

**Protecting Cultural Heritage: International Law after the War in Iraq (Chicago,  
the United States of America, 3 February 2006)**

**The 1954 Hague Convention for the Protection of Cultural Property in the Event  
of Armed Conflict and its 1999 Second Protocol – Comparison between Provisions  
Related to Safeguarding of and Respect for Cultural Property under General  
Protection<sup>1</sup>**

Ladies and Gentlemen,

First of all, let me thank the Cultural Policy Center at the University of Chicago and in particular Professor Rothfield for holding this important Conference and inviting me to participate. This provides me with an opportunity to present briefly the comparison between the provisions on safeguarding of and respect for generally protected cultural property under the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (in short, the Hague Convention) and its 1999 *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (in short, the Second Protocol).

My presentation is divided into three parts. The first part introduces very briefly the main tenets of the Hague Convention because some of you may not be very familiar with them; the second part compares the provisions related to safeguarding of and respect for generally protected cultural property under the Hague Convention and its Second Protocol;

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<sup>1</sup> Jan Hladík, Programme Specialist, International Standards Section, Division of Cultural Heritage, UNESCO. The current presentation is based on a number of my previous presentations on different aspects of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its 1999 Second Protocol.

and the third part analyses the contribution of such provisions to better protection of cultural property.

## **I. Introduction of the main tenets of the Hague Convention**

I will start by introducing the main tenets of the Hague Convention. The Hague Convention<sup>2</sup> is the first multilateral international agreement with a universal vocation to focus exclusively on the protection of the tangible cultural heritage in the event of armed conflict. Its scope covers immovables such as monuments of architecture, art or history and archaeological sites, and also movables, which include works of art, manuscripts, books and other objects of artistic, historical or archaeological interest as well as scientific collections. All such property is generally protected under the Convention, regardless of its origin or ownership.

The essential philosophy of the Hague Convention is embodied in Article 2, providing that the protection of cultural property shall comprise both the safeguarding of and respect for cultural property. The safeguarding consists of positive measures to ensure the best possible physical arrangements for it, while respect represents an “obligation not to do” and means abstention from endangering cultural property and from prejudicing it.<sup>3</sup>

States party to the Convention are required to take in peacetime preventive measures for the safeguarding of cultural property. Such measures may include the preparation of

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<sup>2</sup> The text of the Hague Convention together with its two 1954 and 1999 Protocols is available on-line at [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html). Website visited on 9 January 2006.

<sup>3</sup> Cf. DRAFT CONVENTION, REGULATIONS FOR THE EXECUTION AND PROTOCOL, *Records of the Conference convened by the United Nations Educational, Scientific and Cultural Organization held at The Hague from 21 April to 14 May 1954*, Staatsdrukkerij- en uitgeverijbedrijf, The Hague – 1961, p. 308

inventories of movable and immovable cultural property, the marking of some buildings and monuments with the distinctive sign of the Convention, the creation of special units within the military forces responsible for the protection of cultural property and/or the wide dissemination of the provisions of the Convention within the military, law-enforcement officers, cultural heritage professionals or the general public.

In time of armed conflict, each State party to the Convention is requested to respect cultural property. Furthermore, States Parties must prohibit, prevent or stop any form of theft, pillage, misappropriation or vandalism against cultural property.

In the event of occupation, the occupying State is under an obligation to support (as far as possible) the relevant authorities of the occupied country in safeguarding and preserving its cultural property. It is also required to take the most necessary measures to preserve cultural property situated in occupied territory and damaged by military operations, if the competent national authorities of the occupied State are unable to do so.

States Parties to the Convention are required, within the framework of their ordinary criminal jurisdiction, to prosecute and to punish persons (regardless of their nationality) who violate its provisions or order such violations.

The Convention was adopted together with a First Protocol which prohibits the export of cultural property from occupied territory and requires the return of such property to the territory of the State Party of origin. This First Protocol also expressly forbids the appropriation of cultural property as war reparations.

Currently, 114 States<sup>4</sup> are party to the Convention, 92 of which are also Parties<sup>5</sup> to the 1954 Protocol. The United States of America participated actively in the 1954 Hague Intergovernmental Conference which elaborated and adopted the Convention and its 1954 Protocol and signed the Final Act of the Conference and the Convention. In January 1999, President Clinton submitted to the US Senate for advice and consent the Hague Convention (for ratification) and the 1954 Protocol (for accession). To date, the United States of America has not become party to the Hague Convention and its 1954 Protocol.

## **II. Comparison of the provisions for safeguarding of and respect for generally protected cultural property under the Hague Convention and its Second Protocol**

Before I start comparing the provisions for safeguarding of and respect for generally protected cultural property under the Hague Convention and its Second Protocol, it may be helpful to mention a few words about reasons for adoption of the Second Protocol.

The scope of destruction of cultural property since 1990 both in international and non-international armed conflicts and the practice of the implementation of the Convention during the conflicts in the former Yugoslavia and the former Soviet Union showed certain deficiencies. For this reason, the UNESCO Secretariat began in 1991 a review of the Convention, together with a number of States interested, in order to elaborate a new supplementary legal instrument to fill in certain gaps, such as the lack of clarity in the interpretation of the notion of "military necessity", the application of special protection and of

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<sup>4</sup> The list of States party to the Hague Convention is available on-line at <http://portal.unesco.org/la/convention.asp?KO=13637&language=E&order=alpha>. Website visited on 9 January 2006.

<sup>5</sup> The list of States party to the 1954 (First) Protocol is available on-line at <http://portal.unesco.org/la/convention.asp?KO=15391&language=E&order=alpha>. Website visited on 9 January 2006.

the control system of the Convention, and the reinforcement of penal provisions, as well as the lack of an institutional body to monitor the implementation of the Convention.

The review of the Hague Convention resulted in the adoption of its Second Protocol by the March 1999 Hague Diplomatic Conference.

The Second Protocol recently entered into force, on 9 March 2004, for its first twenty States. To date, 37 States are party thereto.<sup>6</sup>

In addition to strengthening the provisions on safeguarding of and respect for cultural property which I will cover in the next five minutes, the Second Protocol contributes to better protection of cultural property by:

- creating a new category, ‘enhanced protection’, for cultural property of the greatest importance for humanity, protected by adequate legal provisions at the national level and not used for military purposes;
- directly defining the sanctions due in the event serious violations are committed against cultural property, and the conditions under which individual criminal responsibility applies; and
- establishing the *Committee for the Protection of Cultural Property in the Event of Armed Conflict*: composed of twelve States Parties.<sup>7</sup>

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<sup>6</sup> The list of States party to the Second Protocol is available on-line at <http://portal.unesco.org/la/convention.asp?KO=15207&language=E&order=alpha>. Website visited on 10 January 2006.

<sup>7</sup> The Committee’s function, defined in Article 27 of the Second Protocol, essentially relate to the management of enhanced protection, supervision of the implementation of the Protocol, consideration and distribution of international assistance, and the use of the *Fund for the Protection of Cultural Property in the Event of Armed Conflict*.

This Committee was elected for the first time during the meeting of States party to this Protocol on 26 October 2005. It is currently composed of Austria; El Salvador; Libyan Arab Jamahiriya; Peru; Serbia and Montenegro, and Switzerland (all elected for 4 years – e. g. until 2009) and Argentina; Cyprus; Finland; Greece; the Islamic Republic of Iran; and Lithuania (all elected for two years – e. g. until 2007).

## **II.(i) Safeguarding of cultural property**

Article 3 of the Hague Convention on the *Safeguarding of cultural property* requires States Parties to adopt in peacetime appropriate measures for the safeguarding of cultural property within their own territory against foreseeable effects of an armed conflict.<sup>8</sup> The following three elements should be underscored: temporal (e. g. adoption of measures in peacetime), territorial (the territory of the State Party concerned) and discretionary (appropriate).

In comparison with Article 3 of the Convention which is of a very general character (it lacks any precise, minimum uniform content), Article 5 of the Second Protocol on the *Safeguarding of cultural property* provides for the adoption of concrete preparatory peacetime measures. They include 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 its safeguarding.

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<sup>8</sup> An excellent example of technical measures is contained in the Swiss national report on the implementation of the Convention reprinted in the 1995 Secretariat's report. The Swiss report provides information about the creation of refuges of cultural property, the practice of having back-up documentation and other relevant issues. It is available on-line at <http://unesdoc.unesco.org/images/0010/001036/103690e.pdf>. Website visited on 9 January 2006.

The practical implementation of these safeguarding measures will obviously depend on each State Party's administrative structures, financial and other resources, cultural policy and, last but not least, doctrine of national defence. These measures may not only prove helpful in case of armed conflict but also in the event of natural disaster such as floods or earthquakes, or as a highly effective weapon against art theft. For instance, the experience of floods in Germany and the Czech Republic in the summer of 2002 showed, among other things, that their consequences vis-à-vis cultural property would have been more damaging if some of these safeguarding measures had not previously been put in place.

## **II.(ii) Respect for cultural property**

The provisions on respect for cultural property are essentially embodied in Article 4 of the Hague Convention. They consist of two corresponding obligations of States Parties: (i) 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 States Parties, for purposes likely to expose it to destruction or damage in the event of armed conflict; and (ii) to refrain from any act of hostility directed against such property. (cf. Article 4(1)).

The next paragraph of this Article introduces a very important exception to this rule – the waiver of military necessity.<sup>9</sup> It is necessary to point out that the Hague Convention does not define the notion of military necessity.

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<sup>9</sup> 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*, IRRC Review, September 1999, Vol. 81, N° 835, pp. 621 - 635

As there is no universally recognized definition of military necessity, this situation gives room for a loose interpretation or even abuse. When writing this paper, I consulted different sources and I would like to provide you with three definitions which may be of interest to you. The first is quoted from the Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863, also known as the Lieber Code, and states the following:

**“Art. 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.

**Art. 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.

**Art. 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 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>10</sup>

The second definition comes from the Black’s Law Dictionary. It 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>11</sup> and provides a

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<sup>10</sup> *The Laws of Armed Conflicts (A Collection of Conventions, Resolutions and Other Documents)*, edited by Dietrich Schindler and Jiří Toman, Martinus Nijhoff Publishers, Leiden/Boston, The Netherlands, 2004, p. 6

<sup>11</sup> *Black’s Law Dictionary*, Abridged Seventh Edition, St. Paul, Minn., 2000, p. 806

background reference to the Hague Convention on Laws and Customs of War on Land of 18 October 1907. Finally, the Manual of the Law of Armed Conflict containing the United Kingdom's approach to the law of armed conflict states that military necessity "permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources."<sup>12</sup>

It is important to point out that military commanders are aware of this ambiguity and in this connection I wish to quote General Eisenhower's order of 24 December 1943: "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>13</sup>

Coming back to respect for cultural property, Article 4(3) of the Convention introduces the obligation to prohibit, prevent and put a stop to theft, misappropriation of, and acts of vandalism against cultural property in the event of armed conflict. The States Parties are also required to refrain from requisitioning cultural property. Article 4(4) prohibits making cultural property the object of reprisals. Importantly, these obligations may not be waived on the basis of military necessity.

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<sup>12</sup> *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford University Press, Oxford, 2005, pp. 21 - 22  
<sup>13</sup> *The Records*, op. cit., p. 309

In comparison with Article 4 of the Hague Convention, Article 6 of the Second Protocol on the *Respect for cultural property* attempts to define the conditions where military necessity may be applied with regard to generally protected cultural property.

The attacker may only apply this notion to direct an act of hostility against cultural property in the situation, when and for as long as, that cultural property has, by its function, been made into a military objective; and there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective (cf. Article 6(a) (i) and (ii) of the Second Protocol). In addition, an effective advance warning must be given whenever circumstances permit (cf. Article 6(d) of the Second Protocol).

The defender may apply this notion in the situation when, and for as long as, no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage (cf. Article 6(b) of the Second Protocol).

In both cases, the decision to invoke imperative military necessity must only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise (cf. Article 6(c) of the Second Protocol).

To conclude on the notion of military necessity, I wish to point out that the abstract definitions I have just mentioned must be further clarified in military manuals and rules of engagement and be interpreted in good faith.

Finally, Chapter 2 of the Second Protocol also contains detailed provisions related to precautions in attack, precautions against the effects of hostilities and protection of cultural property in occupied territory.

Article 7 of the Second Protocol on the *Precautions in attack* lays down a number of obligations of a military commander such as the verification that objectives to be attacked are not cultural property, the selection of means and methods of attack avoiding or minimizing incidental damage, the abstention from attack causing excessive incidental damage, and the cancellation or suspension of attack if the objective is cultural property and the attack may cause excessive incidental damage. The first two obligations require the military commander to do everything which is feasible<sup>14</sup>, in other words within his/her power or control.

As to the precautions against the effects of hostilities, Article 8 of the Second Protocol requires States Parties, to the maximum extent feasible, to 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 the armament industry or the economic situation of the State concerned.

Articles 7 and 8 of the Second Protocol mirror Article 57 on the *Precautions in attack* and Article 58 on the *Precautions against the effects of attacks* of the 1977 Additional Protocol I to the four 1949 Geneva Conventions for the protection of war victims, thus

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<sup>14</sup> For the understanding of the notion “feasible”, cf., for example, the German declaration made on signature of Additional Protocol I related, among other things, to Articles 57 and 58 of that Protocol understanding this word “to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time including humanitarian and military considerations.”, *The Law of Armed Conflicts*, op. cit., p. 802

ensuring cohesion in the implementation of both the Second Protocol and Additional Protocol I for States party to both instruments.

In addition to Article 5 of the Convention on *Occupation*, Article 9 of the Second Protocol on the *Protection of cultural property in occupied territory* requires the Occupying Party to prohibit and prevent in relation to the occupied territory any illicit export, other removal or transfer of ownership of cultural property, any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property, and any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence. Furthermore, unless circumstances do not permit, no archaeological excavation of, alteration to, or change of use of, cultural property in occupied territory is allowed without close co-operation with the competent national authorities of the occupied territory.

### **III. Contribution of the provisions concerning safeguarding of and respect for cultural property to better protection of cultural property**

Both the Hague Convention and the Second Protocol are influential here. First with regard to safeguarding of cultural property, Article 3 of the Convention contributes to better protection of such property by requiring, for the first time at international treaty level, the territorial State to take, in peacetime, the appropriate internal measures against the foreseeable effects of an armed conflict. Article 5 of the Second Protocol provides a supplementary level of protection by giving concrete examples of such measures, thus supplying States party to that Protocol as well as States considering becoming party to the Second Protocol with useful and practical guidance.

Second with regard to respect for cultural property, Article 4 of the Hague Convention represents an important new element because, again for the first time at international treaty level, it establishes concrete obligations specifically related to cultural property both for the attacker and the defender in the conduct of hostilities, and prohibits specifically reprisals against such property. The provisions of Chapter 2 of the Second Protocol elaborate conditions where the waiver of military necessity may be applied, thus prohibiting its abuse. The inclusion of the provisions on precautions in attack and precautions against the effect of hostilities therein harmonizes the legal protection of cultural property during hostilities with the relevant provisions of Additional Protocol I to the four Geneva Conventions. Finally, the inclusion of a specific article in the Second Protocol on the protection of cultural property in occupied territory addresses the numerous cases of illicit excavation of cultural property in occupied territory, its illicit export or, last but not least, its alteration in order to hide or destroy its historical or cultural evidence.<sup>15</sup>

To conclude, let me come back to my remark on the basic philosophy of the Hague Convention – namely, that the protection is composed of two essential elements – safeguarding of and respect for cultural property. The proper and timely implementation by States Parties at the national level of measures concerning the safeguarding of and respect for cultural property under both the Hague Convention and its Second Protocol is a *condicio sine qua non* for successful protection of cultural property in the event of armed conflict. Such implementation must be carried out with the involvement of all key players concerned, such

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<sup>15</sup> Before the adoption of the Second Protocol, Article 32 of the 1956 Recommendation on International principles Applicable to Archaeological Excavations calls upon a State occupying the territory of another State to refrain from archaeological excavations in the occupied territory and in case of accidental finds to transmit them, on the termination of hostilities, to the authorities of the territory previously occupied together with the relevant documentation. However, unlike the Second Protocol which is legally binding for its States Parties, the 1956 Recommendation does not create reciprocal obligations.

as the military, law enforcement officers or cultural heritage professionals. Finally, let me express my hope that this meeting will also help to raise awareness of the importance for the United States of America to participate in the Hague Convention and its two Protocols, thus leading to better knowledge and implementation of those agreements and, in the long run, to their universality.

Thank you for your attention. If you have any questions, please do not hesitate to ask them.