

# XVIII

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## Protection of Cultural Property: The Legal Aspects

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**D**r. Jean-Philippe Lavoyer's paper, *Should International Humanitarian Law be Reaffirmed, Clarified or Developed?*,<sup>2</sup> provides an excellent overview of international humanitarian law and touches briefly on the need for the protection of cultural property during armed conflict.

The principal law of war treaty provisions protecting cultural property are found in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention)<sup>3</sup>; its First Protocol,<sup>4</sup> also adopted in 1954; and its Second Protocol of 1999.<sup>5</sup> The following substantive areas of the Hague Convention and the Second Protocol are, in my view, those that have the primary impact on the conduct of military operations:

- Safeguarding of cultural property (Article 3 of the Hague Convention and Article 5 of the Second Protocol);
- Respect for cultural property (Article 4 of the Hague Convention and Articles 6, 7 and 8 of the Second Protocol);
- Military measures (Articles 7 and 25 of the Hague Convention);
- Protection of cultural property in occupied territory (Article 5 of the Hague Convention and Article 9 of the Second Protocol);

<sup>1</sup>The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

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- Special protection under the Hague Convention and enhanced protection under the Second Protocol (essentially Chapter II of the Hague Convention and Chapter 3 of the Second Protocol); and
- Sanctions (Article 28 of the Hague Convention and Chapter 4 of the Second Protocol).

### ***Safeguarding of Cultural Property***

Under Article 3, States party to the Hague Convention are to undertake the safeguarding of cultural property through the taking of appropriate measures in peacetime against the foreseeable effect of armed conflict. Such measures only address property situated in the territory of the State concerned. The Convention does not define the nature or scope of the measures; it leaves those questions to the discretion of the State in question. This omission is remedied by Article 5 of the Second Protocol, which provides for the following preparatory peacetime measures: the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property. It should be stressed that the safeguarding measures may prove helpful not only in case of armed conflict but also in the event of natural disaster or as a highly effective weapon against theft.

### ***Respect for Cultural Property***

Article 4 of the Convention provides for respect for cultural property. Such respect consists in two mutually corresponding obligations of State parties: (1) to refrain from the use of cultural property and its immediate surroundings or of the appliances for its protection, situated both within their own territories as well as within the territory of other State parties, for purposes likely to expose it to destruction or damage in the event of armed conflict; and (2) to refrain from any act of hostility directed against such property.<sup>6</sup>

The next paragraph of Article 4 introduces a very important exception to this rule —the waiver of these obligations when required by military necessity.<sup>7</sup> This waiver is referred to in Article 4.2, which is applicable to generally protected cultural property as defined in Article 1 of the Convention. It permits a waiver only where required by “imperative military necessity.” Withdrawal of immunity is addressed in Article 11.2 for cultural property under special protection (a subject to

which I will return). Such withdrawal is permitted only in “exceptional cases of unavoidable military necessity.”

Article 4.2 of the Convention permits the State parties to use cultural property and its immediate surroundings or of the appliances in use for its protection, situated within their own territory as well as within the territory of other States parties, for military purposes and to conduct hostilities against such property “where military necessity imperatively requires such a waiver.” The concept of “unavoidable military necessity” in Article 11.2 has stricter conditions for its application to cultural property under special protection. In particular, the immunity may be withdrawn “only for such time as that necessity continues.” Article 11.2 further provides that “Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger.” Finally, whenever circumstances permit, an advance warning is to be provided to the opposing party a reasonable time in advance of the withdrawal of immunity.

Regrettably, the lack of a universally accepted definition of military necessity leaves room for a loose interpretation of these provisions or even their abuse. Three interesting definitions illustrate this issue. The first is from the Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber. Known as the Lieber Code, they were promulgated as General Orders No. 100 by President Lincoln on April 24, 1863. They provide, in part, as follows:

Article 14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

Article 15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

Article 16. Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but

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disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessary difficult.”<sup>8</sup>

The second definition comes from Morris Greenspan who defined military necessity as “the right to apply that amount and kind of force which is necessary to compel the submission of the enemy with the least possible expenditure of time, life and money.”<sup>9</sup> Finally, Black’s Law Dictionary states that military necessity is “[a] principle of warfare that permits enough coercive force to achieve a desired end, as long as the force used is not more than is called for by the situation.”<sup>10</sup> Black’s provides a background reference to the 1907 Hague Convention on Laws and Customs of War.

It is important to point out that military commanders were aware of this ambiguity and in this connection General Eisenhower’s order of December 24, 1943 stated: “Nothing can stand against the argument of military necessity. This is an accepted principle. The phrase ‘military necessity’ is sometimes used where it would be more truthful to speak of military convenience or even of personal convenience. I do not want it to cloak slackness or indifference.”<sup>11</sup> For this reason, the Second Protocol amplifies the provisions regarding military necessity as it relates to both cultural property under general protection and that under enhanced protection.

What are the main substantive issues contained in the new definition of military necessity in the Second Protocol? In my opinion, Article 6 includes two new elements: first, a waiver of the respect obligation on the basis of imperative military necessity when cultural property has now been transformed, because of the manner in which it is being used, into a military objective (Article 6(a)(i)); and second, tightening the circumstances under which the obligation not to use cultural property for purposes likely to expose it to destruction or damage (Article 6(b)) may be waived. The first provision concerns the attacker, while the second applies to the defender. In addition, Article 6(a)(i), which is based on Article 52.2<sup>12</sup> of the 1977 Additional Protocol I on the Protection of Victims of International Armed Conflicts to the four 1949 Geneva Conventions, thus makes a nexus between the Second Protocol and the definition of military objective under Protocol I. Article 13, which *de facto* develops the definition of “unavoidable military necessity” under Article 11.2 of the Convention, brings in two new elements: the decision to attack must be ordered at the highest operational level of command and the obligation to provide advance warning. It is necessary to point out that to effectively implement these abstract definitions they must be further clarified in military manuals and rules of engagement and must be interpreted in good faith.

To conclude on the issue of military necessity, let me quote Burrus M. Carnahan, an acknowledged expert in the law of armed conflict:

Today, military necessity is widely regarded as something that must be overcome or ignored if international humanitarian law is to develop, and its original role as a limit on military action has been forgotten. As a result, the principle has not been applied in new situations where it could serve as a significant legal restraint until more specific treaty rules or customs are established.<sup>13</sup>

Article 4.3 of the Convention introduces the obligations to prohibit, prevent and put a stop to theft, pillage, misappropriation of, and acts of vandalism against cultural property. State parties are also required to refrain from requisitioning cultural property located in the territory of another party (Article 4.3) and from making cultural property the object of reprisals (Article 4.4). The prohibition of reprisals against historic monuments, works of art or places of worship constituting the cultural or spiritual heritage of peoples is reiterated in Article 53(c) of Additional Protocol I. The waiver of military necessity is not applicable to those obligations.

Articles 7 and 8 of the Second Protocol provide for precautions in attack and precautions against the effects of hostilities, respectively. Article 7 imposes a number of obligations on a military commander, such as verifying that objectives to be attacked are not cultural property, selecting means and methods of attack that avoid or minimize incidental damage, abstaining from attacks that cause excessive incidental damage, and cancelling or suspending attacks if the objective is cultural property or the attack may cause excessive incidental damage to cultural property. The first two obligations require the military commander to do everything that is feasible, in other words what is in his/her power, to fulfill those requirements. As to the Article 8 precautions against the effects of hostilities, State parties must, to the maximum extent feasible, remove movable cultural property from the vicinity of military objectives or provide for adequate *in situ* protection, and avoid locating military objectives near cultural property. Attention should be again drawn to the word “feasible.” The implementation of this obligation will depend on a number of factors such as the density of the population, the location of armament industries or economic potential of the State concerned. Finally, it should be stressed that Articles 7 and 8 mirror Article 57 (Precautions in attack) and Article 58 (Precautions against the effects of attack) of Additional Protocol I, thus ensuring cohesion in the implementation of both the Second Protocol and the Additional Protocol.

### ***Military Measures***

Military measures are mainly embodied in Articles 7 and 25 of the Convention. These, to a certain extent, complement each other. Article 7 provides for two principal categories of State party obligations: (1) introduction in peacetime into their

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military regulations or instructions of provisions ensuring observance of the Convention and fostering in their military personnel respect for the culture and cultural property of all peoples; and (2) the establishment, again in peacetime, of services or specialist personnel whose purpose is to secure respect for cultural property and to cooperate with the civilian authorities who are responsible for its safeguarding. In addition, Article 30.3(a) of the Second Protocol expressly obligates States to incorporate guidelines and instructions on the protection of cultural property into their military regulations.

To facilitate the dissemination of the Second Protocol within the armed forces, the UNESCO Secretariat has prepared a series of inserts<sup>14</sup> for training military personnel on the Protocol's obligations. The main insert contains a detailed discussion of the Protocol's provisions. Other inserts provide a list of possible instructor questions for those providing training to officers and soldiers' rules for the training of enlisted members of armed forces. It is up to each State's armed forces to adapt the inserts to its military traditions, military doctrine and training methods.

### ***Protection of Cultural Property in Occupied Territory***

The 1954 Convention requires the occupying State to take the "most necessary measures" to preserve cultural property damaged by military operations that is situated in the occupied territory if the competent national authorities of the occupied State are unable to do so (Article 5.2). This Article's obligations are complemented by Article 9 of the Second Protocol requiring the occupying Party to prohibit and prevent: (1) any illicit export or other removal or transfer of ownership of cultural property; (2) any archaeological excavation, except when strictly required to safeguard, record or preserve cultural property; and (3) any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence. Furthermore, no archaeological excavation of, alteration to, or change of use of cultural property in occupied territory may be carried out without close cooperation with the competent national authorities of the occupied territory, unless circumstances do not permit such cooperation.

Finally, it should be stressed that the 1954 Protocol, a complementary instrument to the original Hague Convention, prohibits the export of cultural property from occupied territory. If export does occur, it requires each State party to return such property that is located within its territory to the competent authorities of the territory from which it was illicitly exported. This is to occur when hostilities have ended. The 1954 Protocol also expressly forbids the appropriation of cultural property as war reparations. This provision is of fundamental importance because

of its clear recognition that the unique nature of cultural objects makes them inappropriate subjects of war reparations.

***Special Protection under the Hague Convention  
and Enhanced Protection under the Second Protocol***

It should be noted that in addition to general protection<sup>15</sup> under Chapter I of the Hague Convention, Article 8.1 provides that special protection may be granted to three categories of property: (a) refuges intended to shelter movable cultural property in the event of armed conflict; (b) centers containing monuments; and (c) other immovable cultural property of very great importance. Unlike the general protection which is attributed to all categories of cultural property, the granting of special protection is not automatic. The Convention subjects the granting of such protection essentially to two conditions: (1) the cultural property in question must be situated at an adequate distance from a *de facto* military objective; and (2) such property must not be used for military purposes.

What is “an adequate distance?” The phrase is not defined by the Convention and is, therefore, left to the discretion of each State party to the Convention. Its definition will obviously depend on a number of factors, such as the presence of military units or armament industry or requirements of national self-defense. The only exception to the requirement of the adequate distance is found in Article 8.5. Under that provision, if the cultural property is situated in the proximity of an important military objective, the special protection may be nevertheless granted if the State concerned undertakes not to use this military objective in the event of armed conflict. Finally, special protection is granted upon request by the State where the cultural property concerned is situated.

Cultural property under special protection is listed in the “International Register of Cultural Property under Special Protection,” a registry maintained by the Director-General of UNESCO. At present, cultural property in three States (Germany, the Holy See, and the Netherlands) is entered in the Register. The total property protected is four refuges for movable cultural property and the whole of the Vatican City State. Two States (Austria and the Netherlands) submitted registration requests but later withdrew them. Since only three States have placed five sites under special protection and the last entry in the Register took place in 1978, clearly the concept of special protection has never fully developed its potential.

Why have the vast majority of States abstained from placing their cultural sites under special protection? There may be several reasons. In particular, the

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impossibility of complying with the condition of adequate distance from a large industrial center or military objective for densely-populated countries; technical difficulties in submitting nominations; or the fear of designating cultural property for special protection because of possible terrorist attacks; or, in fact, providing an eventual adversary with a ready made “hit-list.”

Because the special protection provisions of the Hague Convention had failed to gain widespread usage, the Second Protocol in Chapter 3 establishes a new concept of “enhanced protection” that combines aspects of special protection from the Hague Convention and the criteria for listing of cultural property in the World Heritage List under the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage.<sup>16</sup> Under the new concept of enhanced protection, three conditions are to be met: the cultural property in question must be of the greatest importance for humanity; it must be protected by adequate domestic legal and administrative measures that recognize its exceptional cultural and historic value; and it may not be used for military purposes or to shield military sites. A declaration to this latter end must be provided. Enhanced protection is granted by entering the property in the List of Cultural Property under Enhanced Protection provided for by Article 27.1(b).

The granting of enhanced protection is accorded by a twelve-member inter-governmental Committee for the Protection of Cultural Property in the Event of Armed Conflict. As in the case of special protection, objections to the granting of enhanced protection are permitted but they must be based only on the failure to meet one or more of the three criteria described above. This prevents States who are party to the Second Protocol from making objections based purely on political animosity or mutual non-recognition, thus avoiding cases such as that of Cambodia, which in 1972 requested the entry of several sites in the Register. Because of the objections filed by four States who did not recognize the Government of Cambodia at that time, the entry was not made. Finally, unlike the granting of special protection which requires no objection from any other state party to the Hague Convention, enhanced protection may be granted by a majority of four-fifths of the above Committee.<sup>17</sup>

#### *Sanctions*

Article 28 of the 1954 Convention imposes an obligation on States to prosecute and punish those persons (regardless of their nationality) who commit breaches or order the commission of breaches of the Convention. The deficiency of this provision is its general character—Article 28 does not contain a list of crimes or offenses to be sanctioned nor does it sets forth the procedural aspects of sanctions.



This deficiency is addressed in Chapter 4 of the Second Protocol. Article 15 establishes a category of serious violations (which can be of either the 1954 Convention or the Second Protocol itself). Five offenses fall within this category:

- Making cultural property under enhanced protection the object of attack;
- Using cultural property under enhanced protection or its immediate surroundings in support of military action;
- Extensive destruction or appropriation of cultural property protected under the Hague Convention and the Second Protocol;
- Making cultural property protected under the Hague Convention and the Second Protocol the object of attack; and,
- Theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the Convention.

Article 16.1 establishes universal jurisdiction with regard to the first three types of offenses.

Chapter IV also addresses other aspects of criminal responsibility—jurisdictional issues, extradition, mutual legal assistance, and the adoption of legislative, administrative, or disciplinary measures to address other violations of the Convention or Protocol. Again, each State party to the Second Protocol must adopt those articles within its national penal legislation, either civilian or military or both.

To facilitate the domestic implementation of the provisions of Chapter IV, the UNESCO Secretariat commissioned and widely distributed a consultant's study on this issue. This study is composed of three parts: the first part introduces the relevant provisions of Chapter 4 and compares them with other international humanitarian law penal provisions by referring to the four 1949 Geneva Conventions, the 1977 Additional Protocol I, and the 1998 Rome Statute of the International Criminal Court; the second provides twelve case studies related to six countries with a common law tradition (Australia, Canada, India, Nigeria, the United Kingdom, and the United States) and six countries with a civil law tradition (Argentina, France, Japan, the Netherlands, the Russian Federation and Switzerland); the third part contains a summary of recommendations.<sup>18</sup>

### *Conclusion*

It is important that there be close cooperation between UNESCO and national military forces in implementing and enforcing the body of cultural protection law that is set forth in the 1954 Hague Convention and its First and Second Protocol because it is those forces that must ensure its application during the execution of

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combat operations. Unless military forces are properly trained and informed of the location of cultural property in the adversary's territory and unless rules of engagement address the protection of cultural property, then cultural property will not be accorded the necessary protection.

### *Notes*

1. Jan Hladík, Program Specialist, International Standards Section, Division of Cultural Heritage, United Nations Educational, Scientific, and Cultural Organization (UNESCO). This paper is partly based on two previous presentations, the first made at the conference "Heritage under Fire: The Protection of Cultural Property in Wartime" organized by the British Red Cross in London in June 2001, and the second delivered at the conference "Conservation Law Heritage 2002" organized by the University of Georgia in Athens in April 2002. The author is responsible for the choice and the presentation of the facts contained in this paper and for the opinions expressed therein, which are not necessarily those of UNESCO and do not commit the Organization.

2. See Dr. Lavoyer's paper, which is Chapter XVI in this volume, at 287.

3. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 373 (Adam Roberts and Richard Guelff eds., 3d ed. 2000) [hereinafter Hague Convention].

4. First Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 397 [hereinafter First Protocol].

5. Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 INTERNATIONAL LEGAL MATERIALS 769, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 700 [hereinafter Second Protocol].

As of March 31, 2006, 114 States are party to the Hague Convention, 92 of which are also parties to the First Protocol. As of March 31, 2006, 38 States are party to the Second Protocol. The text of the Hague Convention and its 1954 and 1999 Protocols together with the list of States party thereto, as well as other relevant information on UNESCO's standard-setting activities for the protection of cultural property, is available on the UNESCO website at <http://www.unesco.org/culture/chlp> (last visited Mar. 31, 2006).

The United States participated actively in the 1954 Hague Intergovernmental Conference which negotiated and adopted the Convention and its 1954 Protocol, and signed the Final Act of the Conference and the Convention. In January 1999, the then President William Clinton transmitted the Hague Convention and the 1954 First Protocol to the US Senate for its advice and consent, a necessary prerequisite to the United States becoming a party to both. To date, the United States has not become party to either.

6. Hague Convention, *supra* note 3, art. 4.1.

7. For the notion of military necessity with regard to the Hague Convention, see my article *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the notion of military necessity*, 81 (No. 835) INTERNATIONAL REVIEW OF THE RED CROSS 621 (Sept. 1999).

8. War Department, Adjutant General's Office, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, (Apr. 24, 1863), *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler and Jiri Toman eds., 4th ed. 2004).

9. MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 313-314 (1959).

10. BLACK'S LAW DICTIONARY 806 (7th ed. abr. 2000).
11. ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 293 (A. R. Thomas and James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies).
12. Article 52.2:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 422, 450.

13. Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 213 (1998).

14. Available at <http://www.unesco.org/culture/chlp> (last visited Mar. 31, 2006).

15. General protection is granted to "movable or immovable cultural property of great importance to the cultural heritage of every people," including works of art; manuscripts; books; other objects of artistic, historical or archaeological interest; scientific or important collections of artifacts; monuments; and archaeological sites. All such property is generally protected under the Convention, regardless of its origin or ownership. States need not take specific measures, such as registration, for property entitled to general protection.

16. Convention concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151.

17. The establishment of the Committee is one of the major achievements of the 1999 Protocol because it provides a supervisory body to monitor its implementation. Such a body does not exist under the original Hague Convention. In addition to the supervision of the implementation of the Second Protocol, the Committee will be essentially responsible for the granting, suspension or cancellation of enhanced protection, assistance in the identification of cultural property under enhanced protection, consideration and distribution of international assistance, and the use of the resources of the Fund for the Protection of Cultural Property in the Event of Armed Conflict created by Article 29.

The Committee for the Protection of Cultural Property in the Event of Armed Conflict was elected for the first time by the first meeting of States party to the Second Protocol that was held in Paris at UNESCO Headquarters on October 26, 2005. The elected committee members having a four-year term (until 2009) are Austria, El Salvador, Libyan Arab Jamahiriya, Peru, Serbia and Montenegro, and Switzerland. The elected committee members having a two-year term (until 2007) are Argentina, Cyprus, Finland, Greece, the Islamic Republic of Iran, and Lithuania.

18. The study is available upon request from the UNESCO Secretariat.