it is possible for heritage at the same time, as well as being a moral value, to be movable, and therefore in the absence of a special text regulating theft, smuggling or destruction of the national heritage, the provisions of the general rules can apply to that.

### First branch

### Indirect protection

**First - Protection through the general rules in the crime of theft**: The crime of theft is based on the act of embezzlement: it is the transfer or removal of something from the victim and placing in into the possession of the perpetrator without the knowledge and consent of the victim. Embezzlement has two elements: a physical element: which is the act or movement in which the thing is moved or removed and a moral element which is the owner's dissatisfaction with the thing and without his knowledge. The act of embezzlement is realized by a physical movement by which the thing is transferred from the possession of the victim to the perpetrator by any means.

Article (431) stipulates: "Theft is intentional misappropriation of movable property owned by a person other than the perpetrator. For the application of the provisions of theft, among movable property is plants and everything that is connected to the land or planted thereon as soon as it is separated from it, fruits as soon as they are picked off, and electrical and water forces and every other energy or power taken out."

The generality of the above-mentioned text indicates that movable property can apply to tangible heritage, and in this case it is subject to the provisions of the texts of the crime of theft, but it is noted is that the aggravating circumstances of the crime of theft do not apply in general and in particular to the crime of stealing tangible heritage during the armed conflict.

We find that Article (444) which stipulates that (he shall be punished with imprisonment for a period not exceeding seven years or imprisonment for theft that occurs in one of the following circumstances:... Seventh - if the offender, to commit the theft, takes advantage of the opportunity of a state of commotion, sedition, fire or drowning of a ship or other disaster). This indicates that this paragraph is one of the most criminal provisions within the crime of theft that applies to the theft of tangible heritage during the armed conflict, as it is stated in general context, expressing the case of the perpetrator exploiting a state of agitation or sedition.





We find in these two terms, sufficient space for logical interpretation of the possibility of the applicability of the embodiment of criminal protection of tangible heritage within the provisions of the crime of theft. The meaning of armed conflict can fall under the concept of sedition or commotion. In this case, theft of heritage in light of the outbreak of sedition or commotion, including armed conflict, shall be an aggravating circumstance for the penalty against the perpetrator of the crime.

**Second - Criminal protection through general rules for crimes against state security**: The right to security occupies an important place in the history, civilization and personality of the human being. From the security angle, the internal and external security of the state are the two elements of national security operations, in its concept as the security of the homeland and the citizen, and both of them are functionally the same thing either in terms of the social goal of each of them, or in their consolidated scope o, or their functional integration.

Some jurisprudents tend to argue that the concept of internal and external state security is one, and combines them into one concept. The advocates based their argument on several justifications, including that there is no longer space for distinction between the two types, and that the distinction was historical and a long time has passed, and that the effects of the aggression are the same in the two cases and their seriousness is known and convergent ().

Article (163) of the amended Iraqi Penal Code No. 111 of 1963 stipulates that (he shall be punished with life or temporary imprisonment: 1- Whoever deliberately sabotages, damages, defects or disables any of the military sites, bases and installations, interests, ships, aircraft, or transportation routes, means of transportation, oil pipelines or installations, weapons, equipment, supplies, medicines, warfare, and other things prepared for the use of the armed forces or in defence of Iraq, or used for these purposes. 2-whoever conceals any of things described in the above paragraph of embezzles them, or enables letting them fall into the hands of the enemy, intentionally abuses their manufacture or repairs, or deliberately performs an act that would render them unserviceable, even temporarily, so that he could benefit from them for what they have been intended, or causing harm to them. The penalty shall be the death penalty if the crime occurs in time of war.

Based on the provision contained in the Iraqi Penal Code, we find that the legislator provides protection for tangible heritage in the event of armed conflict, as the text stipulates the provision of protection to military sites and the like that could be used in defence of Iraq, and the provision of inclusion of tangible heritage in this protection is that the appendix to the first paragraph of Article (163) provided for the wording (and other things prepared for the use of the armed forces or the defence of Iraq, or what is used for this purpose) and this absolute generality allows the inclusion of heritage sites within the provisions of this article, especially since international conventions allowed the conversion of the character of heritage sites to military sites. In the event that the status of heritage sites are transformed into military sites used to defend Iraq, they will fall within the framework of this protection, and will be covered by the legal provision stipulated in Article (163) of the Iraqi Penal Code.

**Third - Protection of intellectual works from piracy**: Piracy is one of the forms of assault on literary and artistic property, and can be included in the criminal aspects for the protection of cultural heritage indirectly. It is also one of the most important forms of aggression included in the copyright protection law on works covered by protection. Piracy includes multiple forms ():

1. Infringement of one of the following copyright rights.

2. Infringement of the right of the performer to enjoy protection.

3. Infringement of the author's right to decide to publish his work and to specify the method of such publication and his right to print it, broadcasting, or directing it out, and to authorize others to do that.

4. Infringement of copyright in translating the author's compilation.

5. Infringement of the author's right to attribute his compilation to him.

6. Selling or offering the counterfeit work for sale or bringing it into the country without the permission of the author or his representative.

7. Imitation of works covered by protection, that is the person who imitates in the country works published abroad, sells these compilations or reproduces them, or undertakes to ship them abroad.

Based on all of the above, we would like to say that national heritage is subject to the general protection established under the provisions of the amended Iraqi Penal Code No. 111 of 1969, and this protection is established in the absence of a special text that determines or regulates the protection of the national heritage during international and non-international armed conflicts, but in the case of the existence of special texts regulating protection, there is no room for interpretations of the general texts. Rather, it is sufficient in the presence of special texts for protection, but what we are witnessing in the current situation is the absence of texts as well as the deficiency of existing texts in providing strict protection for the national heritage during armed conflicts, especially since the armed conflicts and the exploitation of periods of war or civil and internal seditions are among the most dangerous circumstances that are accompanied by intended attack to obliterate the identity of the state and its cultural heritage. Therefore, emphasis must be given to providing protection, and that the Iraqi legislator pays attention to the danger of armed conflicts due to the destruction they leave behind. Therefore, we recommend that the legislator would adopt the utmost severity in providing protection and legal respect for the national heritage during armed conflicts.

## Second branch

## Direct protection

in the Antiquities and Heritage Law No. 55 of 2002, we find that the legislator provided a graded protection according to the gravity of the act or crime and the extent of its seriousness. This is evident that he used a punitive policy somewhat similar to that of the legislator in the Penal Code, dividing the penalties into custody, imprisonment and death penalty. We will state that in succession.

**First - the crimes for which the penalty of imprisonment is meted out:**

The imprisonment penalty has been defined as (the placement of the convict in the punitive institution for the period he is sentenced, which is the same as a prison sentence, but differs in terms of duration and in terms of the lighter treatment of the convict) ().

The Iraqi legislator has determined the penalty of imprisonment for (the crime of smuggling heritage items), as Article (41) of the Heritage and Antiquities Law No. 55 of 2002 stipulates that (First - whoever deliberately takes out of Iraq an archaeological item or embarks on taking it out shall be punished with death penalty. Second- Imprisonment for a period not exceeding (3) three years and a fine of (100,000) one hundred thousand Dinars shall be prescribed for whoever intentionally took a heritage item out of Iraq).

It is noted from the text of this article that he has prescribed a penalty of imprisonment for a period not exceeding three years and a fine of (100) million Iraqi dinars, while the legislator stipulates the death penalty for the same crime if the item smuggled to outside Iraq is an archaeological item not a heritage item. The fact is that it is correct in principle that there should be a difference in the policy of the Iraqi legislator in aggravating and mitigating the penalty, on the basis of the type of smuggled property and the provision of protection. But the difference cannot be the mitigation from the death penalty to imprisonment as this policy is contested since the age proportionality between the heritage item and the archaeological item is not a justification sufficient to bring down this degree of penalty in determining the criminal penalty.

On the other hand, we call on the legislator to mitigate this penalty, because the archaeological item, no matter how high its value, does not modify the human spirit, so it should be modified and to adopt a life sentence instead of it, especially since Iraq has recently lost a lot of lives, and the Iraqi economic situation does not allow such penalties that are based on revenge and ideal foundations far from the economic and humanitarian reality, so we draw the attention of the wise Iraqi legislator to this article in order to amend it and remove the death penalty from the aforementioned text.

**Second- the imprisonment sentence:**

Imprisonment penalty is defined as “one of the freedom-depriving punishments, and it is intended to deprive the freedom of the convict and place him in punitive facilities for the period prescribed by the judgement ().





1. The crime of possession, destruction, or loss of a heritage manuscript or coin: Article 39 of the Antiquities and Heritage Law No. 55 of 2002 stipulates that (shall be punished with imprisonment for a period not exceeding (10) ten years and a compensation of twice the estimated value of the antiquity, the possessor of a manuscript, a coin, or a registered heritage item which he has caused its loss or damage, in whole or in part, in bad faith or by negligence.

By extrapolating this text we note that the Iraqi legislator considered the crime of destroying the heritage item by its possessor a felony and imposed a prison sentence for it. It is also noted that he has imposed the same penalty for this crime, whether it was committed intentionally or unintentionally, and this is clear from the phrase “in bad faith or by negligence.”

In this article, the Iraqi legislator regulated the crime of destroying, possessing, or losing a manuscript or coin, and the truth is that the legislator did well when he provided a stipulation for this crime, but he used various terms without specifying their meaning in the definitions. On the other hand, there are indications of punitive exaggeration by the legislator, not supported by sound legal logic. We find that the legislator, in principle, equated possession, in its general form, and did not specify possession in good faith or in bad faith, as the possessor of the heritage item may not know its status, and he may have possessed it in order to repair it, and within the context of the general text, he will be subject to penalty. He also equated possession, destruction and loss, and at the same time we do not find a justification for this equality, as the one who possesses the item is not like the one who destroys it, as the destruction means the lack of opportunity of finding the heritage item again, which is close to losing it. As for mere possession, it is an act that is less dangerous than damage and loss.

In addition, the legislator equated the loss and destruction of the heritage item, whether this happened in good faith or by negligence, and equated between total and partial damage. In fact, we would like to say that the requirements of the punitive policy and the policy of incrimination, take into account the criterion of gravity and seriousness for the person in committing the crime, except in the field of criminalization in the aspects of heritage and archaeology. We noted that the view is based on the criterion of the moral value of the heritage and archaeological item, and from here the legislator set out to determine the penalty, which is a criterion that we support and go along with our wise legislator.

But since this policy is criticized, the age proportionality between the heritage object and the archaeological object is not considered a justification sufficient to lighten this severity in determining the criminal penalty. On the other hand, we call on the legislator to reduce this penalty, since the archaeological item, no matter how high its value is, does not modify the human spirit, so it should be amended and a life sentence is imposed instead, especially that Iraq has recently lost a lot of lives, and the Iraqi economic situation does not allow such penalties, which are based on a revenge basis and ideal foundations that are far from the economic and humanitarian reality, so we draw the attention of the discreet Iraqi legislator to this article in order to amend it and remove the death penalty from the said text.

The crime of stealing heritage item: Article (40) of the aforementioned law stipulates that (First - a prison sentence of no less than (7) seven years and not more than (15) fifteen years shall be imposed on whoever steals an antiquity or heritage item which is in the possession of the archaeological authority, and a compensation in the amount of (6) six times the estimated value of the antiquity or heritage item in the event that it is not recovered, and the penalty shall be life imprisonment if the perpetrator is one of those charged with managing, preserving or guarding the stolen heritage or antiquity. The sentence shall be death penalty if the crime took place by threat or coercion by two persons or more and one of them carries a visible or hidden weapon. Second- The accomplice in committing the crimes stipulated in Clause (First) of this Article shall be considered as a perpetrator).

1. The crime of sabotaging heritage materials. Article 42 stipulates that (he shall be punished by imprisonment for a period not exceeding (10) ten years, anyone who excavates, constructed, planted, or resided in a declared archaeological site, or customized, broke, uprooted, distorted, or demolished an antiquity or building an archaeological or heritage site, or disposed of its construction materials, or used it in a way that it is feared it will be damaged or harmed or its features altered, and a compensation amounting to twice the estimated value of the damage and the removal of the violation at his expense. Second - The employee or representative of the

legal person who intentionally causes damage to archaeological sites or heritage homes and neighbourhoods shall be facing the same penalty stipulated in Item (First) of this Article.

It is noted that this text has provided for the heritage items the legal protection by preventing their destruction. The legislator used in the formulation of this article multiple forms of criminal behaviour in the crime of sabotage, such as removal, breaking, demolition, uprooting, distortion, or the use of the heritage item, in a manner that it is feared it will be exposed to damage or harm. On the other hand, he also considered them as felonies, imposing a prison sentence on the perpetrator, as well as stipulating the punishment of the employee or representative of the legal person who intentionally commits the crime stipulated in this article.

2. The crime of trespassing heritage neighbourhoods. Article (46) stipulates that (a penalty of imprisonment for a period not exceeding (7) years shall be inflicted on whoever trespasses the buildings, shops, or heritage neighbourhoods announced in the Official Gazette by demolishing or changing the use assigned to them, and he shall be obligated to return them to what they used to be before trespassing them, at his own cost).

The text of Article (46) dealt with the crime of transgressing heritage neighbourhoods, and the text stipulated that these neighbourhoods be announced in the Official Gazette, otherwise the transgression shall not constitute a crime as the publication should have achieved the announcement of these neighbourhoods in their heritage status. Likewise, the text specified that the crime is based on the act of transgression that it specified by demolishing, or changing the use allocated to it. The legislator did well in regulating this crime, in order to preserve the gorgeousness and natural beauty of heritage neighbourhoods. We note that the legislator did not specify the value of the fine added to the prison sentence, rather, he left it open to equal the amount of the total cost of maintaining the heritage neighbourhoods, and he did well in that he did not make the person in charge of maintenance the same person, but rather decided that it should be preserved by the competent authorities, but at his own cost.

## Conclusion

**Results:**

1. The cultural heritage has an exceptional historical value, at the national and international levels. It expresses the treasures of the country's heritage memory, and reflects the nature of living and thinking and the level of culture and development, which is inspiration for subsequent generations, and a moral impetus for progress, uplifting and development.

2. The protection of the national cultural heritage during the armed conflict is of great importance, which urged the states to agree on the need to respect the history and cultures of countries, and to keep the heritage away from military targeting, because it yields no military benefit to the warring states, but only constitutes unjustified devastation and destruction, a matter to which states acquiesced by accepting and acceding to international conventions by which the parties commit themselves to respecting the national cultural heritage during the armed conflict.

3. Jurists have differed over setting an all-encompassing definition of cultural heritage, which was discussed by jurists in wide-scale controversy, given the large-scale significance of cultural heritage as does not stop at the tangible heritage, but extends to the intangible heritage, as well as the water submerged heritage, temples, artworks and valuables. Therefore, we found that legal jurisprudence adopts two directions: the first direction: it is the expanded direction, and the second direction: is the direction narrowing the meaning, which is adopted by Iraqi legislator, and we tend to the expanded direction because it is broader in comprehensiveness and better able to provide protection.

4. Through the study, we found that the issue of protecting the national heritage during the armed conflict was the object of great international attention, and this was evident through international conferences, conventions and protocols, which was reflected at the national level. We find most of the world's constitutions have been amended and provided for the protection of national cultural heritage. Many laws, regulations and instructions have been enacted in order to preserve cultural heritage from sabotage, destruction and theft, and the states initiated many harsh penalties up to death penalty.





**Suggestions**:

1. We suggest to the Iraqi legislator, to amend Item (eighth) of Article (4) regarding the definition of (heritage item) to make the text as follows: (Cultural heritage is every human product less than 200 years old and having high artistic, literary, scientific, historical value or religious, whether movable or immovable, to be announced by a decision of the Minister, and it includes customs, traditions, arts, social practices, and forms of oral expression).

2. We suggest that the legislator amend Paragraph (5) of Article (4) by adding administrative bodies to be concerned with protecting heritage, and not to limit it to the Ministry of Interior, the Ministry of Endowments and Religious Affairs and the Mayoralty of Baghdad, in addition to cancelling the Ministry of Endowments and Religious Affairs, which no longer exists.

3. We suggest to the legislator a more balanced punitive policy approach in determining criminal penalties, as we found through the research that the legislator did not take into account the proportionality between the crime and the severity of the penalty, and this policy is criticized, for example, the age proportionality between the heritage object and the archaeological object is not a justification sufficient to highly reduce the criminal penalty. On the other hand, we call on the legislator to mitigate the death penalty, because the archaeological item, no matter how high its value, does not modify the human spirit, so it should be modified and to adopt a life sentence instead t, especially since Iraq has recently lost a lot of lives, and the Iraqi economic situation does not allow such penalties that are based on revenge and ideal foundations that are far from the economic and human reality. So, we draw the Iraqi legislator's attention to this Article to amend it, and remove the death penalty from the said text.

4. We suggest that the legislator takes into account the invariables of the principle of good faith in the criminal rule, as we find that the legislator did not take into account this principle, as he equated in principle between possession, in its general form, and did not specify possession whether in good faith or in bad faith, as the possessor of the heritage item may not know its status, and he may have possessed it in order to repair it, and within the context of the general text, he will be subject to punishment. The legislator also equated possession, destruction and loss, and we do not find at the same time a justification for this equality, as the one who possesses the item is not as the one who destroys it, as destruction means the lack of opportunity to find the heritage item again, which is close to the loss. As for mere possession, it is an act that is less dangerous than destruction and loss.

**Resources**

1. Dr. Ibraheem Madkoor- The dictionary of social sciences- Egyptian State Board of Book. Cairo 1975
2. Dr. Ahmed Si Ali – Protecting civil objects in the international humanitarian law- Dar al-Akadimiyah – Algeria 2011.
3. Fitori Mniti - New perspectives for the protection of cultural property in the event of armed conflict and entry the second protocol comes into force. International Committee for the Red Cross- Cairo- 2004.
4. Dr. Basheer Mohammed al-Seba'ie- The philosophy of antiquities laws and developing them to protect antiquities and art works. Arabic Center for Security Studies- Reyadh 1992

**Conferences**

1. Protecting cultural objects according to the international conventions law. A paper published in the book "studies in the international humanitarian law issued by al-Mostaqbal al-Arabi printing house. It is a paper that was presented in the international conference.
2. Dr. Ibraheem al-Anani- The legal protection of the of human culture and environment during armed conflicts. A paper that was included in second volume of the international humanitarian law "prospects and challenges". On the sidelines of the scientific conferences of the Beirut Arab University, the annual scientific conference of the Faculty of Rights, issued by Al-Halabi legal print house.
3. -Dr. Muhammed Samih Amro. Provisions for the protection of cultural property in periods of armed conflict and occupation, a working paper included in the first part of the International Humanitarian Law volume "Prospects" and challenges" - issued by Al-Halabi legal print.
4. Dr. Mustafa, Kamel Al-Imam Shehata, The War Occupation and the Rules of Modern International Law, Doctoral thesis, submitted to the Faculty of Law - Cairo University, in the year 1977.
5. Fatima Hassan Ahmed Al-Fawa'ir, Protection of Cultural Property during Armed Conflicts (Study In the light of international humanitarian law), a master's thesis submitted to the Faculty of Law, University of Middle East, 2019.

**Scientific researches**

1. Dr. Ali Hamza Assal, Criminal Protection of Antiquities and Heritage, research published in Al-Mohaqiq al-Hilli magazine for Legal and Political Sciences, second edition, sixth year.
2. Dr. Mazin Khalaf,a research published in the Journal of Law, College of Law, Al-Mustansiriyah University, issue 12, 2012.
3. Dr. Fatima Al-Thabiri, Protection of cultural property during the armed conflict in Syria, research was published in the Kuwaiti International Law Journal, Issue (8), eighth year, December 2020.
4. Ammar Murad Gharqan, Enhanced protection of cultural property during armed conflict, research was published in: The thirteenth annual scientific conference of the College of Law - Ahl al-Bayt University,
5. Dr. Yahya Yassin Saud - Cultural property and the means of protecting and recovering it internationally – Research was published in the Journal of Law - Al-Mustansiriya University - Sixth Year - Volume Four - Fifteenth Issue - 2011.
6. Dr. Salah Abdul Rahman Al-Hadithi, Solafa Tariq Al-Shaalan - International Protection of Heritage- The World Cultural in the Light of the Case of Iraq – Research was published in the Journal of Comparative Law -Fifty-sixth issue - 2008.



Prof. Dr. **Hadeel Salih**

- Specialized in International Law
- Lecturer in College of Law- al-Mustansiryah University and al-Turrath College.
- Supervised many theses for master and Ph.D

Dr. **Raya Abdul Sattar**

- Specialized in International Law
- Lecturer in College of Law- al-Mustansiryah University of various areas of public law.

# Protecting Cultural Properties During Occupation ERA

Protecting cultural properties during occupation era is one of the topics that attracted the attention and the protection of the international law, and specifically the international humanitarian law, which is applied during the period of armed conflicts when chaos spreads. Therefore, this law came to impose its protection over many of interests that worth protection, including cultural properties during occupation era through activating international responsibilities related to violating the rules of their protection, taking all required procedures to protect them through preventing violations and paying compensations for any since the violations that damage the cultural properties of any nation affect the humanity in general, and this is a mentioned in Hague convention 1945.

So, out paper topic is going to be the protection of cultural properties during occupation and the international responsibilities related to violating the rules of their protection. The discussion will be about the forms of the protection that was mentioned in the international law of cultural properties and the limits of the occupying country's responsibilities in regard to violating it. We will also refer to the reality of violations that targeted Iraqi cultural properties.

We will discuss in this paper the legal consequences in regard to restoration and compensation after approving the occupation legal responsibility for violating the rules of protecting cultural properties, declaring the occupation's international responsibility in regard to the crimes committed against cultural, religious and historical properties.

In order to explain these points, we will adopt the descriptive, analytic and the applied approach dividing this paper into three parts. The first part is to explain the meaning of cultural properties while the second part will be about the forms of the international protection for the properties during occupation. The third part will discuss the international responsibilities related to the violations taking into account showing the real violations that targeted Iraqi cultural properties.



# Protecting Cultural Properties During Occupation Era

**Assistant Prof. Dr. Hadeel Salih al-Janabi**
**Dr. Raya Abdul Sattar**
Mustansiriyah University / College of Law

The topic of the protection of cultural property during the period of occupation is considered as one of the important issues that has received attention and protection of international law, particularly the humanitarian international law that is applicable at the time of armed conflicts that are usually dominated by confusion. So, this law has been introduced to establish its protection of many interests it deems worthy of protection, including the protection of cultural property during the period of occupation by activating the international responsibility arising from the violation of the rules of its protection, and taking necessary measures to protect it by stopping and suppressing these violations and making compensations for them, given that the damage caused to cultural property owned by any people "compromises the cultural heritage owned by humanity as a whole", which is a principle stipulated in 1954 Hague Convention.

Therefore, the topic of our research paper is related to discussing the topic of the protection of cultural property under occupation and the international responsibility arising from violation of the rules of that protection, where the problematic issue revolves in this research around the forms of protection that are singled out by international law to cultural property and how far the occupying state is responsible for infringing on this property while identifying the practical reality of the abuses against the Iraqi cultural property.

We will address, in the framework of this research, the nature of the occupation and the impact of its sovereignty over the state under occupation, and then the legal implications of proving the ensuing international legal responsibility for the violation of the rules of protecting the cultural property in terms of recovery and compensation, and indicating the international responsibility placed on the occupying state for the crimes committed against the cultural, religious and archaeological properties. In view of exhibiting these aspects, we will pursue the two analytical descriptive and applied approaches, dividing this research paper into two requirements as follows:

**The first requirement: identifying the occupation and its impact on the sovereignty of the state**

**The second requirement: the occupier's responsibility**

## First requirement

## Defining the occupation and its impact on the sovereignty of the state

Wars in old times had been considered as a legitimate means for settling inter-state disputes, and a legitimate means of gaining control of regions. But as a result of wars and their extensive material and human damage, the world community has become convinced of the need of casting away this means and establishing its illegitimacy. So, there has been international consensus on the illegality of using force in settling international disputes as stressed in the United Nations' Charter in accordance with Article 2-4 thereof. Hence, the armed invasion has been deemed as a direct use of force and a source of threat to world peace and security, thereby requiring many obligations under international laws and norms on the part of the occupying state.

Based on the foregoing, we will address in this part of the research the definition of occupation and its ensuing elements, and then identify the impact of the status of the occupying state over the sovereignty of the occupied state, divided into two branches as follows:

- First branch: Defining the occupation and elements for it to arise

- Second branch: the impact of occupation on the sovereignty of the state

## First branch

## Defining the occupation and its elements

Economic greedy ambitions sometimes and political or social dimensions at other times constitute a motive for a certain state to occupy another state, thus we find ourselves in front of a case called occupation, prompting us to wonder about what is meant by occupation, and then identifying its elements.

### First: definition of occupation

The concept of occupation is considered as one of the old concepts that has spread worldwide, and a tool for controlling peoples' territories' riches, wealth and resources. Occupation has been defined as (fighting forces being able to get into the territory of another country and actually control it in whole or in part [1]. According to this concept, occupation constitutes a tool for oppressing the peoples, thus making it the focus of world community's attention, with several international conventions making reference of occupation by showing how this case has taken place. Emphasizing this, the **Hague Convention** stipulates that "the territory of a state shall be considered occupied when it is under the actual authority of the enemy's army. Occupation includes only the territories in which this authority is being exercised after it has been established"[2], in addition to the text of the common second article of the **Fourth Geneva Convention of 1949** provided that "these conventions apply to any territory occupied during any international hostile operations, and also apply in cases where the occupation of the territory of a state is met with no any armed resistance[3]).

In this framework, it is important to indicate that the League of Nations, as well as the Charter of the United Nations, have come with no reference to the concept of occupation, and it can be said that the Charter of the United Nations has regulated the issue of dealing with a case of occupation through (Jus ad bellum) law. So, when we are in front of a de facto situation and a military control over the territory of another country under any name, whether invasion, liberation, administration, or occupation, then what is important is the actual existence and actual control, and then the law of occupation shall be applied whether this occupation is legitimate or illegitimate, and there is no difference whether or not this occupation took place with the approval of the Security Council. The questioning about the legitimacy or illegitimacy of the case is not that important in terms of the validity of the humanitarian international law, particularly the rules related to the regulation of the situation of occupation[4].

Based on this, the rules of humanitarian international law relevant to the status of occupation become applicable when a territory falls under the actual control of hostile foreign armed forces, even if occupation is not met with any armed resistance and with no fighting going on. It is worth noting that occupation, based on what we have indicated, differs from the **status of invasion** which is meant to control by the battling forces over the enemy's territory, with the aim of occupying it without yet actually taking control of it and thus gaining control [5]. This would mean that the failure of a military force to establish or exercise its authority over a certain territory, for example due to a military resistance from the other party, would make the region a battle field. In such cases, the humanitarian law does not consider these territories as occupied lands, but rather lands being subjected to invasion. In other words, they are considered as battle fronts, and the rules to which they apply are the general rules for armed conflict.

This means that the case of occupation is linked to the military presence and actual control by the enemy over the country certain territories in a manner that would make the occupied region under the effective command of the enemy's army, no matter whether the occupation has taken place on the whole land or just part of it. Therefore, in both cases, the case of occupation is established whenever its elements are available, and then the relevant rules of humanitarian law are brought into force.

*1 Dr. Sabah Nouri Al-wan Al-Ajily and Dr. Salah Hassan Al-Rubaie, "National Liberation War Strategies", Academic Book Center, 2915, p. 38*
*2 Article 42 of the 1907 Hague Regulation*
*3 Common Article Two of the Four Geneva Conventions of 1949*
*4 article published on the official website of the International Red Cross Committee at the link: https://www.icrc.org/ar/doc/resources/documents/misc/634kfc.htm, visited on 28/12/2021*
*5 Dr. Abed Ali Mohammad Swadi, "Protection of Prisoners of War in International Law", First Edition, The Arab Center for Studies and Scientific Research for Publishing and Distribution, Arab Republic of Egypt, 2917 , p. 51*





### Second: Elements of occupation

For the purpose of describing a specific case as occupation, international jurisprudence has settled on the obligation of availability of several elements for occupation to take place. They are:

1. A situation of armed conflict taking place between two or more states in such a way that one of them gains control wholly or partly of the territory of another state1.
2. A case of temporary actual occupation taking place in which foreign armed forces occupy territories of another state and subjugate it to its control after the other state has been defeated2. This would mean that the relationship between the occupying state with the region under its control is classified as a relationship of administration of a temporary nature, as the occupying country has the responsibility of administering the occupied territory on a temporary basis extending over the period of the occupation.

3. **the occupation is effective**, so it is not possible to say that the state of occupation has begun, unless the military forces have been able to gain control of the territories it has invaded, and then stopping the armed resistance therein and have been able to establish a stable military administration[3]. If the invading state is not able to establish an effective and realistic administration, we face a situation of invasion and not occupation as already pointed out.

Based on the foregoing, we find that the availability of the aforementioned elements would mean that the state of occupation is actually taking place, which entails some implications on the sovereignty of the state under occupation, which we will discuss in detail in the second branch.

## Second section:

## The impact of the occupation on the sovereignty of the state

The issue of determining the impact of the case of occupation taking place is closely related to the nature of the existence of this occupation on the occupied territories, and since the case of occupation is generally classified as a temporary actual control not a permanent legal status, then its material existence does not change the legal status of the occupied territories, and this means that it is not permissible to compromise or prejudice the sovereignty of the state under occupation. This would result in several implications, perhaps the most important of which is the impermissibility of transferring the sovereignty of the occupied state to the occupying state. In addition, occupation does not make annexation possible.

### First: occupation does not make possible the transfer the sovereignty of the occupied state to the occupying state

Occupation shall not be considered a reason for canceling the sovereignty of the state which is owner of the occupied lands, nor transferring it to another state of occupation. Rather, the first state will retail its sovereignty over the occupied lands, even if this sovereignty is undermined temporarily and directly due to the case of occupation being established[4].

This means that the case of occupation leads to temporary disruption of sovereignty, not robbing it, and so long the occupying state is actually holding control of the lands, its authority is similar to seizure, and therefore it is an actual authority with no sovereign rights over the territories of the occupied state.

Second: Occupation does not make it possible to annex the occupied lands

We have indicated above that occupation used to be a legitimate means of gaining lands and annexing territories. The occupying state used to possess the absolute disposition of the territories under its occupation, until the emergence of a new principle in early 19th century, which stipulates that (occupation does not make

*1 Dr. Sabah Nouri Alwan Al-Ajily and Dr. Salah Hassan Al-Rubaie, ibid, p. 40*
*2 . ibid, same page.*
*3 Dr. Abul-Majd Ali Dhargham, Sovereignty, Responsibility and Equality in Conclusion of Treaties and Compliance with them within the Framework of International Law", first edition, Al-Masriya for Publishing and Printing, Arab Republic of Egypt, 2020, p. 22*
*4 Dr. Hisham Basheer and Dr. Alaa Al-Dhawi Sabeita, "The occupation of Iraq and Violations of Environment and Cultural Properties", First Edition, The National Center for Legal Publications, Arab Republic of Egypt, 2013, p. 33*

it possible to annex the occupied lands). This has been introduced after it was considered that occupation is a temporary status, as we stated above, and in this context, Dr. Mohammad Hafidh Ghanim sees that if occupation status would not result in the transfer of sovereignty to the occupying state, it is still a sovereignty suspended throughout the occupation period, and this means that the occupying state shall not to transform this material situation into a legal status by annexing the occupied territories to it[1].

Emphasizing this, **the Hague Convention on Respect for the Laws and Customs of War on Land of 1907** stipulates that (If the authority of a legitimate power is actually transferred to the hand of the occupying power, the latter, as far as possible, shall establish and guarantee security and public order, while respecting the laws in force in the country...[2]. When scrutinizing this text, we find that there is implicit indication of impermissibility of annexing the occupied territories as this text requires respect for the valid national laws, with which the permissibility of annexing the territories of this state to another state may not be perceived.

Based on the foregoing, we find that the status of occupation constitutes a temporary actual and realistic status, meaning that this status is subjected to a set of international legal rules regulating it in terms of time and place, the violation of which would result in ensuing responsibility. This would bring us in front of questioning about the legal ground for the responsibility to arise and then identify the forms of such responsibility, the contents of which are discussed in the next topic of the research.

## Second requirement

## Responsible of occupier

The occupying state shall bear full responsibility within the framework of taking the necessary measures to ensure compliance with the international humanitarian law, which sets forth several forms of the obligations that this state undertakes towards the state being under occupation. So, considering the responsibility of the occupier and the basis for this responsibility is very important, as it constitutes a legal guarantee of the rights of persons whom the law accords care and protection. Based on the foregoing, we will identify the basis of this responsibility, and then its forms in two branches divided as follows:

- First branch: The legal basis for occupier's responsibility

-Second branch: forms of the occupier's responsibility.

### First branch

### The legal basis for the responsibility of the occupier

We all know that the idea of international responsibility is the oldest of the legal principles that governed human communities throughout the ages, until this principle has transformed into an integrated legal system. Certainly, we are here talking about the responsibility of the occupying state particularly in the field of protecting civilian targets and cultural property, but we have to go back to the legal ground of this responsibility within the rules of international humanitarian law. So, if we learn that the American forces have carried out the following practices after occupying Iraq:

- Left 12,000 archaeological sites unprotected

- Left Iraqi museums vulnerable to looting and plundering

- Destroyed the national libraries by burning them, with the Iraqi universities facing the same fate.

- Most importantly, when informing the commanders of these forces were informed about these practices, no any deterrent actions were taken to protect these properties[3].

*1 Dr. Hisham Basheer and Dr. Alaa Al-Dhawi Sbeta, ibid, p. 36*
*2 Article 42 of the 1907 Hague Convention on Respecting the Laws and Customs of War on Land*
*3 Dr. Hisham Basheer and Dr. Alaa Al-Dhawi Sbeta, ibid, p. 168*





Thus, it becomes clear to us that the forces occupying Iraq insisted on violating the rules of principles of the international law, particularly:

-The Hague Convention of 1907

- First Protocol of 1945

- Second Protocol of 1999

Whereas, the second protocol clearly referred to the responsibility of states to protect cultural property in the case of armed conflict and stipulated that (the protection of movable and immovable property of major importance for the cultural heritage of the peoples, such as architectural, artistic, historical, worldly or religious buildings and archaeological sites, and sets of buildings that have historical or artistic value, and artifacts, manuscripts, books and other things of artistic, historical, archaeological value, the scientific collections and important collections of books and movable cultural archives described in the subparagraph in the case of armed conflict[1].

The Hague Convention of 1945, Article 5, obligated the occupying state to support the efforts of the national authorities in charge of the occupied territories to safeguard and preserve the cultural property in those areas, and in case the local authorities are unable to take effective measures, the occupying state should take such measures. The same convention committed the occupying state to prevent the export of cultural property existing in the lands it is occupying[2].

The 1999 protocol has added another obligation to the obligations of the occupying state, forbidding the unlawful transfer of such property with the intent of concealing or destroying it, or any excavation operations for such property[3].

Also, the Geneva Conventions of 1949 hold the United States responsible in accordance with Article (one) of the Convention, which stipulates: "The High Contracting Parties shall undertake to respect this Convention and ensure its respect in all cases). Also, Article (56) of the 19o7 Hague Convention holds the United States of America responsible for damage that has befallen the Iraqi civilian targets[4].

In addition, other United Nations resolutions establish the responsibility of the United States, notably the Security Council's two resolutions:

1483 for the year 2003

- 1546 for the year 2004

Both of which stipulate that the occupying state must protect Iraqi cultural targets and property and not to inflict any kind of damage on it and to return to Iraq what has been stolen.

### Second branch

### Forms of occupier's responsibility

After we have stated in the previous branch the basis of occupier's responsibility, now we move to the forms in which the occupier is held responsible, as follows:

**First: International responsibility**

Based on all of the foregoing, it becomes evident to us that both the United States and Britain bear responsibility for all the damage caused to Iraq in general, whether in its infrastructure or cultural proeprty, and to its civilian targets on the basis of the rule (the damage it sustained and the gain it missed) since the reason that instigated launching this war was the disarmament of Iraq's weapons of mass destruction. The facts have proven that these weapons did not exist, and there is no better evidence than the statement of Ambassador Paul Bremer

*1 Annex to the 1999 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict*
*2 Article 5 of the Hague Convention of 1945*
*3 Article Two, Paragraphs (A and C), of the Second Protocol of the Hague Convention of 1945*
*4 Article 1 of the Geneva Convention of 1949*

in his memoirs when he said (our soldiers have come to Iraq for nothing but to overthrow the tyrant[1] ) and this matter is an internal affair and not a duty of the United States of America , nor it is inconsistent with the provisions of the United Nations' Charter.

**The question here remains, is the United States alone responsible? Or the United Nations too?**

Over weeks of war, killing, destruction and looting of Iraq's wealth, no voice of the United Nations or the Security Council was heard, rather, the Security Council after several months – gave a mandate to the forces which it called the Multi-National Forces. Also, the United Nations, did not play an active role in following up on the enforcement of the two Resolutions (1483 and 1546), and the issue of the United Nations bearing part of the international responsibility is still controversial until now.

The world community has agreed to respect the international legal principles and rules to regulate their relationships, and based on the foregoing, they bear some obligations to achieve the goals of the world community in a society that enjoys international security and peace.

The world community is based on the mutual obligations between its parties without these obligations causing damage to any of the states, and otherwise, the states shall be responsible towards other states when they violate the international obligations in light of the rules of general international law embodied in the international treaties and agreements, primarily the United Nations Charter.

Among the basic rules in international law is the rule that force shall not be permissible in international relations, and any act in contravention of this rule shall be null and void. This matter carries the international responsibility of the respective state since occupation as an act represents the seizure of the territories of others by force and is banned internationally, and therefore it will entails international liability, as well as international criminal liability in the event of international crimes, in addition to the liability borne by the forces of occupation according to the national law of that state.

**Second: International criminal liability**

While Article (15) of the Second Protocol of 1999 annexed to the Hague Convention considered the acts committed during the armed conflict against cultural targets and property as a crime entailing punishment of its perpetrator, and has been introduced to confirm what is stipulated in the Fourth Geneva Conventions of 1949 and its first protocol of 1977. It is clear from the foregoing that the protocol has prioritized the protection of cultural property covered by enhanced protection under the second Additional Protocol of 1999, as the wide-scale destruction of cultural property protected by this Protocol and the Convention is considered as a crime[2].

Also, Paragraph (E) thereof considered theft, looting, embezzlement, or sabotage of cultural property under the Convention and the Second Protocol as a war crime which entails punishment against its perpetrators under (M/8) of the Statute of the International Criminal Court, which stipulates 9) Intentionally directing attacks against buildings designated for religious, educational, artistic, scientific or charitable purposes, and archeology, hospitals, and the assembly places of the sick and wounded, provided that they are not military targets[3].

Although the United States of America is not a party to the statute of the International Criminal Court, it is a party to the Geneva and Hague Conventions, and therefore is fully responsible for whatever happened to Iraqi cultural property, at least during the period of occupation, as we knew that it may also be responsible for the events that followed this era as a result of the procedures and decisions adopted by the authority of occupation.

*1 Paul Bremer, "My Year in Iraq", Rockef eller center, New York, 2006, p.375*
*2 Hisham Basheer and Alaa Al-Dhari, ibid, p. 184*
*3 Article 8 Paragraph 9/E of the Statute of the International Criminal Court*





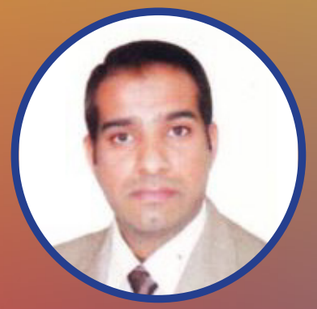
**Conclusion**

In conclusion of the foregoing, it can be said that strengthening the rules for the protection of cultural property is linked to the establishment of the international law rules concerning its protection and to ensure compliance by those addressed by these rules by repressing all behaviors that constitute a violation of the rules of protection, as cultural property is an international cultural heritage which requires mustering international efforts aimed at protecting it and redressing the damages befalling it. In the end, we find it very important to recommend the need to take the following procedures into consideration and attention, including:

1 activating the rules of international responsibility in confronting violations that took place during the time of occupation, to curb any behavior breaching the rules of international law.

2. Committing the occupier to bear responsibility through effective international decisions to be taken by the United Nations to put an end to violations against the state under occupation and protect its cultural property through international resolutions.

3. Setting up an Iraqi committee to be concerned with following up on abuses that have taken place against Iraqi cultural property during the period of occupation, and developing and integrated strategy on how to deal with these violations based on the rules of international law in general, and the rules of humanitarian law in particular.



**Assistant Professor Dr. Husam Abdulameer Khalaf**

- Specialized in International Humanitarian Law and International Criminal Law
- Lecture in College of Law Baghdad University
- Produced many paper research on Cultural Heritage

# Intangible Cultural Heritage in Iraq: between Ambition and Reality

In the light of the spread of globalization phenomena and the increase of the cultural and economic influence that threaten the cultural foundation of the community's existence. Intangible cultural heritage considered to be an important issue in maintaining the existence and continuity of the humanity components especially the indigenous people, because it works on enhancing the cultural identity, diversity, and creativity for generation and it has great importance in maintaining communities' cultural identity, therefore, it represents a global heritage to mankind. This heritage includes many divers' phenomena whether it was languages, or verbal traditions, or material culture creativities, or values systems. Or performance arts.

Unfortunately, the legal framework to protect the intangible heritage is not inclusive in comparing it to the tangible heritage as this type of heritage has a very comprehensive legal framework at both international and national level. It is easy to have inventory for the tangible cultural heritage whether it was huge or not, and it considered practically unchanged, and its protection consists of furbishing and maintaining measures or keep it in the museum environment to be safe from looting and sabotaging. The tangible cultural heritage is design to stay longer period after the disappearance of the artist, whereas the Intangible cultural heritage is closely linked to creative people as it's often transmitted verbally, as it is a result of the human creative ability that transmitted from one individual to another and from one generation to another. For this specific properties, intangible cultural heritage is different from the other forms of cultural heritage that leads to many difficulties that must be overcome to achieve an international instrument safeguarding the intangible cultural heritage according to 2002 convention.

In fact, on the Iraqi level we find, especially the legal framework, that the Heritage and Archeology Law no. 55 of the year 2002, didn't address the protection of the intangible cultural heritage. Although the importance of the intangible cultural heritage, it is outside the scope of the legal protection due to its intangible nature comparing it to tangible heritage components. There are no specific regulations in protecting this heritage, except some administrative orders or instructions issued by the Ministry of Culture that refer to the need to address this kind of heritage through establishing training centers and organizing carnivals to revive this heritage. Although in 2008, Iraq ratified the UNESCO Convention to safeguarding the intangible cultural heritage 2002 and including more than one component within the intangible heritage regulation, these regulations haven't been implemented seriously till now due to the lack of competent institutions in this field which is considered as a legal inadequacy concerning this matter.

On the terminological aspect, we find that using the term Iraqi Folklore that in principle consisted of four main categories that cover folk literature, customs and traditions, beliefs and folks norms as well as to what it called tangible culture, it also expresses an inaccuracy of meaning, because it considered in UNESCO convention as one of the main element to the intangible heritage and that it embodied in the knowledge, letter, traditional hand-crafts.

In fact, this requires an indication to the concept of intangible heritage and its elements, adding to that- the Iraqi legislator stand to it and the role that can be played by this concept in achieving national peace and enhancing human rights and sustainable development, as it considered to be apart of the cultural diversity and one of community stabilization core pillars.

# Intangible Cultural Heritage in Iraq: between Ambition and Reality

**Assistant Professor Dr. Husam Abdulameer Khalaf**
University of Baghdad / College of Law

## Introduction

In the light of the spreading phenomenon of globalization and the increasing economic and cultural powers that pose a threat to the cultural basis of the existence of societies, intangible cultural heritage is an important issue in preserving the existence and continuity of human components, especially indigenous peoples, because it seeks to promote cultural identity, diversity and creativity for several generations, and is of great importance in maintaining the cultural identity of the communities. Therefore, it represents a world heritage of mankind. This heritage includes many and miscellaneous manifestations, whether in terms of languages, oral traditions, traditional knowledge, material culture creations, value systems or arts of performances.

But unfortunately, we find that the legal framework for the protection of intangible heritage is not comprehensive compared to the tangible heritage, as there is today a very comprehensive legal framework for protecting this type of heritage, whether at the international or national level. So, it is easy to take stock of the tangible cultural heritage, whether it is huge or not, and is considered as being practically unchangeable.

Also, its protection is limited to measures of conservation and improvement or keeping in a museum environment, safe from theft and damage, while tangible cultural heritage is designed to survive long after the disappearance of artist. The fate of intangible heritage is closely associated with the creators because it is often transmitted by oral means, so it is the result of the creative ability of a person that is transmitted from one individual to another and from one generation to another. Given these features in particular, intangible cultural heritage differs from other forms of cultural heritage, and this has led to many difficulties that had to be overcome in order to adopt an international instrument protecting intangible cultural heritage according to the 2002 Convention.

At the Iraqi level, especially the legal framework, , actually we find that the Antiquities and Heritage Law No. 55 of 2002 did not address the protection of intangible cultural heritage, despite its importance, as it is outside the scope of legal protection due to its intangible nature compared to the components of tangible heritage. There are no special regulations to protect this heritage, except some administrative decrees or instructions issued by the Ministry of Culture that contain a reference to the need for caring for this heritage through establishing training centers and organizing festivals for the revival of this heritage. Although Iraq in 2008 ratified the 2002 UNESCO Convention for the Safeguarding of the Intangible Heritage and the inclusion of more than one component in the List of Intangible Heritage, these provisions so far have not been in force seriously due to the lack of institutions concerned with this field, which is a legal deficiency at the legal level in this regard.

In terms of terminology, we find the use of the term “folklore” in Iraq, which consists, in principle, of four main categories that cover popular literature, customs and traditions, beliefs and popular knowledge, in addition to the so- called “material culture”. It also expresses an inaccurate meaning, because it is considered one of the basic elements of intangible heritage in the UNESCO Convention, which are embodied in knowledge, crafts and traditional industries.

Actually, this requires stating the concept of intangible heritage and its elements in addition to the attitude of the Iraqi legislator towards it and the role this concept may play in achieving national peace and promoting human rights and sustainable development as being an integral part of cultural diversity and one of the basic pillars of stability of communities.





## First topic: Introducing intangible cultural heritage

The identification of intangible heritage is a major problem due to its invisible or limited nature, which has brought about many difficulties in its formulation and specification of its scope, especially that the need for a clear definition of the concept is very important for developing an appropriate modular tool and for the type of protection to be taken into account.

### *The first requirement: a concept with different associations*

The concept of intangible cultural heritage consists of various associations that make it difficult to define it in general terms. Rather, it must be looked into in its entirety in order to reach an overall understanding of this concept, and then review elements constituting it.

#### First: the definition of intangible heritage

The world community in the fifties of the twentieth century had started to have worries over the African oral traditions being exposed to the risk of not surviving, by launching for the first time the debate about a new type of heritage (intangible heritage)[1]. But, thinking about the latter has arrived late, when UNESCO earnestly began in the seventies to draw up the 1972 Convention for the Protection of the World Cultural and Natural Heritage, accompanied by the proposal by some states to subject the intangible heritage to the protection of the world cultural and natural heritage system, and although this proposal was not approved, it is clear that the protection of intangible heritage was of the object of interest during this period[2].

In view of the growing threat to intangible heritage, the world community has started to seriously study how to protect this type of heritage independently, after it initially used to be preserved within the framework of copyright, which prompted the Bolivian government to propose in 1973 to UNESCO looking into the question of drafting a protocol to protect the arts of popular and cultural heritage of all countries and adding it to the Universal Copyright Convention[3].

This request was sent to the Culture Sector in 1975 for study by UNESCO, because it was a largely broad issue and not simply a matter of copyright[4]. Although this proposal was rejected. Thinking about living heritage[5] was not delayed, as UNESCO and WIPO had been working closely from 1978 to 1982 to create a framework for the protection of forms of folkloric expression and traditional knowledge. However, it was agreed in 1978 that these two organizations would have different functions in this context, with UNESCO being responsible for the general guarantee, while the protection of intellectual property would be the WIPO responsibility[6].

UNESCO’s work in this regard has continued independently, embarking on a long process of terminology that expresses intangible heritage, sometimes referred to as (popular and traditional culture), (folklore), (oral and

*1 Caecilia Alexandre, L’insertion du concept de développement durable aux règles internationales et aux programmes nationaux et locaux de sauvegarde du patrimoine culturel immatériel. Regard croisé Québec - Maroc , Mémoire , FACULTÉ DE DROIT UNIVERSITÉ LAVAL QUÉBEC, 2013,p.8*
*2 Janet Blake, Elaboration d’un nouvel instrument normatif pour la sauvegarde du patrimoine culturel immatériel, Eléments de réflexion, Paris, UNESCO,2002 p 9.*
*3 This convention was approved in 1952 and revised in 1971*
*4 In 1977, the Director-General appointed an expert committee for the legal protection of folklore to conduct a comprehensive study of all issues relating to the protection of folklore. The Executive Committee of the Berne Union and the Intergovernmental Committee of the World Copyright Convention considered in 1977 that “...the problem of the protection of folklore entails many aspects... all of which are interrelated and call for a global study on the protection of folklore by UNSECO currently on a multi-discipline basis within a holistic integrated approach. However, special efforts should be made to find solutions to the problem of aspects of legal protection of folklore that are matters related to intellectual property...”, as quoted in the comment*
*5 The Bolivian government called for the addition of a protocol on the protection of folklore to the Universal Copyright Convention, and that the protection of popular art under copyright has not been well received by the world community, which rejected this stipulation.*
*Angelica Sola, «Quelques réflexions à propos de la Convention pour la sauvegarde du patrimoine culturel immatériel» dans Jares A.R Nafziger,Jullio Scovazzi, ed, Le Patrimoine culturel de l’humanité, La Haye, Académie de droit international de la Haye, 2008, p 492.*
*6 Burra Srinivas, «The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage» dansJares Nafziger A.R, Jullio Scovazzi, ed, Le Patrimoine culturel de l’humanité, la Haye, Academie de droit international de La Haye, 2008 p 531*

intangible heritage), (living heritage)[1], (Cultural and Intellectual Property, (Ethnological Heritage). In light of the diversity of texts that evoke this heritage, UNESCO has prioritized the drafting of a binding international instrument to unify the concept of living heritage[8].

In 2000, UNESCO asked Janet Blake to conduct a study on this subject in light of the 1972 Convention, and presented her work at a round table in Turin[2], where the term (intangible heritage) was chosen with proposing guidelines for UNESCO to formulate a specific definition[3]. Indeed, all this work has led to the term to be drafted into the final definition in the UNESCO Convention for the Protection of the Intangible Cultural Heritage (2003), where it is defined as:

(The practices, perceptions, expressions, knowledge and skills - and their associated instruments, objects, artifacts and cultural places - that communities, groups, and sometimes individuals, consider as part of their cultural heritage. This intangible cultural heritage, inherited from generation to another, is constantly recreated by communities and groups as consistent with their environment, interactions with nature and history, thus instilling in them a sense of their identity and continuity, and then enhancing respect for cultural diversity and human creativity (...etc)[4].

More specifically, intangible cultural heritage refers to:

- Traditions and forms of oral expression, including language as a medium for expressing the intangible cultural heritage;
- Arts and traditions of performances;
- Social practices, rituals and festivities;
- Knowledge and practices relating to nature and the universe;
- Skills related to traditional craftsmanship.

**Second: Elements of the intangible cultural heritage**

The definition is broad enough to cover multiple forms of intangible cultural heritage, and the constituent elements of the definition can be divided into the following categories.

## 1. Tangible and intangible components

The definition indicates that intangible cultural heritage means (the practices, representations, expressions, knowledge and skills - as well as tools, objects, artifacts and cultural spaces associated therewith)[5]. This covers three forms of intangible cultural heritage. The first category includes practices, representations, expressions, knowledge, and skills, which can really be named intangible forms of heritage, while the second form, in fact, covers some tangible components, which include tools, objects and artefacts as well, as some tangible objects fall under the category of intangible cultural heritage.

The third component of this part of the definition is represented by cultural spaces. Strictly speaking, this is unique in that it is neither an intangible expression nor a tangible object, but the space in which certain forms of intangible expressions are implemented. Yet, it must be emphasized here that the second and third forms of intangible cultural heritage as provided in the definition are not classified entirely independently but are

*1 Wim Van Zanten, «A la recherche d'une nouvelle terminologie pour le patrimoine culturel immatériel» Museum International, 2004, n°221-222 ; Vol 56, n°1-2. p 38.*
*2 Rapport final sur la table ronde internationale: «Patrimoine culturel immatériel-définitions opérationnelles», Doc. off. UNESCO (2001).*
*3 Caecilia Alexandre…op.cit.,p.11.*
*4 Article 2-paragraph 2-Convention on Safeguarding of Intangible Heritage of 2003*
*5 Article 2-Convention on Safeguarding of Intangible Heritage of 2003*



Legal aspects on the Protection of Iraqi Cultural Heritage, Baghdad, 28th February - 1st March 2022
Intangible Cultural Heritage in Iraq: between Ambition and Reality,
Assistant Professor Dr. Husam Abdulameer Khalaf

granted such status only in the context of their association with the first category of intangible cultural heritage[1]. Thus, this means that some of the tangible objects and cultural spaces used in the performance of intangible cultural expressions or their forms of expression are part of the intangible cultural heritage.

## 2. Dynamic nature

The other important element of the intangible cultural heritage is that communities and groups are constantly reproducing this heritage in response to their environment and their interaction with nature and their history, instilling in them the feeling of their identity and continuity and then respect for cultural diversity and human creative capability[2], which reflects the principle of community engagement[3], i.e., intangible cultural heritage is not fixed in its manifestations and expressions, but it is also subject to certain changes. It may be understood that intangible cultural heritage undergoes some changes in the process of its transmission from one generation to another, without losing the basic structure, because each generation has different experiences in their social and ecological context[4], i.e. the changes and processes of transformation associated with cultural practices are an essential component of intangible heritage, ad actually constituting an interaction between the tangible and the intangible.

It appears from the foregoing that the human being is the essence of the concept of this heritage and not only the guarantor of its expression, as individuals designate the intangible cultural heritage and also create and develop it[5]. It is worth noting in this regard that the participation of these communities[6] must take place on two levels:

1. They should be engaged in the government's initiatives which include maintaining inventory lists, and adopting legal, technical, administrative and financial measures, awareness and capacity building programs.

2. The other level, which is an important matter, is related to persuading the communities to go on with these cultural practices and performances.

## 3. Compliant nature with existing standards

Among other important elements is that intangible cultural heritage must be considered as being consistent with existing international human rights instruments, as well as with the requirements of mutual respect between communities, groups and individuals, and sustainable development[7].

This requirement assumes importance in the context of human rights, and apart from providing protection for human rights in general, there are some human rights instruments that address specific groups of people, so any inconsistency between a particular form of intangible cultural heritage and the human rights provision in these instruments would create a controversial situation, and thus this consistency requirement makes human rights instruments prevail over incompatible intangible cultural heritage. In other words, the practices and representations must be consistent with universally accepted human rights principles, thus excluding inconsistent practices and rituals, such as the social practices specific to gender[8] or differentiation ceremonies

*1 Burra Srinivas…op.cit.,p535*
*2 Article 2-Convention on Safeguarding of Intangible Heritage of 2003*
*3 Chiara Bortolotto, « Le trouble du patrimoine culturel immatériel », Terrain [En ligne], Le patrimoine culturel immatériel, Revue d'ethnologie de l'Europe, p.31.*
*4 Burra Srinivas…op.cit.,p536.*
*5 Caecilia Alexandre…,op.cit.,p.13*
*6 Communities are networks of people whose sense of identity or bond is born out of "a common historical relationship deep-rooted in the practice and transmission of their intangible cultural heritage or attached to it."*
*7 19 Article 2 (1)-Convention on Safeguarding of Intangible Heritage of 2003*
*8 "Life-cycle rites - birth; rites of passage/initiation rites; marriage-related rites, divorce, funerals; rites of ceremonies relating to kinship and tribal affiliations; …; differentiation ceremonies relating to status and prestige;*
*…; gender-based social practices; …; body-ornamentation (tattoos, piercing, painting)".*

associated with the status and prestige, or some practices localized in Africa, such as circumcision...etc[1].

The same provision applies in the case of some practices exercised by a particular community that might be conflicting with or distorting another community, as this may acquire vital importance, especially when such communities live together, which leads to societal repulsion, so intangible cultural heritage must respect the practices and beliefs of other communities as well. Examples of this kind can be found in countries where hierarchical social structures exist and the cultural forms of lower societies are viewed as inferior. In such cases, recognition of intangible cultural forms of communities that are high in society classes would lead to delegitimize the cultural practice of societies of lower class[2].

For example, in India, the priesthood in temples, which involves certain religious practices and recitation of hymns, which are primarily in Sanskrit language, symbolizes the dominion of the upper class over the lower classes, which is also reflected in different dimensions of life, where the untouchables in India, had been denied entry into temples for a long period of time, and this practice is followed in many places de facto until now[3]. The priesthood is practiced by people belonging to the Brahmin caste which occupies the highest position in the caste hierarchy of the sect, unlike the Dalit movements[4] which represent the lower or outcast classes in the caste hierarchy versus the dominance of Brahmanism in the intellectual and social life of India. Therefore, any recognition of, for example, the priesthood as intangible cultural heritage of India would invariably hurt the sentiments of many of the lower classes who are also a large majority.

The other aspect of congruence is the compatibility between intangible cultural heritage and sustainable development requirements. It is recognized that there is a reciprocal link between nature and culture, especially knowledge and practices related to nature and the universe. Also, the preservation of intangible cultural heritage cannot be based on cultural policies and procedures only, but also other regional, environmental, economic, tourism or other policies must be taken into consideration[5].

It is worth mentioning here that this compatibility provision does not allow expanding the scope of preventive measures to include intangible cultural heritage that is incompatible with the concept of sustainable development, and therefore, any form of intangible cultural heritage that involves the exploitation of nature must be compatible with the requirements of the concept of sustainable development as stipulated in the relevant international instruments[6].

## 4. Transitional nature (transmission from generation to generation)

The definition states that intangible cultural heritage is transmitted from generation to another, and this asserts that transmission occurs between groups of people instead of an existing institutional mechanism, many of which are confined to a particular community. Such transmission from one generation to another takes place in a somewhat informal manner that differs from what we observe in the formal method of education and institutional structures, in other words, mostly orally or by imitation, which confirms that local communities and cultural groupings are a major player in the process of creating and preserving this heritage, unlike other types, representing the principle of intergenerational equity, which refers to the idea of fulfilling the needs of current generations without prejudice to the ability of future generations to fulfil their own needs[7].

*1 Lankarani El-Zein Leïla. L'avant-projet de convention de l'Unesco pour la sauvegarde du patrimoine culturel immatériel : évolution et interrogations. In: Annuaire français de droit international, volume 48, 2002. p.635. Aussi. Tullio Scovazzi, La notion de patrimoine culturel de l'humanité dans les instruments internationaux. In J. Nafziger, & T. Scovazzi ,Le patrimoine culturel de l'humanité - The Cultural Heritage of Mankind, 2008 ,p104*
*2 Lankarani El-Zein…,op.cit.,p.35*
*3 Burra Srinivas…op.cit.,p549*
*4 The term "Dalit" is used to refer to the "scheduled castes," which make up the untouchables, making up 16.6 percent of India's population according to the 2011 Census of India. For more information on this topic, see the following website: Http://www.arabdiya.com/dhalit/. The term refers to "repressed and exploited persons". The term is taken from the Marathi language. The term became popular after the emergence of the "Dalit Panthers" movement in Maharashtra, India in the 1970s.*
*5 Véronique Guèvremont, Le développement durable au service du patrimoine culturel : À propos de la Convention pour la sauvegarde du patrimoine culturel immatériel, p.170- 172. Ethnologies, 36 (1- 2), 161–176. https://doi.org/10.7202/1037605ar.*
*6 Burra Srinivas…op.cit.,p537.*
*7 Caecilia Alexandre…,op.cit.,p.57.*





In other words, it is the creativity of the current generations inspired by the traditions of the ancestors and taking into account the interests of future generations, that guarantees the long-term protection of this heritage, which is reflected in the sustainable development philosophy referred to above[1].

## Third: Mechanisms for preserving the intangible heritage (safeguarding) or (protection)

The term safeguarding, which appears under the same title of the Convention was chosen, unlike the 1972 Convention, which uses the word "protection", a term generally used in legal texts relating to the field of tangible heritage[2], which refers to measures designed to prevent certain social practices from causing harm. The reference to "sauvegarde-safeguarding" is inspired by the 1989 Recommendation, which aims to "preserve" traditional and popular cultures[3], considering that the scope of the term "preservation" is broader than that assigned to the word "protection."[4]

According to the formulators of this term, the dynamic nature of the forms of intangible cultural expression, which differ from the invariability of tangible heritage, must be taken into account, as in fact the protection of tangible heritage aims to maintain the conditions of soundness and credibility of the element when it is registered (UNESCO / Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage). But the same term cannot be used towards practices and knowledge that are transmitted from generation to generation, therefore, the term safeguarding seemed to be more appropriate for reference to the constant evolution of this concept[5]. Safeguarding has been defined, according to the Intangible Heritage Convention, as:

(Measures aimed at ensuring the sustainability of the intangible cultural heritage, including identification, documentation, conduct of research, preservation, protection, promotion, prominence and transmission of such heritage, in particular through formal and non-formal education, and revival of various aspects of this heritage)[6].

Through this definition, we understand that safeguarding is a means of serving the renewal and continuity of heritage, that is, ensuring its permanent development and transmission, in other words the transfer of knowledge and know-how, including a focus on the processes involved in its transmission or communication from one generation to another rather than the reproduction of its tangible manifestations - Such as dance performances, songs, musical instruments or crafts. Some elements of the intangible cultural heritage may die out or disappear if they are not safeguarded, and here, as we have already indicated, it conflicts with protection or preservation, which revolves around repair or freezing in the ordinary sense of these terms, because there is the risk of fixing or freezing of the intangible cultural heritage .

The communities that take care of and practice this heritage are best suited to identify and safeguard it. The external parties can also contribute to its safeguarding, for example, they can support the communities in collecting and recording information about the elements of their intangible cultural heritage, or transmission of knowledge about intangible cultural heritage through more formal channels, such as school education or university. The promotion of information through the media is also a way to support the safeguarding of intangible heritage.

Yet, the intangible cultural heritage must not be preserved or revived at any cost, because, like any living being, it follows a life cycle and therefore some of its elements are destined to disappear after the birth of

*1 Caecilia Alexandre…,op.cit.,p.33.*
*2 Chiara Bortolotto, « Le trouble du patrimoine culturel immatériel », Terrain, Revue d'ethnologie de l'Europe, 2011.27. The term (protection) has already been used in the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, the Convention on the Means of Prohibition and Prevention of the Import, Export and Transfer of Illegal Cultural Property, November 14, 1970 and the World Heritage Convention, November 16, 1972.*
*3 Caecilia Alexandre ,…op.cit.,p.15.*
*4 Daphne Voudouri, Une nouvelle convention internationale relative au patrimoine culturel, sous le signe de la reconnaissance de la diversité culturelle : La Convention pour la sauvegarde du patrimoine culturel immatériel, Revue Hellénique de Droit International (RHDI), 57ème ANNEE, 1/2004 , p.126*
*5 Chiara Bortolotto…op.cit.,p.27.*
*6 Article 2 (paragraph 3)-Convention on Intangible Heritage of 2003*

new forms of expression, as some forms of intangible cultural heritage may no longer be considered relevant or feasible to the community itself[1]. In other words, intangible cultural heritage develops evolves according to the norms, customs and the space around it.

As for the scope of safeguarding, it includes identification, documentation, promotion, researching, evaluation and revival, which represent measures that distinguish safeguarding from protection.

- **Identification**: This term refers to the recognition of intangible cultural heritage in such capacity, and is the first step towards effective protection.

- **Documentation**: It is in the form of recording it on a physical medium in order to facilitate accessing it, and even if it fails to ensure viability, it is still somehow an effective means in preserving any of the manifestations of the respective intangible heritage and not to lose it[2].

- **Promotion**: It is a public awareness job, both of which seem to provide the younger generations with (transmission), which also requires taking positive and tangible measures, especially at the level of education.

- **Research**: We can say that it is the effort that must be known, to discover it, and moreover, the preservation and protection term refers to the idea of guaranteeing the preservation and protection of intangible heritage from damage and destruction[3].

- **Revival**: It may bring about some problems because one would wonder if it means that one should make efforts to revive practices, representations, etc., which have already fallen into disqualification and irrelevance. In fact, revival should not be likened to renaissance, nor is it intended to mean revival at any cost, but rather it is a process for providing circumstances that make it possible to return or resume certain practices, representations, etc., that fulfil the conditions that must be considered in relation to the intangible heritage, which offers some interest in a group or community[4].

## Second requirement: Elements of intangible heritage in the global list (the case of Iraq)

After our review of the concept of intangible heritage and its components, we are trying to highlight some of the elements of the Iraqi intangible heritage within the UNESCO World List, as follows:

### First: The Iraqi Maqam

The Maqam is widely known as the main tradition of Iraqi artistic music, covering a wide range of songs, accompanied by traditional musical instruments. This popular genre is also a wealth of information about the musical history of the region and Arab influences that have dominated for centuries, and which was registered in 2008 on the representative list of the human intangible cultural heritage.

The Iraqi maqam is similar, in its structure and instruments, to the family of traditional musical forms practiced in Iran, Azerbaijan and Uzbekistan. It covers many basic melodic genres and styles of tunes and includes spontaneous vocal parts that rely on regular rhythmic accompaniment and often lead to a set of lyrics. All the spontaneous talents of the lead singer (reciter) are represented in engaging in a complex dialogue with the orchestra (locally known as Chalghi) which accompanies him from beginning to end. The typical instruments are the Qanoon (zither) on a dulcimer, the Joza (spike fiddle -like), the four-stringed violin, the low-pitched drum, and the tambourine, which is a small tambourine. The Maqam parties are usually conducted in private

*1 UNESCO, Questions et réponses à propos du patrimoine culturel,p.2 -3.*
*2 Lankarani El-Zein Leïla…op.cit.,p.644*
*3 Angélica Sola… ,op.cit.,p.498.*
*4 Lankarani El-Zein Leïla…op.cit.p.644.*





gatherings, cafés, and theatres. Given its musical repertoire inspired by classical and popular Arabic poetry, the Maqam is revered not only by musicians and scholars, but also by the Iraqi people as a whole.

While many styles of Arabic music of the region have either disappeared or become westernised the Iraqi Maqam has remained almost intact and maintained in particular its ornamental vocal technique and spontaneous character. But, due to the current political situation, the Maqam concerts conducted for a large audience are increasingly rare and have become more limited to private circles. Yet, numerous recordings and concerts show that it is still highly appreciated and always received with great success.

### Second: Khidr Elias festivity and expression of wishes

This element was put in 2016 on the Representative List of the Intangible Cultural Heritage of Humanity. In February of every year, Iraqi communities honor Al- Khidr, who is a saint who, according to ancient beliefs, was mindful of the wishes of the participants, especially if they needed this.

In northern Iraq, families get together on a hill where the sanctuary of al-Khidr is said to be located. During the last three days of the month, they are dressed in traditional clothing, eat dishes which are specially prepared for the event and perform the Dabka dance( a country dance with stamping the feet). In central Iraq, members of the community join together on the banks of the Tigris River, where the sanctuary of greens will be established. They bring sugar, salt, henna, pastries, myrtle leaves, and lit candles placed on wood and are thrown across the river at nightfall to ask for their wishes to be fulfilled. If the candles are put out before reaching the shore, the wishes will be granted. In southern Iraq, they also bring myrtle leaves but only one candle is lit. If the candle is put out before reaching the other side, believers are encouraged to donate to the poor on Friday to have their wishes fulfilled.

Younger generations are learning this practice from older family members and at school, as shared familiarity with traditions helped ensure the social cohesion of communities.

### Third: Nowruz

This element was put in 2016 on the Representative List of the Intangible Cultural Heritage of Humanity, which corresponds to March 21 marking the beginning of the year in parts of Afghanistan, Azerbaijan, India, Iran, Iraq, Kazakhstan, Kyrgyzstan, Uzbekistan, Pakistan, Tajikistan, Turkmenistan and Turkey. It is known as Nowruz (“New Day”) or by other names in each of the respective countries, corresponding to a festivity comprising rituals, celebrations and other cultural events that are conducted over a period of about two weeks. An important tradition specific to this period is that individuals gather around a table decorated with objects symbolizing purity, clarity, life and wealth, to share a meal with their loved ones. On this occasion, the participants wear new clothing and visit their relatives, especially the elderly and their neighbours. Gifts are exchanged, especially for children. Usually these items are made by craftsmen. Nowruz also includes street music, dance performances, public rituals involving water and fire, traditional sports and craftsmanship.

These practices promote cultural diversity and tolerance and help build up community solidarity and peace. They are passed down from older generations to young people through observation and participation.

### Fourth: Services and hospitality provided during the Arbaeen pilgrimage

This element was put by Iraq in 2019 on the Representative List of the Intangible Cultural Heritage of Humanity, which is represented by the services and hospitality that are provided during the Arbaeen visit. It is part of a social practice prevalent in the central and southern regions of Iraq, from which processions of worshippers and pilgrims proceed to the Holy City of Karbala. The element is a social practice deeply rooted in Iraqi and

Arab traditions of hospitality - a monumental manifestation of philanthropy through volunteering and social mobilization, and is considered an element defining the country's cultural identity.

Every year, around the 20th of the Islamic month of Safar, the Iraqi province of Karbala receives millions of pilgrims marking one of the most famous religious pilgrimages in the world. They flow from different parts of Iraq or from foreign countries on foot to the shrine of Imam Hussein. More and more people volunteer their time and resources to provide the pilgrims with free services on their way. At least two weeks before the Arbaeen date, the associations set up makeshift facilities or reopen fixed facilities along the routes they take such as prayer rooms, boarding places and kiosks that provide various services. Many locals open their homes to accommodate pilgrims at night all free of charge, in addition to the bearers and experienced cooks, and families that provide hospitality facilities, and the administrative authorities of the Two Holy Shrines in Karbala, volunteering guides, volunteering medical teams, and generous donors.

## Fifth: Arabic calligraphy: knowledge, skills and practices

It was put in 2021 on the Representative List of the Intangible Cultural Heritage of Humanity. The Arab calligraphy refers to the artistic practice of writing Arabic script finely by hand, in order to express harmony, grace and beauty. This practice which can be transmitted through formal and informal education, uses the twenty- eight letter Arabic alphabet, written in a cursive line from right to left. It was originally designed to make writing clear and legible, and then gradually evolved into an Arabic-Islamic art used in both traditional and modern works.

The fluidity of Arabic scripts offers limitless skills, even on a single word, as the letters can be made longer and transformed into many patterns to create different styles. The traditional techniques use natural materials such as reeds and bamboo stems for the reed pen which is a writing instrument. The ink is made from natural ingredients such as honey, soot and saffron. The paper is hand-made and coated with starch, egg white, and alum. Modern calligraphy often uses synthetic markers and paints, and spray paint for calligraphy is used on walls, signage, and buildings. Craftsmen and designers also use calligraphy for artistic decoration, for example on marble, wood carvings, embroidery, and metal engravings. Arabic calligraphy is commonly used in Arab and non-Arab countries and is practiced by men and women of all ages. Skills are transmitted informally or through formal schools or apprenticeships.

Also, there is the knowledge, traditions and practices associated with the date palm, included in 2019 on the Representative List of the Intangible Cultural Heritage of Humanity, as a basic material for many forms of handicrafts and many social and cultural traditions, customs and practices, in addition to traditional crafts and technical knowledge related to waterwheels which were listed in 2021 on the Representative List of the Intangible Cultural Heritage of Humanity, which is a wooden wheel revolving around its axis, used on the banks of the Euphrates River in Iraq where the water level is lower than the level of neighbouring fields. The day of installing the waterwheel is the subject of festivities, including performances of poetry, songs and traditional dances.

## Second topic: the Iraqi intangible heritage and the problematic issue of protection

Although Iraq has ratified the Intangible Heritage Convention in Law No. 12 on 24/8/2009, and included many elements on the Representative List of the Intangible Cultural Heritage of Humanity issued by UNESCO, the scope of its application, whether at the legislative or practical level is still facing many difficulties due to the lack of clear handling.





## The first requirement: the development of concepts related to heritage at the legislative level

The attitude of the Iraqi legislator has developed regarding the terminology used to express the elements of heritage in Iraq, as more than one term has been used. We find that sometimes the term antiquities is used, and heritage at other times, but with different meanings and connotations. In addition, there are other secondary terms which are less important compared to the first two terms, so it is necessary to study the meaning and history of each of these terms.

## First: Antiquities

The word "antiquities" means all traces of human activity dating back to ancient times or recounting past events. This term was used for the first time in 1924, when the first law was enacted regarding the regulation of ancient archaeological matters in Iraq. The basis for using this term was the Turkish laws that were applicable in Iraq during the era of the Ottoman Empire. This term was defined at that time as (*everything that was built in Iraq or created or brought to it before the year 1118 AH or 1700 AD, including buildings, structures, ruins, and things that manifest art, science, craftsmanship, history, religion, literature or custom*)[1].

It is clear that this definition lacks legal accuracy through the use of generic terms, such as (whatever was built in Iraq or things that manifest art...etc.). In addition, this law set a rigid standard by using a specific date (1700 AD) to consider these objects as antiquities, and this means that these objects are characterized by stability regardless of the course of time element. The selection of this particular year can be interpreted as marking the end of the Islamic period which extends from 637 to 1700, with the start of the modern period that accompanied the industrial revolution in the world. This meaning of antiquities did not change much in Law No. 59 of 1936, where it has introduced an almost identical definition[2].

Later, in 1974, this term was developed when the First Amendment No. 120 was introduced in 1974, which defined antiquities as (the movable and immovable property that was built, made, produced, sculpted, written, drawn, or photographed by humans if it was two hundred years old or more)[3]. This definition, compared to the previous law, reflects two important developments: First, that the legislator has used more accurate and clearer legal terms by qualifying the antiquities as (movable and immovable property), and this means that all provisions relating to the distinction between property in civil law must be applied. The second development relates to the legislator's position on the chosen or specified period, as he has set the minimum number of years for these objects, that is, they must be 200 years old or more. This new approach is considered a more flexible criterion, because it takes into consideration the continuity in the time element, which logically leads to an increase in the scope of the antiquities every year after they attain the age prescribed in the law.

This term remained dominant in use until the issuance of the valid Antiquities and Heritage Law No. 55 of 2002, which introduced two important developments: The first is the expansion of the scope of antiquities, as it is no longer limited to the context of wonderful architectural and heritage elements and calli graphical drawings, but also applies to human elements, plants and animals. Antiquities were defined as (the movable and immovable properties that were built, made, sculpted, produced, written, drawn, or photographed by humans and whose age is not less than (200) two hundred years, as well as human, animal and plant structures)[4]. The second development is the use, for the first time, of another term besides the concept of antiquities, which is the term heritage, in order to cover some items that were not included within the scope of the term antiquities.

*1 Article 2 of the Ancient Antiquities Law of 1924*
*2 Article 1 of the Antiquities Law No. 59 of 1936 states that the word "antiquities" means "everything that was made or mastered by the human hand before the year 1700 AD and 1118 AH, such as buildings, caves, coins, sculptures, manuscripts, and all types of artifacts that indicate the conditions of science, arts, crafts, literature, religions, traditions and morals and politics in past generations)".*
*3 Article 1 of the First Amendment to the Ancient Antiquities Law 59 of 1936, No. 120 of 1974*
*4 Article 4- Paragraph 7 of the Law on Antiquities and Heritage of 2002*

## Second: Heritage

The position of the Iraqi legislator has developed regarding this concept, especially within the scope of Law No. 55 of 2002, where the first stage was embodied in the this law pre-issuance period, when there was only one term to express the traces of human activity, which is the concept of antiquities. As for the term heritage, it was not known until 1979 when Law No. 80 related to the establishment of the General Directorate of Antiquities and Heritage was issued[1]. This law represents the starting point for using this concept, which also included the first definition in this regard, when it defined it as (all movable and immovable properties that are less than two hundred years old, and which the public interest requires their preservation because of their historical, national, religious or artistic value)[2].

It seems through this definition that heritage is narrower in scope than the meaning of antiquities, as it is limited to things that are less than two hundred years old only. However, despite the explicit reference in the law, this concept has remained a dead letter in terms of application, due to the lack of regulations or instructions on the regulation of heritage characteristics. This situation continued until 1994, when some instructions were issued, among them we can mention Instructions No. 4 of 1994, according to which it was forbidden to take out the heritage and artistic materials, coins and notes related to the history of Iraq outside the country, while Statement No. (12) for the same year came to specify some of these properties that were prohibited from being taken out or exported, such as (artworks of pioneers, museum works, non-Iraqi artworks...).

Also, in 1995, the Ministry of Culture and Information issued instructions No. (3) regarding the regulation, circulation and sale of antiques and heritage materials, which are still in force until now[3]. Despite the issuance of these instructions, the heritage characteristic did not receive effective protection during this period due to the lack of legal mechanisms to ensure such protection.

As for the second stage, it is represented by the period of issuance of the current Law of Antiquities and Heritage No. 55 of 2002, where we note through this naming that the legislator, for the first time in relation to archaeological legislation, used the term (heritage) next to the term antiquities in order to refer to some other components of cultural heritage that rank lower to that of antiquities in the legal system. This term has been defined by law as (*those movable or immovable property that is less than 200 years old and has a historical, national, national, religious or artistic value, announced by a decision of the Minister*)[4].

In fact, the legislator in his definition of (heritage) has used the term (heritage materials) instead of the word "heritage", and the reason for this is due to the legislator's consideration that the concept of heritage includes both the tangible and intangible aspect, while the term "heritage materials" is limited to the tangible aspect only, and since the law is concerned only with the components of the tangible heritage, so it was necessary to refer to this explicitly by adding the word (materials) to the term "heritage". However, we note that it would have been more appropriate to also change the title of the law to become the Law of Antiquities and Heritage Materials instead of the Law of Antiquities and Heritage, because this name suggests to others that it deals with matters related to both tangible and intangible heritage. In addition, this law decided the age condition for these properties to be less than two hundred years, but the practical application by the General Commission of Antiquities and Heritage is to the contrary, as it goes to determine a minimum limit for considering these properties as heritage properties setting the condition that their age must not be less than around (50) fifty years[5]. This matter is completely similar to what is stipulated in the Instructions of the Ministry of Culture and Information No. (3) of 1995 regarding the trading in the above-mentioned heritage materials.

*1 Iraqi Gazette Issue 272 dated 9/7/1979*
*2 Article 1 of the Law of the General Establishment of Antiquities and Heritage No. 80 of 1979*
*3 According to Article 2 of these instructions, heritage materials are defined as (those materials that were made, produced, sculpted, written, drawn, or photographed by humans and whose age ranges between (50-1999) years, or what the Ministry decides as a masterpiece or heritage material) - The Iraqi Gazette No. 3562 dated 8/5/1995.*
*4 Article 4- Paragraph 8 of the Law on Iraqi Antiquities and Heritage of 2002*
*5 An interview with the head of heritage survey Alaa Husein on 24/4/2011*



Legal aspects on the Protection of Iraqi Cultural Heritage, Baghdad, 28th February - 1st March 2022
Intangible Cultural Heritage in Iraq: between Ambition and Reality,
Assistant Professor Dr. Husam Abdulameer Khalaf

The reason behind this difference may be reflected in the fact that the Antiquities and Heritage Law is one of the new laws that were adopted before the fall of Baghdad in 2003, so that there was no room for issuing regulations or other instructions explaining some of the new texts it has introduced, especially those related to heritage, which prompted the General Commission of Antiquities and Heritage later to rely on the old texts that addressed the same subject, contrary to what exists in the law.

As for the classification of heritage materials, they are ranked second in terms of importance as we have already explained, and they are divided into three main categories: Category (A) Category (B) Category (C)1: In principle, category (A) represents the buildings that are around 200 years old or less. As for the category

(B) it includes the buildings whose age is up to 100 years, and finally, the third category (C) includes the buildings whose age is up to 50 years or more.

This classification also depends, in addition to the age requirement, on several heritage architectural elements, which consist of a set of certain qualities that are required to be available in these heritage buildings, for example, Shanasheel (decorative balconies and facades), decoration, mosaic decorations, interlocked tiling, arches, columns, wood ... etc. in addition to the quality of the material used in construction, such as being pure clay or simple materials. These architectural elements are the basis for determining the category covering this heritage building. For example, if there is a heritage property aged within (100) one hundred years or less, but has excellent architectural characteristics, then it is in Category (A) on account of its importance.

The benefit of this classification is to know the level of protection that these characteristics enjoy. Heritage properties that fall into category (A), for example, benefit from higher protection compared to others, as it is not permissible, in principle, to make any alternation or change to them that would may lead to a change in its features and no approval is given in regard to it except in case of necessity. As for those which are in category (B), it is possible to grant permission to make some changes or modifications after submitting a request in this regard by the owner to the Directorate of Antiquities and Heritage. As for the features fall into the third category (C), it is possible to carry out all work related to demolition or total alteration, provided that the new construction is compatible with the manifestations of the architectural heritage in the area which houses many heritage buildings[2]. However, it is important to note that this classification applies only to real estate, while immovable property is equally important, whether ancient and modern[3].

## Third: Other terms

Besides these two main terms, there are other terms that are less important for making a reference to a small number of elements of cultural heritage. In Law No. 55 of 2002, we find that the legislator also uses another concept known as historical sites, which are defined as (those sites that were the scene of an important historical event or of historical importance, regardless of its age)[4].

In order of importance, these sites come in the third degree under the law after archaeological and heritage properties. This concept is, in principle, is narrower in scope compared to other concepts, because it is limited to real estate properties only. On the other hand, it is required that this property be linked to human political, cultural and economic activities in Iraq. This concept is not concerned with sites of exceptional value from an aesthetic, dynastic or anthropological perspective. Likewise, with regard to the age requirement, although here the law does not require any specific age for such property, practice has set a maximum number of years for these goods, which must be fifty years or less, as the historical sites are in fact a kind of immovable heritage properties that are less than fifty years old and that are linked to a history and political events related to Iraq[5].

*1 As stated by the head of heritage survey Alaa Husein on 24/4/2011*
*2 An interview with the head of Heritage Survey Alaa Husein on 24/4/2011*
*3 An interview with the head of heritage survey Alaa Husein on 24/4/2011*
*4 Article 4- Paragraph 9 of the Law on Antiquities and Heritage of 2002*
*5 An interview with the head of Heritage Survey Alaa Husein on 24/4/2011*

As for historical sites, it is clear that they are ranked last in terms of importance. This type of heritage lacks a specific classification, because it represents only a small amount of cultural heritage that does not exceed 50 years of age. Thus, these sites are often identified based on personal criteria relating to the people who had lived in these buildings as politicians or artists[1], without an association with the building.

Eventually, it seems to us that the concept of cultural heritage in Iraq refers to many terms that differ according to their nature and importance, and they are concerned with material aspects only. The reason for the multiplicity of these terms is due to the great archaeological wealth Iraq owns, which prompted the legislator to use more than one term in order to cover all the different periods in the past and the present. As for the reason for excluding immaterial aspects, it is due to several considerations, including considering intangible heritage a relatively recent concept at the international level that covers multiple concepts that are difficult to enumerate, in addition to the abundance of material aspects that require prioritization in protection and attention. compared to the non- material aspects.

## Second requirement: status of the intangible heritage within the scope of protection

As we have already explained, the title of Law No. 55 of 2002 as a law on antiquities and heritage prompts us to believe at first glance that the legislator has addressed the intangible heritage, but when analyzing the provisions of this law we found that the legislator was concerned with only protection of the tangible cultural heritage. Yet, there are other texts that refer to the protection of some components of the intangible heritage and indirectly, among which:

### First: at the constitutional level

The constitution, according to the hierarchy of rules theory, represents the basic basis of a generally effective legal system, which determines the promulgation and validity of laws that are lower in rank.

In the field of cultural heritage, we note, while reading the various Iraqi constitutions until 2005[2], that the rules of cultural heritage were rarely mentioned, with the exception of some references related to cultural and religious diversity, which represent the most important components of intangible heritage, for example provisions related to ensuring religious freedom, the practice of religious rites[3] and recognition of the rights of all minorities[4]. The insertion of these principles can achieve different goals, as it serves to establish a common national identity for several ethnic groups, as well as shedding light on the national culture prevailing in the country.

The absence of direct rules relating to cultural heritage has prompted the Iraqi legislator to give more importance to this issue in the new Iraqi constitution of 2005, whether in the preamble to the constitution, or in the body of the constitution, stating a set of explicit articles on the necessity of protecting cultural heritage, both the tangible and the intangible heritage. .

The preamble of the Iraqi constitution reflects three main issues[5], including a reference to the importance of the Iraqi cultural heritage by referring to ancient civilizations and their role in building the Iraqi society:

*1 There is, for example, one of the buildings belonging to the Iraqi artist Abdul Jabbar Kadhm, which was considered a historical site because of this artist's job, according to the statement of the Head of the Heritage Survey Department, Alaa Jasim Hussein, in an interview on 24/4/2011.*
*2 It should be noted that the number of Iraqi constitutions since independence until the present is (6) constitutions, which are, the first constitution known as the Basic Law of 1925, the 1958 constitution, the 1964 constitution, the 1968 constitution, the 1970 constitution, and finally the current constitution of 2005.*
*3 Articles of constitutions related to freedom of religion are (Article 13 of the Basic Law of 1925, Article 12 of the 1958 Constitution, Article 28 of the 1964 Constitution, Article 30 of the 1968 Constitution, Article 25 of the 1970 Constitution).*
*4 The minorities in Iraq are (Christians, Armenians, Shabaks, Turkmen, Yazidis, Baha'is, Gypsies, Mandaean Sabeans, Philean Kurds, blacks) - for more information. see the website of the Iraqi Minorities Council www.minoritiescouncil.org.*
*5 Among the other issues mentioned in the preamble to the constitution is the reminder of the crimes committed by the former regime against the Iraqi people, in addition to a definition of the philosophy of the political system to be applicable in Iraq.*





(*We are the sons of Mesopotamia, the homeland of the messengers and prophets, the shrines of the sanctified imams, the cradle of civilization, the makers of writing, the pioneers of agriculture, and the place of numeration. On our land, the first law established by man was enacted, and in our country the first line of the most ancient and just covenant of homeland politics was drawn, and on our soil the prophet's companions and saints had prayed, philosophers and scientists introduced their theories, and writers and poets have made creations...etc.)*

These first words in the constitution shed light on the importance of cultural heritage in Iraqi society as a distinct heritage and the society's desire to preserve it by adopting the necessary provisions. In this preamble, there is a reference to all the components of the cultural heritage, for example the religious, scientific, historical and cultural heritage, which have formed the basis from which the provisions of the Constitution relating to human rights, democracy, justice, freedom...etc. derived their value.

As for the provisions specifically related to the components of the intangible cultural heritage, they were represented in the second article of the 2005 Constitution, reflecting the increasing interest in religious heritage represented by buildings and places designated for the practice of religious rituals. This has been confirmed several times in the constitution, under Article 10 (Holy shrines, religious places in Iraq are religious and civilizational entities, and the state is committed to confirming and maintaining their sanctity, and ensuring their free practice of rituals). It has also stipulated under Article 43, paragraph 2, that (the State shall guarantee freedom of worship and the protection of its places). The religious places now have double protection. On the one hand, they enjoy protection granted by the Constitution, which prohibits violating their sanctity and on the other hand, they enjoy protection as established under the Antiquities and Heritage Law which provides for the protection of religious places as antiquities[1].

The constitution also contains other provisions related to intangible heritage. Linguistic diversity has been taken into consideration when the Iraqi constitution was legislated[2], and linguistic diversity has been officially considered by UNESCO as one of the components of the intangible heritage of humanity[3]. In this regard, we find that the Constitution Article 4, paragraph 1, stipulates that (the Arabic language and the Kurdish language are the two official languages of Iraq, and guarantees the right of Iraqis to educate their children in the mother tongue, such as Turkmen, Syriac, and Armenian, in governmental educational institutions...etc.). Paragraph (4) of the same article also indicated that (the Turkmen language and the Syriac language are two other official languages in the administrative units in which they constitute a population density). In addition to these languages, the Iraqi constitution has given the right to each region or governorate to adopt any other local language and to consider it a complementary official language if the majority of its residents so decided by a general referendum, and this is confirmed in the Constitutional Article 4, paragraph 5 of.

In fact, all of these articles are considered as new articles compared to previous constitutions, converging with recent international developments in the field of intangible heritage, especially the Intangible Heritage Convention of 2003, as well as the 2005Convention on the Protection and Promotion of Diversity and Cultural Expression, which considers linguistic diversity as one of the main components in cultural diversity[4].

As for the spiritual and religious aspects, there are many constitutional articles that stress the need to pay attention to the protection of different religions and religious sects, in addition to ensuring the freedom to

*1 See articles 10, 11 and 47, paragraph 1 of the Antiquities and Heritage Law No. 55 of 2002.*
*2 Dr. Husam Abdul Ameer Khalaf, "The Legal System of Cultural Heritage in Iraq", Al-Saisaban Bookstore, Iraq, 2014, p. 115.*
*3 The languages of the world are currently passing through significant weakness and are in danger of extinction. Almost 50% of languages are actually threatened with extinction, with one language disappearing on average every two weeks. 90% of languages are likely to disappear during this century.*
*See the website: http://anemoc.org/sites/default/files/DOCUMENT%20CG%20DU%20220312.pdf. (25/03/2012).*
*The number of languages in danger in Iraq is 8, including: Adyghe language, which is called in the Arab countries the language (Circassian)language which is considered a weak language; Extinct languages are Judoo-Araméen Barszani, lishana deni, and lishanid noshan. Languages in a critical situation (in peril) include Mandaean and Hawrami, soureth and Western Armenian. For more information, see the UNESCO Atlas of the World's Endangered Languages: http://www.unesco.org/culture/languages-atlas/index.php?hl=ar&page=atlasmap&cc2=IQ.*
*4 Article 4 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005 states that (Cultural diversity reflects the multiple ways in which the cultures of groups and societies are expressed. These expressions are transmitted within and between groups and communities).*

practice religious rituals. For example, Article 2 states that (the Constitution guarantees the preservation of the Islamic religious identity of the majority of the Iraqi people, and enshrines the religious rights of all individuals to freedom of religious belief and practice, such as Christians, Yezidis, and Mandaean Sabeans)[1]. Also, according to Article 3 of the Constitution (Iraq is a country of multiple nationalities, religions, and sects...etc.), and Article 43, paragraph 1, states that (followers of every religion and sect are free to: A- Practice religious rites, including Husseini rites).

In fact, the reason for the increasing interest of the 2005 Constitution in religious rites is due to the fact of the widespread violations committed by the former regime against some sects, especially the Shiite sect, which was prohibited from practicing the rites or ceremonies called (the Husseini rites).

Finally, the Constitution has included a reference to the necessity of strengthening cultural policy and adopting measures aimed at highlighting the Iraqi cultural heritage. Under Article 35 (the State shall take into account the cultural activities and institutions in proportion to Iraq's civilizational and cultural history, and is keen to adopt genuine Iraqi cultural orientations).

The state's interest in cultural aspects or institutions can be achieved by many means: On the organizational side, it is through the performance of certain cultural activities through which the Iraqi heritage can be revived, as is the case, for example, with the Babylon International Cultural Festival, which included many ancient cultural and popular aspects which aimed to highlight the various civilizations and nations that had ruled Iraq and its cultures[2]. As for the financial aspect, it can be through financial assistance granted to cultural organizations and institutions, artists and other those working in the field of culture with the aim of developing and promoting the free exchange of ideas in addition to contributing to the preservation of the traditional Iraqi heritage.

## Second: on the legal level

Unlike some countries, Iraq does not have a code that includes all the provisions related to the protection of cultural heritage components[3], but these provisions are stipulated in several laws, which can be divided into two types: The first section includes laws that provide direct protection represented by the laws of antiquities and heritage, which are too far from providing protection for intangible heritage because they are limited to material components. As for the second section, it includes those that provide indirect protection, i.e. the set of provisions included in other legislations that are not directly related to the cultural heritage, but contribute to providing protection for it. We mention, for example:

## 1. Protection under Penal Code No. 111 of 1969

We find that there are some provisions in the Penal Code that can be applied in the field of intangible cultural heritage, especially the scope of crimes that harm religious sentiment, and they mean a group of behaviors or acts that include violations against the beliefs of religious sects or their buildings or disregarding their religious rituals. In this regard, we find that the Penal Code stipulates in Article 372, paragraphs 1 and 3 that (a penalty of imprisonment not exceeding three years shall be meted out on whoever destroys, damages, distorts or desecrates a *building that is prepared for performing the rituals of a religious sect, a symbol or something else that has religious sanctity ...etc.*).

*1 Yazidism is an ancient religion dating back to the Sumerian period in Mesopotamia. The vast majority of Yazidis live in Iraq, and there are about 600,000 people. They belong to the Kurdish ethnicity and speak the Kurdish dialect Krmanji. The Mandaeans, also called Sabeans or Sabean Mandaeans, are estimated to number about 30,000 to 40,000 Iraqi Mandaeans, and their original location is in southern Iraq, but there are approximately 10,000 Mandaeans living in Iran. Most of the Mandaeans have migrated from southern Iraq to the capital, Baghdad. They are the disciples of John the Baptist, who is considered to be their last prophet and a central figure in their religion. Their most important ritual is baptism, which is carried out in rivers, and some of their elders still speak the ancient Aramaic language, and their writings are in Aramaic, and most of the Mandaeans work in the field of silver or gold or as blacksmiths.*
*S. Hanish, "Christians, Yazidis, and Mandaeans in Iraq: a survival issue", Digest of Middle East Studies. Spring, 2009, p. 8-11.*
*2 At the international level, it is worth noting, for example, that there was a cultural festival in the Leiden Museum, the Netherlands, which was opened under the auspices of the Iraqi Embassy in the Hague on January 27, 2009 to introduce the Dutch people to the Iraqi cultural heritage.*
*3 In France, for example, we find a code that contains all the provisions and laws relating to the protection of cultural heritage.`*





On the other hand, there is a treatment within the scope of intellectual property crimes. Article 476 of the Penal Code states (without prejudice to any more severe penalty stipulated by law, a fine shall be inflicted on whoever infringes on the intangible property rights of others protected by law or an international convention to which Iraq has acceded. ... etc.). This stipulation applies to intangible cultural heritage as it is a heritage property similar to literary, industrial or commercial property[1].

## 2. Intellectual property laws

The scope of protection includes some components of the intangible heritage under the Law of Protection of Copyright and Related Rights No. 3 of 1971, as it was limited to innovative intellectual compilations, and it means every mental product, regardless of how it is expressed, whether by writing, drawing, sculpting or otherwise and that its production must be within a tangible physical framework, while the intangible is outside the scope of protection, which is a requirement that can be achieved with the intangible heritage. We find that most of its components and forms can be preserved as literary or artistic works, as bodies have been established to document this heritage in special records that achieve the required materiality attribute.

## 3. Document Safeguarding Law No. 70 of 1983[2]

The main objective of this law, according to its first article, is (to safeguard the documents or documentary units that express the values, practices, heritage, rights and material and moral properties of the state and society, especially those related to the work of the National Assembly, the Council of Ministers, ministries and other state departments and the socialist and mixed sectors... etc.).

These documents are classified into three basic categories[3]: The first is technical documents, and it means documents that organize or express specialized qualitative activity. The second type includes the financial documents that regulate the financial matters of the department or that express its financial status. The third type includes administrative documents that organize or express the administrative activity that helps the department achieve its goals.

This law is mainly concerned with the protection of the state-owned documents, and in this regard the law warrants an obligation on the departments to deposit the original documents with the National Center for Documents if they are of historical, heritage, scientific or technical importance, at the discretion of the department to which these documents belong, in coordination with the Center[4].

The law also required the establishment of a permanent committee called (the Documents Evaluation Committee) in each department to be tasked with supervising the maintenance, and evaluation of documents belonging to it, and organizing them in records and lists in cooperation with the National Center for Documents[5].

## Third: at the institutional level

The first institution for intangible heritage (folklore) was established in Baghdad in 1970 under the name of Craft Training Center with the aim of taking care of popular heritage through identifying professions, industries and popular arts, and reviving and safeguarding them from extinction. At the same time, in 1971, the Folklore Center Regulation No. 18 was issued in the Ministry of Culture in order to study popular heritage, which includes literature, dancing, and traditional popular costumes, in addition to preparing research and holding exhibitions to preserve and document this heritage[6]. This center includes eight main departments

*1 Mohammad Ismail Juma'a, "Safeguarding the Intangible Cultural Heritage in International Law", Master's Thesis, College of Law / University of Baghdad, 2020, p. 121.*
*2 Iraqi Gazette No. 2947 dated 11/7/1983*
*3 Article 4 of the Document Safeguarding Law No. 70 of 1983*
*4 However, there are some documents that are excluded from this obligation, due to their own nature, and they include security, military, and political documents. Article 2, Paragraph 4 of Document Safeguarding Law No. (70) of 1983.*
*5 Article 7 of the Document Safeguarding Law No. 70 of 1983*
*6 Article 3 of the Folklore Center Regulation No. 18 of 1971*

dealing with the majority of the components of the intangible heritage[1].

Later, in 1986, this Center joined the Vocational Training Center to become the Popular Heritage Department. In addition to this institution, there are also other specialized centers at the governorate level whose activities are limited to an interest in the old customs and traditions of the city in which they are located due to their special importance. We can mention, for example, the Popular Heritage Center in Basra, in south of Iraq (Visual Popular Heritage Centre)[2]. This center aims to preserve the heritage of the city of Basra, highlight the various aspects of visual popular heritage and popular arts and sponsor them, pay attention to popular costumes and seek to spread folkloric culture[3]. Another example is the Salahuddin Documents and Heritage Center Instructions No. 35 of 1992- Iraqi Gazette Issue No. 3399 dated 30/3/1992[4], which aims to print and publish whatever is related to the heritage and history of this province.

The concept of intangible heritage, especially popular heritage (folklore), is widely and commonly used in Iraqi circles. It is defined as (a group of customs, traditions, values, arts, crafts, skills and various popular knowledge that the community created and formulated through its long experiences and which individuals circulate and learn spontaneously and stick to them in their behavior and dealings as they represent distinct cultural patterns tie the individual to the community)[5]. This definition is very close to the definition adopted by UNESCO in the Convention on the Intangible Heritage of 2002, that it is (the entirety of cultural, traditional and popular creations derived from a community and transmitted through traditions, such as languages, stories, tales, music, dances, martial athletic arts, festivals, medicine...etc. )[6].

Folklore in Iraq consists, in principle, of four main categories that cover popular literature, customs and traditions, beliefs and popular knowledge in addition to the so-called material culture which is represented by some old popular crafts that include, for example, ornaments and pottery, carving on wood and metal, weaving and handmade carpets, in addition to the old popular costumes76. What draws our attention about the above-mentioned categories is the fourth category which is given the term " material culture" which includes various popular crafts, although this type represents, originally, one of the basic elements of the intangible heritage in the UNESCO Convention, which is embodied in knowledge and crafts and traditional industries.

In fact, this misconception is based on the belief that these popular crafts would lead to the production of material things such as pottery, carpets, ceramics ... etc., and accordingly, they must also be described as material culture, without taking into account the knowledge and skills that are the basis of these popular crafts!

It appears from the foregoing, that the intangible heritage in Iraq, despite its importance, is outside the scope of legal protection due to its intangible nature compared to the components of the tangible heritage, as there are no special regulations protecting this heritage, except for some administrative orders or instructions issued by the Ministry Culture that include a reference to the need to pay attention to this heritage through establishing training centers and organizing festivals to revive this heritage. Although Iraq in 2008 ratified the UNESCO Convention for the Safeguarding of the Intangible Heritage 2003, these provisions have not yet been enforced seriously due to the lack of institutions concerned in this field.

*1 Article 43 of the Folklore Center Regulation No. 18 of 1971*
*2 Instructions No. 55 of 1993- Iraqi Gazette Issue No. 3445 dated 15/2/1993*
*3 Article 2 of Instructions No. 55 of 1993*
*4 Instructions No. 35 of 1992- Iraqi Gazette Issue No. 3399 dated 30/3/1992*
*5 Wi'am Ahmad Hamza - Lectures delivered to students of the Craft Institute for Popular Arts - Department of Popular Arts - Ministry of Culture - 2011.*
*6 See Article 2, paragraph 1, of the 2002 UNESCO Convention for the Protection of the Intangible Heritage.*



Legal aspects on the Protection of Iraqi Cultural Heritage, Baghdad, 28th February - 1st March 2022
Intangible Cultural Heritage in Iraq: between Ambition and Reality,
Assistant Professor Dr. Husam Abdulameer Khalaf

## Conclusion:

The issue of intangible cultural heritage is an important issue facing the world community in general and the national community in particular, that requires urgent and effective handling due to globalization and the increasing electronic advancement that threatens it given its fragile and intangible nature. For Iraq, intangible heritage is also of great importance in preserving the cultural identity of the society, which requires increased attention by the Iraqi legislature and the competent authorities in order to develop a comprehensive legal framework for safeguarding and preserving it through documentary studies and to maintain the human context in which it was established and to maintain it through integration with the components of the tangible heritage, as they are both two basic components of the existence and sustainability of the society.

## Recommendations

1. The need for developing legislative treatments of the components of the Iraqi intangible heritage in addition to the tangible heritage;
2. The need for recognizing the importance of the intangible heritage of the Iraqi society and the important role of the holder of traditions in the creation, maintenance and transmission of this heritage;
3. Recording and making inventory of oral heritage, related customs which are in danger of disappearance (including languages) and traditional crafts;
4. Establishing competent institutions and entities, at the national level, to ensure the safeguarding, preservation, and protection of the intangible heritage present in their territory and transmitting it to future generations;
5. Preventing any act that would deteriorate, diminish, alter or in any other way misuse the intangible heritage in the territory of states;
6. Cooperating with other parties where the intangible heritage belongs to communities living in more than one state;
7. engaging the tradition holders in the preservation, planning and management of intangible heritage.

## Sources and references

### Arabic references

1. Husam Abdul Ameer Khalaf, "The Legal System of Cultural Heritage in Iraq", Al-Saisaban Bookstore, Iraq, 2014.
2. Mohammad Ismail Jum'ah, "Safeguarding the Intangible Cultural Heritage in International Law", Master's Thesis, College of Law / University of Baghdad, 2020.
3. Wi'am Ahmad Hamza - Lectures delivered to students of the Craft Institute of Popular Heritage - Department of Popular Arts - Ministry of Culture - 2011.

### Laws and Official Texts

1. Old Antiquities Law of 1924.
2. Antiquities Law No. 59 of 1936
3. Law of the First Amendment to the Antiquities Law No. 59 of 1936, No. 120 of 1974.
4. Antiquities and Heritage Law No. 55 of 2002.
5. Law of the General Establishment for Antiquities and Heritage No. (80) for the year 1979.
6. Document Safeguarding Law No. 70 of 1983.
7. Folklore Center Law No. 18 of 1971.
8. Instructions No. 55 of 1993 - The Iraqi Gazette No. 3445 dated February 15, 1993.
9. Instructions No. 35 of 1992 - Iraqi Gazette No. 3399 dated 3/30/1992.

### International conventions

1. The 2003 Convention for the Safeguarding of the Intangible Heritage.
2. Convention on the Protection and Promotion of the Diversity of Forms of Cultural Expression of 2005

### Foreign references

1. Angelica Sola, «Quelques réflexions à propos de la Convention pour la sauvegarde du patrimoine culturel immatériel» dans Jares A.R Nafziger,Jullio Scovazzi, ed, *Le Patrimoine culturel de l'humanité*, La Haye, Académie de droit international de la Haye, 2008.
2. Burra Srinivas, «The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage» dansJares Nafziger A.R, Jullio Scovazzi, ed, *Le Patrimoine culturel de l'humanité*, la Haye, Academie de droit international de La Haye, 2008.
3. Caecilia Alexandre, L'insertion du concept de développement durable aux règles internationales et aux programmes nationaux et locaux de sauvegarde du patrimoine culturel immatériel. Regard croisé Québec - Maroc , Mémoire , FACULTÉ DE DROIT UNIVERSITÉ LAVAL QUÉBEC, 2013.
4. Chiara Bortolotto, « Le trouble du patrimoine culturel immatériel », Terrain, Revue d'ethnologie de l'Europe, 2011.



Legal aspects on the Protection of Iraqi Cultural Heritage, Baghdad, 28th February - 1st March 2022
Intangible Cultural Heritage in Iraq: between Ambition and Reality,
Assistant Professor Dr. Husam Abdulameer Khalaf

5. Daphne Voudouri, Une nouvelle convention internationale relative au patrimoine culturel, sous le signe de la reconnaissance de la diversité culturelle : La Convention pour la sauvegarde du patrimoine culturel immatériel, Revue Hellénique de Droit International (RHDI), 57ème ANNEE, 1/2004 .
6. S. Hanish, «Christians, Yazidis, and Mandaeans in Iraq: a survival issue», *Digest of Middle East Studies*. Spring, 2009.
7. Janet Blake, *Elaboration d'un nouvel instrument normatif pour la sauvegarde du patrimoine culturel immatériel, Eléments de réflexion*, Paris, UNESCO,2002.
8. Lankarani El-Zein Leïla. L'avant-projet de convention de l'Unesco pour la sauvegarde du patrimoine culturel immatériel : évolution et interrogations. In: Annuaire français de droit international, volume 48, 2002. Aussi. Tullio Scovazzi, La notion de patrimoine culturel de l'humanité dans les instruments internationaux. In J. Nafziger, & T. Scovazzi

,Le patrimoine culturel de l'humanité - The Cultural Heritage of Mankind, 2008,

Véronique Guèvremont, Le développement durable au service du patrimoine culturel : À propos de la Convention pour la sauvegarde du patrimoine culturel immatériel. Ethnologies, 36 (1-2), 161–176. https://doi.org/10.7202/1037605ar.

9. Wim Van Zanten, «A la recherche d'une nouvelle terminologie pour le patrimoine culturel immatériel » Museum International, 2004, n°221-222 ; Vol 56, n°1-2.

Project leaders: Christiane Burrell and Silvio Mele
European Union Advisory Mission in Iraq (EUAM Iraq)
Royal Tulip Al-Rasheed Hotel
Yafa Street, International Zone
Baghdad, Iraq
chp@euam-iraq.eu
Printed by: ALSHAMIL Co. Ltd.
Photographs: Ali Kitoo