PROTECTION OF CULTURAL HERITAGE IN TIMES OF ARMED CONFLICT: THE INTERNATIONAL LEGAL FRAMEWORK REVISITED

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I INTRODUCTION

The ability of armed conflict to devastate cultural heritage is patently clear. Whereas in the past wars were brief and isolated with limited damage,\(^1\) the twentieth century saw the development of new technology with greater capacity to cause widespread permanent destruction.\(^2\) The protection of cultural heritage should be the concern of all people, everywhere.\(^3\) A rich cultural heritage is important to every country if for no other reason than because it strengthens national and cultural identity.\(^4\) It is also internationally significant in that it helps to foster an appreciation of cultural diversity, knowledge of human society and an understanding of our past. War, and other armed conflict, poses one of the greatest risks to this cultural heritage\(^5\) and yet it has only been relatively recently that any

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2 Ibid 288-289. Specifically, in reference to the use of heavy bombers in World War II.

3 ‘… damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world …’ Preamble to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954. Signed May 14, 1954. Entered into force 7 August 1956, 249 UNTS 240.


specific international laws have provided for the protection of cultural property in the event of armed conflict.6

The international rules of war have developed over hundreds of years of human conflict, with contemporary codification of laws beginning in the late nineteenth century. But it was not until the widespread loss of cultural property in World War II that the international community acknowledged the need for detailed heritage protection in wartime. The Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (1954)7 (Hague Convention 1954), together with its Protocols8 and the 1977 Protocols to the Geneva Convention9 now provide a codified protection framework. As will be seen below, over the latter part of the twentieth century these laws have been slowly strengthened with the most recent developments occurring in 2003.10 However, despite international hard and soft law specifically addressing its protection, loss of cultural heritage has continued. In even the most recent conflicts in the former Yugoslavia11 and Iraq12 cultural heritage has again been lost, and a ‘cultural disaster’ occurred in Afghanistan.13 It is clear that the world still contains many areas of significant instability and no doubt human conflict and military action will continue. This brings sharply into focus the efficiency of these international laws and their ability to protect our precious cultural heritage.

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6 For the purposes of this discussion the development of the rules of war have resulted in the recognition of the distinction between civilian property and military objectives. Cultural property is civilian in nature and therefore has been afforded general protection as such.


11 For example, the destruction of Dubrovnik and the loss of the Mostar Bridge. James A R Nafziger, ‘Protection of Cultural Heritage in time of War and its Aftermath’ <www.ifar.org/heritage.htm> last accessed 21 May 2007. And most recently the grenade attack in the vicinity of the Monastery of Decani in Kosovo on March 30, 2007. It is reported that this is the fourth attack since 1999 and the 23rd grenade fired at the site since the end of the war < http://www.kosovo.net/news/archive/2007/March_30/2.html> accessed 21 May 2007.


13 Manhart, above n 4, 40 referring to the loss of the Bamiyan Statues.
This paper sets out the background to the international protection of cultural heritage and provides details of the specific measures to protect such property in times of armed conflict, together with a critical evaluation of their effectiveness.

II HISTORICAL BACKGROUND

Cultural heritage can include moveable and immoveable, tangible or intangible objects such as buildings and monuments, works and collections of art, books and manuscripts, relics and many other items. In peacetime cultural heritage is protected by the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage (WHC) and the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003). However, this heritage is also under threat during any armed conflict: it may be attacked deliberately because it represents a symbol of the enemy and its identity, be it historical, cultural or religious. It may be subject to pillage or theft for profit. Or it may simply suffer incidental damage during hostilities.

Whilst specific protection at the international level was not articulated until the Hague Convention 1954, the first steps towards its protection began in the nineteenth century when the laws of warfare began to be codified. Prior to that time various rules of warfare have made reference to the protection of cultural property. For example, the customary prohibition on destruction of cultural and ancient properties is said to date back to classical Greece. By Roman times it was accepted that culture would only be destroyed as a last resort. And later during the Napoleonic wars the principle that cultural property is the property of all humanity first emerged in international law.

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16 Keith Suter, ‘We Must do More to Protect Cultural Property in Wartime’ <http://www.onlineopinion.com.au/view.asp?article=2407> accessed 22 May 2007, 1. For example, Keith Suter cites the targeted attack on the Stari Most in the Balkans, being a symbol of Mostar’s multicultural past. The bridge had been built in 1566 by the Ottoman Empire. Similarly the statues of Bamiyan were destroyed because they represented religious symbols contrary to the beliefs of the Taliban.
17 However, it is clear that there are many ancient rules of warfare which prohibited the seizure of enemy property which included cultural property. For a summary of some of the history of these rules see Lieutenant Commander Gregory P Noone, JAGC, USN ‘The History and Evolution of the Law of War Prior to World War II’ (2000) 47 Naval L Rev 176, 184-186. <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/634HW6/$File/irre_854_Frigo.pdf> last accessed 21 May 2007, 367.
18 Kastenberg, above n 1, 281.
19 Kastenberg, above n 1, 282.
20 Kastenberg, above n 1, 284.
It was the Lieber Code\textsuperscript{21} that represented the first modern attempt to codify the laws of war.\textsuperscript{22} It was prepared during the American Civil War by Professor Francis Lieber, a German immigrant to the United States of America (‘USA’) and professor at the Columbia Law School.\textsuperscript{23} Although the Lieber Code was binding only on the military forces of the USA they correspond, to a great extent, with the laws and customs of war existing at that time. Specifically, Articles 35 and 36 of the Lieber Code aim to protect cultural property. Article 35 provides:

> Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

Article 36 relates to a conquering State’s duties not to steal, destroy or injure such property:

> If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace. In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

Following promulgation of these Instructions there were further moves towards codification of the laws of war at the international level. The Lieber Code formed the basis for the Declaration Concerning the Laws and Customs of War presented to the Brussels Conference in 1874.\textsuperscript{24} However, this Declaration was never formally accepted. Subsequently, following the Hague Conference in 1899, an international convention was signed which again drew heavily on the Lieber Code.\textsuperscript{25} The Convention with respect to the Laws and Customs of War on Land and its annexed Regulation (Hague Convention II)\textsuperscript{26} focussed primarily on prisoners of war and non combatant civilians; however some articles do offer protection for cultural property items. For example, the destruction or seizure of enemy’s property was formally prohibited, unless it was ‘imperatively demanded by the necessities of war’.\textsuperscript{27}

Attack or bombardment of towns, villages, habitations or buildings, which were not defended, was prohibited.\textsuperscript{28} Furthermore, before commencing any bombardment, the commander of an attacking force, except in the case of an assault, should have done all he could to warn the local authorities.\textsuperscript{29} This, at least in theory, should have

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\textsuperscript{22} Noone, above n 17, 192. In addition the destruction, pillage, or looting of art works and other items of public or private cultural property in the course of armed conflicts were arguably unlawful under customary international law before the late nineteenth century: Ibid.

\textsuperscript{23} Noone, above n 17, 192.
allowed for the removal of moveable heritage items. Under Article 27 all necessary steps should be taken during sieges and bombardments to spare, as far as possible, edifices devoted to religion, art, science, and charity. The besieged was to indicate these buildings or places by some particular and visible signs, which should also be notified to the assailants prior to the commencement of bombardment. Thus some protection was also provided to immovable objects. Article 46 prohibited the confiscation of private property, and pillage was formally forbidden under Article 47.

This Convention was later replaced by the Convention on the Laws and Customs of War on Land (Hague Convention IV). However, the Hague Convention II remained in force for parties which had signed it but had not signed the later Hague Convention IV. The later Convention is very similar to the former but Article 27 is strengthened by providing that steps ‘must’ rather than ‘should’ be taken and ‘historic monuments’ is added to the list of buildings to be protected. Article 56 remains essentially unchanged in relation to the protection of cultural property.

However, notwithstanding the fact that both these Conventions were in effect and binding on parties during World War I, they failed to protect cultural heritage such as France’s Rheims Cathedral or Belgium’s Louvain University from damage and there were no formal prosecutions for these atrocities following the end of the War. Subsequently, the USA initiated an international agreement which resulted in the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (known as the Roerich Pact).

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24 Noone, above n 17, 194.
25 Noone, above n 17, 195-196.
26 Convention signed on 29 July 1899 and entered into force 4 September 1900, 26 Martens Nouveau Recueil (ser 2) 949. Regulation with respect to the Laws and Customs of War on Land 29 July 1899, 32 Stat 1803.
27 Article 23(g) Hague Convention II.
28 Article 25 Hague Convention II.
29 Article 26 Hague Convention II.
30 Article 27 Hague Convention II.
31 Signed on 18 October, 1907, 36 Stat 2277.
32 Article 4 Hague Convention IV.
33 Articles 27 and 56 of Hague Convention IV were specifically referred to in the 2003 UNESCO Declaration.
35 Kastenberg, above n 1, 286. Nafziger, above n 11, 2.
36 Although the Treaty of Versailles forced Germany to return historically significant stolen property: Ibid.
World War II again saw widespread destruction and plunder of cultural property across Europe and elsewhere.\(^{38}\) The German forces looting of artworks throughout Europe is well publicised, as is the allied destruction of the Monte Cassino monastery in Italy.\(^ {39} \) Following the end of the war, action was taken and subsequently major Nazi war criminals were prosecuted for war crimes.\(^ {40} \) In addition, an attempt was made to control the trafficking of looted articles subsequent to their seizure. To this end a post World War II ‘Statement of Policy’ was signed by the USA, United Kingdom (‘UK’) and France. This, in part, led to the Geneva Convention of 1949. Whilst that Convention included a prohibition on destruction of private property, no specific reference is made to cultural property or heritage. However, there remained an international concern to prevent the destruction and looting that had occurred in Europe during the Second World War and in 1954 UNESCO convened a conference specifically relating to the protection of cultural property. The Hague Convention 1954, and the greater protection that it offered cultural heritage, was a direct result of this conference.

### III Hague Convention 1954

The *Convention on the Protection of Cultural Property in the Event of Armed Conflict, 1954*\(^{41} \) represents a comprehensive legal framework for the protection of cultural property during hostilities. In summary, it provided for the protection during international or civil wars including times of occupation\(^ {42} \) and covered both movable and immovable property.\(^ {43} \) Obligations to safeguard and respect cultural property are placed on both the state in which the property is situated and the attacking or occupying force.\(^ {44} \)

Interestingly, protection is afforded to ‘cultural property’ which is defined as including:

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(a) \quad [M]\text{ovable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books}
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38 Much of this was due to improved air power and the use of heavy bombers: Kastenberg, above n 1, 288.
39 For example, see Kastenberg, above n 1, 289.
41 The Convention was signed in The Hague on 14 May 1954 and entered into force generally on 7 August 1956. 249 UNTS 240. However, its entry into force in Australia was not until 19 September 1984. For the Convention text and details of all State signatories, see <http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html> last accessed 22 May 2007.
42 Article 5 Hague Convention 1954.
43 Article 4 Hague Convention 1954.
44 Article 4 Hague Convention 1954.
and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centres containing monuments’.45

This is in contrast to ‘cultural heritage’ which is protected in peacetime and defined in WHC as:

- Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
- Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
- Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.46

The definition of ‘cultural property’ would appear to be narrower than ‘cultural heritage’ in terms of its reference to (tangible) property.47 Therefore, it may be that spiritual sites, such as the location of traditional ceremonies or rituals, which may satisfy the WHC definition, are neither ‘moveable or immoveable property’ nor ‘archaeological sites’48 under the Hague Convention 1954 and therefore escape protection.49

In order to be afforded protection, cultural property may be identified using a blue and white shield emblem.50 Cultural property can be classified as having ‘general

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45 Article 1 Hague Convention 1954.
46 Article 1 of Convention for the Protection of the World Cultural and Natural Heritage (1972).
48 An ‘archaeological site’ normally involves a location of human activity combined with physical evidence such as human antiquities.
49 Karen Hulme, War Torn Environment: Interpreting the Legal Threshold (2004) 114. For further discussion on this issue, particularly in the European context, see Frigo, above n 47 generally.
50 Articles 16 and 17 Hague Convention 1954. Pursuant to Article 17 the shield may be used to mark property under special protection by repeating it three times in a triangle formation. It
protection’ or ‘special protection’ with all cultural property being afforded the general level of protection as a minimum.\footnote{Protocol 2 to the Hague Convention 1954 provides for ‘enhanced protection’ which is discussed further below.}

In relation to ‘general protection’, parties must make preparations in peacetime to safeguard their own cultural property against the foreseeable effects of armed conflict.\footnote{Article 3 Hague Convention 1954.} Parties must then refrain from using their own and other states’ cultural property for any purpose likely to expose it to damage or destruction, and not direct any act of hostility against it.\footnote{Article 4 Hague Convention 1954.} The only exception to this obligation is where ‘military necessity imperatively’ requires such a waiver.\footnote{Article 4(2) Hague Convention 1954.} This term is not defined in the Convention and its lack of precision has been the subject of much criticism and debate, as discussed below. Parties must also prohibit, prevent and, if necessary, put a stop to pillage, theft, misappropriation and vandalism of cultural property.\footnote{Article 4(3) Hague Convention 1954.} There is no military necessity exception in relation to this provision. Items under ‘general protection’ may bear the distinctive blue and white emblem to identify them.

Pursuant to Article 8, ‘special protection’ may be granted to a limited number of refuges to shelter movable cultural property and centres containing immovable cultural property ‘of very great importance’. The conditions for such protection are that the property must be situated away from large industrial centres or any important military objective and that it is not to be used for military purposes.\footnote{Article 8(1) Hague Convention 1954.} Shelters for movable cultural property may be granted special protection wherever they are situated as long as they are unlikely to be damaged by bombs: Article 8(2) Hague Convention 1954.

\begin{itemize}
\item Article 8(1) Hague Convention 1954.
\item Article 8(2) Hague Convention 1954.
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Unfortunately, this special protection has not been widely utilised.\(^5\) This has been said to be due to the ‘stringent requirements and practical difficulties’ of registration.\(^5\) In addition, the wording of the Article would not allow protection of buildings which Parties might properly try and protect, such as museums and art galleries of great importance that happen to be located in city centres or close to major infrastructure. Therefore, the vast majority of cultural property remains protected at only the general level.

The main concern with this protection regime is that there is no definition of (or even guidelines regarding) ‘military necessity’ and for that reason much is left to the discretion of individual States in its interpretation. It is therefore possible for States to use the ‘military necessity’ excuse in defence of virtually any damage caused to cultural property.

Article 7 of the Hague Convention 1954 provides that Parties are to introduce, in peace time, instructions or regulations within their military forces to ensure observance of the Convention and to foster respect for the culture and cultural property of all people. In addition, there is a general provision in relation to dissemination of the text of the Convention\(^6\) but no requirement to educate civilians in the underlying purpose or reasons for protecting cultural property. Furthermore, there is no provision for an overriding body charged with implementing the Convention and no requirement for regular meetings to be convened.\(^6\) However, the Convention does include the obligation to report to the Director General of UNESCO at least once every four years.\(^6\) Article 23 provides for Parties to call upon UNESCO for technical assistance, but it has no overriding power to implement the Convention.\(^6\) This is left to the individual states and implementation therefore rests on the political will of contracting parties.

Under Article 28, Parties to the Convention must take all necessary steps to impose sanctions and prosecute persons who breach the provisions. However, this provision only requires that such action be taken within a state’s ‘ordinary criminal
Breaches are not international war crimes and therefore there is no mechanism, under the Convention, to bring prosecutions in an international judicial forum such as the International Court of Justice or International Criminal Court of Justice.

Certain provisions were separated from the Convention itself and placed in the 1954 First Protocol (‘Hague P1’). At the time, these provisions were considered more controversial and were removed from the main Convention and placed into a separate Protocol.\textsuperscript{64} Hague P1 largely deals with protection of cultural property during times of occupation. Under the Protocol an occupying state must prevent the export of cultural property from the occupied territory,\textsuperscript{65} seize all cultural property imported into its territory from an occupied territory and return seized property at the close of hostilities.\textsuperscript{66} Furthermore, there is provision for payments to be made to subsequent holders of cultural property, on the condition that they received the property in good faith. This provides a compensation scheme for innocent third parties who have acquired stolen cultural property that must be returned.

IV OTHER INTERNATIONAL LAWS PROTECTING CULTURAL HERITAGE

Beyond the Hague Convention 1954 and its Protocol, there are other international instruments that protect cultural property in times of armed conflict. Of particular note are the 1977 Protocols I and II of the Geneva Convention 1949 (Geneva P1 and Geneva PII respectively)\textsuperscript{67} which were passed after the Vietnam War.\textsuperscript{68} Geneva P1 applies to situations of international armed conflict and Geneva PII is applicable to non-international conflicts. Cultural property is ‘civilian property’ for the purposes of these Protocols and it was prohibited to use such property for military purposes or to intentionally attack it. General protection is given to undefended localities\textsuperscript{69} and again pillage is prohibited.\textsuperscript{70}

Unfortunately, these provisions did not grant any better protection to cultural property than civilian property generally, despite their more widespread significance. In recognition of the fact that many countries were not parties to the Hague Convention 1954, the Geneva Convention Protocols provisions were drafted to afford greater protection to cultural property. Article 53 of Geneva P1 provides:

\textsuperscript{64} Patrick Boylan ‘Implementing the 1954 Hague Convention and its Protocols: Legal and Practical Implications’ (paper presented at the Conference ‘Protecting Cultural Heritage: International Law after the War in Iraq, University of Chicago, 3 February 2006). Paper available <culturalpolicy.uchicago.edu/protectingculturalheritage/papers.shtml> accessed 22 May 2007, 2-3. Hague P1 was adopted at the same time as the Hague Convention 1954 although there are far less signatories. Therefore, these important provisions, relating to occupation forces, bind relatively few States.

\textsuperscript{65} Article 1 Hague P1.

\textsuperscript{66} Article 3 Hague P1.

\textsuperscript{67} Above n 7.


\textsuperscript{69} Geneva P1 Article 59.

\textsuperscript{70} Geneva PII Article 4(2)(g).
Without prejudice to the provisions of the Hague Convention … it is prohibited:

(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
(b) to use such objects in support of the military effort;
(c) to make such objects the object of reprisals.

Article 38 prohibits the deliberate misuse of the protective emblem of cultural property. Similarly, Article 16 of Geneva PII also prohibits acts of hostility directed against cultural property and the use of such property in support of a military effort.\(^71\)

Furthermore, Article 85 of Geneva PII provides that the \textit{deliberate} breach of Article 53, in relation to property granted special protection, resulting in extensive destruction, constitutes a ‘grave breach’ and therefore a war crime. There is no reciprocal Article in Geneva PII.

These Protocols were an important advancement in the protection of cultural property as it can be seen that they placed obligations on the attacker rather than the attacked. In circumstances where the defender put no measures in place to protect their own cultural heritage the attacker must still take steps to avoid such damage. This is particularly relevant where a defender attempts to use cultural property as a shield against attack.\(^72\)

Additional action can be taken pursuant to the Rome Statute of the International Criminal Court\(^73\) in which a war crime is defined as including

\[\textit{intentionally} \text{directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives}.\]\(^74\)

This gives some further avenue to prosecute at the international level, which is omitted from the Hague Convention 1954. However, it is limited to immoveable property rather than the wider ‘cultural heritage’, and only where a deliberate attack has been made.

Lastly, mention should be made of the \textit{Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural}
This Convention implements a system of import restrictions and export permit controls to prohibit the trafficking in cultural property that has been specifically designated as important. However, a detailed analysis of this Convention and other measures relating to trade in cultural heritage objects is beyond the scope of this paper and will not be undertaken here.76

V RECENT DEVELOPMENTS: PROTOCOL II TO THE HAGUE CONVENTION

The continued loss of cultural property including in the former Yugoslavia, led to a further consideration of the provisions of the Hague Convention 1954.77 As referred to above, four main problems were identified: The first relates to the failure to define ‘military necessity’ in the Hague Convention 1954. The second is the limited protection in relation to domestic disputes. Thirdly, the failure of the Convention to provide a robust system of sanctions. And the last issue was the lack of an organising body to administer the Convention.

UNESCO, together with intergovernmental and non-governmental organisations, conducted a review of the Hague Convention 1954.78 Through the review process a report was prepared and recommendations were made as to how to strengthen the Convention.79 The Boylan Report found problems with the interpretation and implementation of the Hague Convention 1954 rather than with its substance. Subsequently, a draft Protocol was developed known as the Lauswolt Document later to become the Second Protocol to the Hague Convention 1954 (Hague P2).80

In summary, Hague P2 provided greater precision in relation to ‘military necessity’, simplified the procedure for granting special protection (which became known as ‘enhanced protection’), provided for individual criminal responsibility and the establishment of a committee to promote respect for cultural property and monitor implementation of the Convention.

Hague P2 provided for greater pre-planning to protect cultural property. A national inventory must be prepared, emergency measures must be developed, all moveable

76 For a summary of the provisions and critique of the UNESCO Convention and the more recent Convention on Underwater Cultural Heritage see Craig Forrest ‘Strengthening the international regime for the prevention of the illicit trade in cultural heritage’ (2003) 4(2) Melbourne Journal of International Law 592.
77 Boylan, above n 64, 3.
78 For a detailed account of the discussions and report see Hladik, above n 58.
80 Following Professor Boylan’s Report three expert meetings were held and further identification of issues developed and refined. The Lauswolt document was further refined and in March 1999 a Diplomatic Conference was held in The Hague to adopt the Second Protocol to the Hague Convention 1954.
cultural property must be removed from areas likely to be damaged or adequate protections must be put in place to protect in situ property. 81 Lastly, competent authorities must be established to be responsible for the safeguarding of cultural property. The attacking party has a duty to take all feasible precautions in choosing targets to attack and to ensure that objects likely to be attacked are not protected cultural property. The party must refrain from attack if the objective is the destruction of protected cultural property or incidental damage might be suffered that is excessive in relation to the anticipated military advantage. 82

Under Hague P2 the ‘special protection’ regime was replaced by ‘enhanced protection’. A Committee for the Protection of Cultural Property in the Event of Armed Conflict was established which grants such ‘enhanced protection’ to property. 83 The Party with jurisdiction over the cultural property may request that it be granted ‘enhanced protection’. In addition, other bodies may recommend to the Committee that such protection be granted. Parties may then make representations and the Committee votes on the request. Provision is also made for listing of items of cultural property on an emergency basis when necessary.

‘Enhanced protection’ of cultural property will be granted in the following circumstances: 84 The cultural heritage must be of ‘the greatest importance to humanity’, it must be protected by domestic legislation that recognises its cultural and historical value ensuring the highest level of protection and it must not be used for military purposes or to shield military sites. 85

One of the most important advancements was the inclusion of a definition of ‘military necessity’. Much discussion centred around this term and despite strong opposition to its retention, the concept and wording was retained. 86 However, it was agreed that it did not give an unfettered power to damage or destroy cultural property otherwise protected, rather that it ought to be limited to specific circumstances. By including a definition of the term greater precision has been given to situations in which it can be invoked.

Under the Second Protocol, ‘military necessity’ can be invoked both by an attacking and defending Party. Cultural property with ‘general protection’ may be used for purposes likely to endanger it, only where there is no feasible alternative to obtain a similar military advantage. 87 Such property may be attacked where it has, by its use,

81 Article 8 Hague P2.
82 Article 7 Hague P2.
83 Article 11 Hague P2.
84 Article 10 Hague P2.
85 In addition the party seeking ‘enhanced protection’ must also declare that the property will not be used for military purposes.
86 Professor Boylan’s Report recommended the complete renunciation of the military necessity exception.
87 Article 6 Hague P2.
become a military objective\textsuperscript{88} and there is no feasible alternative to obtain a similar military advantage.\textsuperscript{89} Whilst these provisions do effectively permit attack on items of cultural property, two safeguards are provided in the Protocol. Firstly an officer commanding a force equivalent to a battalion must decide to invoke military necessity and a warning must be given in advance where circumstances permit.\textsuperscript{90}

Property granted ‘enhanced protection’ will lose its special status if, by its use, it becomes a ‘military objective’.\textsuperscript{91} ‘Military objective’ is defined in Article 1(f) as an ‘object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage’. In those circumstances, cultural property with ‘enhanced protection’ may then be attacked only if that is the only feasible way of terminating such use and measures are taken to minimise damage. The decision to invoke military necessity must be taken at the highest level of command and a warning must be given in advance of such attack.\textsuperscript{92} Otherwise the property or its immediate surroundings must not be used in support of military action.\textsuperscript{93} Notably, there is no military necessity exception to this obligation.

The Second Protocol established individual criminal responsibility for violations of the Protocol. Making cultural property with ‘enhanced protection’ the object of attack or using such property in support of military action is a ‘serious violation’ and is subject to universal jurisdiction.\textsuperscript{94} A party must either prosecute or extradite for breaches of Article 15(1)(a)-(c).\textsuperscript{95} A similar provision relates to cultural property under general protection but only where extensive destruction of such property results will universal jurisdiction apply. As under the Hague Convention 1954, the Parties are required to establish criminal offences for breaches under domestic law however the specific circumstances of the offences are set out in the Protocol.\textsuperscript{96} The

\textsuperscript{88} Military necessity appears in a number of other treaties including the Geneva Convention 1949 and its First Protocol and the Third Geneva Convention. However, the link between military necessity and military objective appears to be taken directly from the 1977 Protocol.

\textsuperscript{89} Article 6 Hague P2.

\textsuperscript{90} Article 6 Hague P2.

\textsuperscript{91} Article 14 Hague P2.

\textsuperscript{92} Article 13, Hague P2.

\textsuperscript{93} Article 12, Hague P2.

\textsuperscript{94} Article 15 Hague P2. There are five categories of ‘serious violation’ under Article 15(1) being intentional acts: ‘a. making cultural property under enhanced protection the object of attack; b. using cultural property under enhanced protection or its immediate surroundings in support of military action; c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; d. making cultural property protected under the Convention and this Protocol the object of attack; e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.’

\textsuperscript{95} Article 18 Hague P2.

\textsuperscript{96} Article 15(1)(d)-(e) Hague P2. As set out above, these include making cultural property (generally or where granted enhanced protection) the object of attack, using cultural property in support of military action, extensive destruction or appropriation of cultural property, and theft, pillage, misappropriation or vandalism of cultural property.
Protocol also allows for administrative penalties to be implemented. These provisions are a significant step forward in terms of both the protection offered and the enforceability of offences should violations occur.

The Committee for the Protection of Cultural Property in the Event of Armed Conflict was established under Article 24. The Committee has many responsibilities including the development of guidelines for implementation of the Protocol, granting, suspending, cancelling and maintaining a list of cultural property under ‘enhanced protection’. It also reports to the Parties. The functions are to be performed in cooperation with the Director General of UNESCO. A major improvement is the inclusion of representatives of NGOs such as the International Committee of the Blue Shield and International Centre for the Study of the Preservation and Restoration of Cultural Property (Rome Centre) (ICCROM), International Council on Monuments and Sites (ICOMOS) and the International Committee of the Red Cross (ICRC). Any other professional organisation may also be invited in an advisory capacity. This is advantageous as these bodies have a great deal of expertise and knowledge of cultural property worldwide.

The dissemination of information, both in peacetime and during armed conflict, is encouraged under Article 30. Particular emphasis is placed on educational and information programmes in order to strengthen appreciation and respect for cultural property. It has been recognised that raising public awareness is an important issue as the threat of looting may come from the local population.

Overall, the Second Protocol has succeeded in achieving much of what was recommended in Professor Boylan’s report. The simplified procedure for granting ‘enhanced protection’ should ensure more cultural property is protected at this higher level. The greater precision in relation to ‘military necessity’ and stricter sanctions should also provide a better enforcement mechanism. Whilst the Protocol contains safeguards to protect the sovereignty of states and provides that the primary jurisdiction resides within the territorial state the provisions still involve a major step forward by the provision for universal jurisdiction. The Protocol also applies to non-international armed conflicts, therefore, the serious violation provisions invoking universal jurisdiction apply to domestic conflicts. However, one of Professor Boylan’s main recommendations, the removal of the defence of military necessity, was not achieved. Arguably, the retention of this exception

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97 Article 21 Hague P2.
98 Article 27 Hague P2.
99 Article 27 Hague P2.
100 Bogdanos, above n 12, 4-5.
102 Article 15 Hague P2.
103 Article 22 Hague P2.
104 Chadha, above n 5, 1.
will continue to result in military action being taken against cultural property if it can be argued that it is a valid military objective or will reduce loss of lives.\textsuperscript{105}

It is clear that the provisions of Hague P2 go well beyond customary international law. Therefore, they will not bind states that are non-parties.\textsuperscript{106}

\textbf{VI THE EFFECTIVENESS OF THE LEGAL REGIME}

War by definition causes destruction. However, there remain two specific areas of threat to cultural heritage: Firstly, the deliberate destruction and pillage of items of cultural property during hostilities. The significance of this threat cannot be understated as can be seen from the wilful destruction of the Bamiyan Statues in Afghanistan in 2001.\textsuperscript{107} The second major threat is incidental damage from the hostilities themselves or from looting. Again this can be illustrated by the damage to and theft of items of Iraq’s museums.\textsuperscript{108}

As set out above, the framework of legal protection of cultural property comprises a number of international instruments: Hague II and Hague IV together with their regulations, the Geneva Convention 1949 and 1977 Protocols and the Hague Convention 1954 and two Protocols. The recent additions to the Hague Convention 1954 by the Second Protocol have served to significantly strengthen the protection offered. Success can be claimed in as much as heritage monuments and buildings have in some circumstances been removed as ‘targets’ of external military attack. For example, during the First Gulf War in 1991 the coalition forces trained their personnel in the principles of the Hague Convention 1954.\textsuperscript{109} They created a ‘no fire target list’ of places where cultural property was known to exist\textsuperscript{110} notwithstanding the fact that many of the sites were being used as a shield and attack may therefore have been permitted.\textsuperscript{111} This was repeated in the Second Gulf War with the bombing

\begin{footnotesize}
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\item \textsuperscript{105} Kastenberg, above n 1, 302.
\item \textsuperscript{106} For a full list of all state parties see http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=590&ps=P accessed 23 May 2007.
\item \textsuperscript{107} In March 2001 the Taliban commenced destruction of the Bamiyan statues located outside Kabul in Afghanistan. For a collection of articles relating to the site see <http://www.tamu.edu/anthropology/Buddhas.html> last accessed 21 May 2007.
\item \textsuperscript{109} The USA, UK and Canada were not parties to the Hague Convention but nonetheless are reported to have ‘honored the spirit of the Convention’: Kastenberg, above n 1, 297.
\item \textsuperscript{110} Nafziger, above n 11, 3.
\item \textsuperscript{111} Kastenberg, above n 1, 301.
\end{itemize}
\end{footnotesize}
in Iraq in 2003 being done with minimal relevant damage. This can certainly be considered an improvement on the situation during the two World Wars and the Vietnam War. However, there continues to be intentional destruction of cultural heritage, illustrated by the losses in the former Yugoslavia and Afghanistan.

However, the relative failure to protect the moveable cultural heritage of Iraq is of great concern. It has been reported that little effort was made by coalition forces to protect relevant sites such as the Iraq Museum, National Library and National Archives from the looting by the local population. Iraq itself had a good record in relation to protection of its own cultural heritage with rare Mesopotamian artefacts being preserved in museums for many years; although it paid less regard to the cultural heritage of other countries. Iraq has been a Party to the Hague Convention 1954 since 21 December 1967 and had in place legislation to protect objects of cultural heritage. The United States of America and United Kingdom are not parties to the Hague Convention 1954 or its Protocols. However, the USA is a signatory to the Convention and arguably is bound not to act contrary to it, even in the absence of ratification. In any event the USA has indicated that it follows the

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112 Suter, above n 16, 1. The Director-General of UNESCO contacted the Secretary-General of the United Nations and the US Department of State prior to the war in Iraq and provided a detailed map of the positions of Iraqi archaeological sites and museums. UNESCO also contacted INTERPOL, the World Customs Organization and the International Confederation of Art Dealers to ensure compliance with the 1970 Convention on the illicit trade in cultural property: <http://portal.unesco.org/ci/en/ci.php-URL_ID=8725&URL_DO=DO_TOPIC&URL_SECTION=201.html> last accessed 21 May 2007.

113 Some as recently as this year: Above n 11 and 12.

114 It was estimated that whilst 1200 looted items were returned, 2200 items remain missing: Dinah Shelton, ‘The World of Atonement Reparations for Historical Injustices’ (2004) 1(2) Miskolc Journal of International Law 259-289, 259. Girstenblith, above n 101, 290, reports approximately 11,000 items remain missing.

115 Girstenblith, above n 101, 288. Shelton above n 114, 259. Shelton comments that little has been done since then apart from a few journalists and military personnel who were later arrested when they tried to smuggle looted objects in the USA. However, it appears that US forces have been involved in investigating the looting and the whereabouts of the artefacts: Bogdanos, above n 12, 2. UNESCO and Interpol have also worked to prepare and publish an inventory of looted items: Above n 108.

116 At least until the First Gulf War: Girstenblith, above n 101, 278. Suter above n 16, 1.

117 Iraq is said to have removed some 20,000 artefacts from Kuwait during the Gulf War: Nazfiger, above n 11, 3. See www.icrc.org/web/eng/siteeng0.nsf/htmlall/party_main_treaties/ $file/IHL_and_other_related_treaties.pdf. As at 12 December 2004 there were 111 parties to the Hague Convention 1954, 88 parties to Protocol I and 23 to Protocol 2. Nor is the US a party to the International Criminal Court statute 1998. However, the United Kingdom is a party (since 4 October 2001) and therefore bound by the ICC.

118 Nazfiger, above n 11, 3. The Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, Article 18 provides: ‘A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.’
Convention’s principles as a matter of customary international law. Furthermore, the USA is bound by the Hague Conventions 1899 and 1907. Those laws do provide for the restoration of public order and prevention of pillage. In addition, arguably, Article 35 of the Lieber Code placed a duty on US forces to have protected the cultural sites from looting. Lastly, it has been argued that the rules promulgated under the Geneva Convention Protocols represent an expression of customary international law which apply regardless of whether the state is directly bound by those Protocols. The United Kingdom has formally announced that it would ratify the Hague Convention 1954 and both Protocols but at present is not bound by them.

Australia, however, is a party to the Hague Convention 1954 but not the subsequent Protocols. Therefore, Australian forces had positive obligations to prevent the looting. As set out above, there is no ‘military necessity’ exception to the obligation to prevent looting and pillage. In its 1995 report to UNESCO on the Implementation of the Convention for the Protection of Cultural Heritage in the Event of Armed Conflict, Australia reported that the contents of the Convention have been included in the Draft Military Manual of International Law and made available to all military personnel. In addition references to the Convention appear in the Law of Armed Conflict Commander's Guide and the Australian Army Law of Armed Conflict Manual and all defence force personnel receive training in relation to the Hague Convention 1954. Despite these measures Australia was part of a coalition force that failed to prevent the loss of cultural property. It is contended that by failing to take necessary steps to prevent the looting of Iraq’s museums and libraries the coalition forces breached their international obligations.

Overall, the international legal framework was relatively successful at removing cultural heritage in Iraq as an object of direct attack, but the Coalition forces provided inadequate military safeguards to prevent loss of cultural property due to

However, this Convention itself is not retrospective and therefore arguably does not apply to the signing of the Hague Convention in 1954. Furthermore, the USA has not ratified the Vienna Convention.

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120 Gerstenblith, above n 101, 299.
121 And the Geneva Conventions 1949, I to IV.
122 Kastenberg, above n 1, 280.
124 Adopting the Convention thirty years later in 1984.
127 Ibid 15.
128 Ibid 15.
looting.\textsuperscript{129} There remains open the question of whether the obligation extends to preventing theft by the local population rather a state party, however, the wording of the Hague Convention 1954 seems clear.\textsuperscript{130} Therefore, the new Iraqi government could possibly seek reparation from the Coalition forces for failure to take action to prevent looting. In reality, even if the obligation extended to preventing theft by the local population, liability would be difficult to prove and therefore action unlikely to be taken.\textsuperscript{131}

UNESCO has recognised the continued failure to prevent \textit{deliberate} damage to cultural property in its \textit{Declaration Concerning the Intentional Destruction of Cultural Heritage}.\textsuperscript{132} Specific reference is made there to the destruction of the Bamiyan Buddhas.\textsuperscript{133} The Declaration calls for states to become parties to the Hague Convention 1954 and its Protocols and promote the adoption and implementation of legal regimes to protect cultural heritage. The Declaration also calls for states to take all measures to prevent intentional destruction of cultural heritage wherever it is located during peacetime activities and when in occupation. These two key elements, being adoption of the Hague Convention 1954 and raising awareness in relation to the protection of cultural heritage items, have been echoed by other commentators.\textsuperscript{134} In particular, more work could be done to raise public awareness of the importance of cultural heritage which may serve to limit the black market that encourages looting.\textsuperscript{135} Gerstenblith argues that the major military powers should re-establish a military corps dedicated to the preservation of cultural heritage\textsuperscript{136} and incorporate modern principles of cultural resource management.\textsuperscript{137} Both of these measures would serve to prevent losses of cultural property from incidental damage and looting.

\textbf{VII CONCLUSION}

The main threats to cultural property come from deliberate attack, incidental damage, pillage and theft.\textsuperscript{138} The international community has responded to these threats by providing a legal framework for the protection of cultural property. Prior to 1999, the Hague Convention and Protocols contained many limitations but to a great extent these have now been rectified. However, many countries are not parties

\textsuperscript{129} Arguably the problems had started before then when the US sanctions prevented the import of chemicals needed to preserve much of its heritage. See Suter, above n 16, 1.
\textsuperscript{130} Article 4(3) Hague Convention 1954 refers to stop 'any form of theft'. Cf Gerstenblith, above n 101, 109-110.
\textsuperscript{131} For the difficulties encountered in seeking reparations see Shelton above n 114. Specific case studies were undertaken in relation to Japanese actions during World War II, the trans Atlantic slave trade and the Herero claim against Germany.
\textsuperscript{132} Above n 10.
\textsuperscript{133} See Preamble.
\textsuperscript{134} For example, Bogdanos, above n 12, 5; Gerstenblith, above n 101, 337 and 340.
\textsuperscript{135} Bogdanos, above n 12, 4.
\textsuperscript{136} She reports that during World War II the USA and UK did maintain a similar corps: Gerstenblith, above n 101, 258 and 345.
\textsuperscript{137} Ibid 8.
\textsuperscript{138} Nafziger, above n 11, 1.
to the Hague Convention 1954 and its later Protocols and therefore are only subject to limited international obligations contained in other treaties. All countries should now adopt these laws.

When cultural property is damaged or destroyed the effectiveness of these laws is often called into question. However, arguably it is more appropriate to blame the parties directly engaged in conflict for their lack of responsibility and respect. As can be illustrated by the loss of the Bamiyan Statues, the damage to the Byblos World Heritage\(^{139}\) site and more recently the attacks near the Monastery of Decani in Kosovo,\(^{140}\) there is little that the law can do to protect cultural property from deliberate and wilful destruction. Only a change in global attitudes and increased respect for our differing cultures can protect such items. Each and every country has a responsibility to publicly educate not only those involved in the military and defence forces but also its citizens, that cultural property should be protected for the future of all people.\(^{141}\) Cultural property is part of the inheritance of humankind and should never be deliberately attacked as a symbolic gesture of power nor suffer preventable incidental loss. Its destruction in times of armed conflict is not inevitable provided the international legal regime for its protection is effectively implemented.

\(^{139}\) The site was harmed in the conflict in Lebanon in 2006 when the fuel tanks of the Jiyeh power plant were damaged during the conflict and caused oil to spill and spoil two medieval towers and other archaeological remains on the shoreline: <http://portal.unesco.org/en/ev.php-URL_ID=34765&URL_DO=DO_TOPIC&URL_SECTION=201.html> accessed 21 May 2007.


\(^{141}\) It was acknowledged by Australia that no uniform approach had been taken to such public education: Above n 124, 16.