

Implementing the 1954 Hague Convention and its Protocols: legal and practical implications

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If and when a State decides to adopt the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its Protocols of 1954 and 1999 there are a number of important legal and practical issues that must be addressed. In terms of diplomatic procedure and protocol the Hague Convention is rather unusual. Though the 1954 text designates the Director-General as the custodian of the Convention and responsible for providing its Secretariat, it is not in fact a UNESCO Convention as such, but a treaty between the various States Parties. The 1954 Convention (which now has 114 States Parties), and its Protocol (now First Protocol, with 92 States Parties) were adopted by a Diplomatic Conference in The Hague in 1954, and came into force in August 1956. The Second Protocol was adopted by a further Diplomatic Conference, also in The Hague, in March 1999, and now has 36 States Parties, having come into force in March 2004.

Consequently the procedure for the adoption of the Convention and its Protocols will depend on the country's own national diplomatic and legal procedures, but within the terms of the Convention, and guided also by the 1969 Vienna Convention on the Law of Treaties where necessary. States who originally signed a treaty or protocol within the specified time, typically a year after its adoption, become Parties by depositing an Instrument of Ratification. Those that did not sign by the designated date may still become Parties by Accession at the invitation of the Executive Board of UNESCO (which has extended such an invitation more than once to every member state of the United Nations and UNESCO), though the practical effect is the same. For example, since the United Kingdom (like the USA) signed the original Hague Convention in 1954 but did not signed either the First Protocol of 1954 or the Second Protocol of 1999, the UK government has announced that following the May 2004 announcement that the Britain will adopt all three. This will be on the basis of the ratification of the 1954 Convention itself, and accession to the two Protocols.

Under the main 1954 Convention, States Parties (described as "High Contracting Parties" in the text) undertake to safeguard against the foreseeable effects of armed conflict all cultural property as defined in the Convention (which includes museums and important archives and libraries in addition to sites and monuments) by means of peacetime preparations within their own territory (Article 3). Equally, they undertake to put in place measures for the regulation and training of the armed forces in relation to the obligations under the Convention, and the creation or designation within the armed forces or specialist bodies personnel whose purpose will be to secure respect for cultural property during a conflict (Article 7). There are also provisions for the marking of identified cultural property with the Convention's special emblem of a blue and white quartered shield (Articles 6, 16 & 17). There is also an obligation to respect personnel engaged in the protection of cultural property (Article 15), and States Parties are also bound to apply the Convention in the event of non-international conflicts within the territory of a State Party (Article 19).

A State is not obliged to mark important cultural property in this way. (Some have decided as policy not to do so since they argue that this would make such cultural property more vulnerable to attack by an enemy determined to destroy symbols of national identity in defiance of the Convention, as with some highly publicised attacks on marked cultural property in the Yugoslav civil wars of the 1990s). However, whenever it is used the blue shield does

have the protected status of an official emblem for the purposes of the Geneva Conventions and most national law regulating and protecting the use of the red cross, red crescent and other official emblems.

A significant issue for consideration by a State preparing for the adoption of the Hague Convention therefore include the nature and extent of the register of identified national cultural property. The extent of scheduling or registration for this purpose varies widely from one State Party to another. Some do not identify or designate (at least publicly) any, while numbers within the range of 500 to 5,000 localities and buildings seems fairly typical for a medium-size “developed” country.

It is likely that a State will need to be selective in identifying cultural property for designation for the purposes of the Hague Convention, and that existing national measures or classifications may be far too wide-ranging to be practicable for this purpose. For example, within England alone the United Kingdom has around 850,000 sites, monuments and buildings with some protection under national cultural heritage legislation. A consultation exercise on the basis to be adopted for a United Kingdom Hague Convention inventory and rules for the use of the official emblem under Articles 3, 6, 16 & 17 is currently in progress. However, the indications are that the government is thinking in terms of a list of some hundreds rather than the present hundreds of thousands implied by current general national law. In relation to the display of the Blue Shield on a property it is also considered necessary to decide who should decide to display it on a particular designed site or building, and who should pay for cost of this.

When an armed conflict takes place or appears to be imminent, the States Parties are obliged under the Convention to “respect” cultural property in both their own territory and that of any other State Party during a conflict, including refraining for hostile action against such property, or from using it or its immediate surroundings for military purposes which might attract attack (Article 4). Under the same Article States are also required to take measures to prohibit and prevent theft, pillage or other misappropriation of cultural property, and refrain from any reprisals against cultural property, while Article 5 requires States to safeguard cultural property during any occupation of the territory of a State Party. The Convention also includes a provision (Article 28) requiring States Parties to prosecute within their normal criminal jurisdiction persons of whatever nationality who commit or order to be committed a breach of the Convention.

In practice, most of the provisions of the Convention other than the identification and possible marking of important national cultural property are typically dealt with by means of appropriate Military Regulations and training programmes. Indeed, the requirements of the Convention are often taught as part of military training programmes about the law of armed conflict (international humanitarian law) and included in relevant training and information manuals even in countries that are not Parties to the Convention, such as the United Kingdom and United States. The latest (March 2005) edition of the US Army’s “Civil Affairs: Arts, Monuments and Archives Guide” (GTA-41-01-002) includes a summary of the Hague Convention and its application.

The 1954 Protocol to the Convention (since 1999 referred to as the First Protocol) deals primarily with issues relating to the protection of movable cultural property, and the control, prohibition of export during a conflict, and eventual return of such property at the end of the conflict. These provisions were removed from the final draft into this separate legal instrument

during the 1954 Diplomatic Conference to answer objections from certain countries concerned that these provisions might restrict or interfere with the international trade in cultural property. States which adopt the First Protocol must establish and enforce measures required to implement its provisions.

The Second Protocol to the Hague Convention had a long gestation, with various studies being carried out into the problems thrown up by failures of the Hague Convention provisions during conflicts in several regions of the world, notably south-east Asia, the Middle East, Cyprus during the 1960s to 1980s, and finally with the Yugoslavia civil wars of the early 1990s. From 1992 onwards UNESCO, The Netherlands and a number of experts in various fields worked on a possible revision or updating of the Convention, and this was finally achieved in the March 1999 Diplomatic Conference in The Hague with the adoption of the Second Protocol to the Convention. This came into force in March 2004 with the deposit with UNESCO of the 20th instrument of ratification or accession. As at January 2006 The Second Protocol has 37 States Parties, but it is known that a significant number of further States (including most if not all of the 23 original signatory States that have not yet ratified), are currently preparing for ratification or accession through their national administrative and legislative procedures. All the indications, therefore, is that the Second Protocol is quickly becoming a very significant addition to the overall body of international humanitarian law in terms of its widespread international acceptance.

Essentially, the findings of the various discussions and studies, and in particular UNESCO's 1993 "Boylan Report", were that there was nothing fundamentally wrong with the 1954 Convention and the First Protocol, but that there were serious problems in terms of its interpretation and practical application. The Second Protocol therefore attempts to address these problems with much more detail and precision in relation to the actions that States Parties should take both within peacetime preparations and in the conduct of armed conflicts. It is interesting to note that UK government lawyers have expressed the view that the lack of detail and precision in the original Convention was seen as a significant problem from the perspective of a Common Law legal system, and that the Second Protocol, though arguably it goes further than the 1954 text, makes the British ratification and implementation of the original Convention easier rather than more difficult, hence the May 2004 UK announcement of the intention to proceed with ratification/accession of all three Instruments.

The Second Protocol is much more explicit in relation to the range of peacetime safeguarding measures that States should undertake, and includes such measures as the preparing of inventories, of measures for the emergency protection of buildings against fire or structural collapse and plans for the evacuation of movable cultural property (Article 5). The same Article proposes the designation of a competent authorities to manage the protection of cultural property in times of war.

There is a similar filling in of the details of what is likely to be required under the 1954 provisions for the "respect" of cultural property during a conflict, including limiting the application of the doctrine of military necessity (Article 7), precautions against the effect of military action to be taken by the combatants in the course of a conflict, and in particular the possible removal or movable cultural property, and avoiding locating potential military objectives near to cultural property (Article 8), while there is again much more detail in relation to the measures that should be taken to protect cultural property in occupied territories (Article 9). Again, from the point of view of effective implementation, most if not all of these provisions would need to be spelt out in both general Military Regulations and associated

training, and also be taken fully into account within military planning and the overall military and politico-military direction of the conduct of the conflict. However, this could almost certainly again be achieved through administrative policy decisions and Military Command orders, without the need for legislation.

However, what is arguably the most substantial innovation of the Second Protocol are the provisions in Chapter 4: Criminal responsibility and jurisdiction, which both give teeth to, and internationalise, the rather vague obligations on States in Article 28 of the original Convention to take action within their ordinary criminal jurisdiction in respect of breaches of the Convention, with the defining of five explicit offences of serious violations of the Protocol are defined in Article 15. The first three of these are subject to universal jurisdiction (Article 16), and prosecution (Article 17), as well as being extraditable (Articles 18 - 20), paralleling international crimes such as piracy under customary international law, or e.g. “grave breaches” of the Geneva Conventions or the crime of genocide, within treaty law. The provisions of the 1954 Convention relating to the obligation to prosecute at the national level continues to apply to the other two categories, but the terms are again made much clearer and explicit (Article 21). Implementing the Chapter 4 provisions will almost certainly require primary legislation in most if not all countries, and some countries are having to go through special constitutional procedures (e.g. Constitutional restrictions on the extradition of nationals) before they can comply with the obligations accepted with the ratification of the Second Protocol.

The Second Protocol also includes a number of other important advances, such as the new institutional structures including regular meetings of States Parties, the election of an international Committee for the Protection of Cultural Property in the Event of Armed Conflict, and the setting up of a similarly named Fund. There are also new provisions for the involvement of civil society in support of the work of the new Committee and UNESCO, with special recognition of the International Committee of the Blue Shield and its constituent international professional non-governmental organisations (International Council of Archives - ICA, International Federation of Library Associations and Institutions - IFLA, International Council on Monuments and Sites - ICOMOS, and the International Council of Museums - ICOM).

The obligation of States in relation to national planning, training and information has also been extended far beyond the military and official government heritage system by the Second Protocol, to include an obligation to involve institutions, professions, and to inform the general public (provisions modelled closely on those now well established under the World Heritage Convention). The provisions for the international designation of the most important cultural properties as under “Special Protection” in the original Convention, has now been developed into a new, and one hopes more acceptable and effective, “exceptional protection” regime for exceptional properties - to be defined and evaluated by the new Second Protocol Committee, but there is no time in such a short presentation to consider the wide-ranging and complex issues likely to be involved in this. However, at the national level most if not all of these issues will require only policy and administrative action by States wishing to ratify or acceded to the Second Protocol.

Therefore, the legal implications for a State joining the system laid down in the Hague Convention and its Protocols are largely in relation to questions of legal enforcement and, in particular, criminal sanctions, plus (preferably) national measures to protect the Blue Shield official emblem of the Hague Convention from misuse. The other obligations under Hague, though substantial, can generally be met through policy and administrative actions and

instructions, for example additions to Military Regulations, the broadening of military and specialist civilian training, and measures to identify (with adequate descriptions and location details etc.) protected cultural property. However, in expressing this view I do not want to minimise either the significance of the Convention and, especially, the Second Protocol, or the far-reaching nature of the Second Protocol's strengthened measures against what might be termed "cultural war crimes".

In the end the most important requirement of all is for governments, legislatures and national military authorities to have the political will to adopt the Hague Convention principles and rules and to be determined to implement these, in active cooperation with the national and international cultural heritage sector.