

A HISTORICAL PERSPECTIVE ON THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: FROM THE HAGUE 1907 CONVENTION AND THE ROERICH PACT, TO THE 2003 UNESCO DECLARATION CONCERNING THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE

ETIENNE CLEMENT

Taking a historical perspective, the author shares some of his experience on the implementation of international instruments for the protection of cultural property in the event of armed conflict. Based on his past responsibility as a UNESCO staff in charge of the implementation the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict from 1987 to 1998, he covers broadly the period from 1971 until the adoption of Protocol II to the Convention in 1999. He also briefly refers to latest normative developments, as a result of more recent destruction of cultural heritage in Afghanistan, in the Middle East and in Mali.

Towards the Hague 1954 Convention for the Protection of Cultural Property in the event of Armed Conflict and its two Protocols

Destruction of cultural and religious monuments, thefts of national treasures and other damages to the heritage have long been considered as “spoils of war” and occurred from centuries. It is only from the beginning of the 20th Century that the Law of War, as codified in various international conventions adopted at The Hague, considered illegal the destruction and removal of cultural property in time of armed conflict or occupation.

Provision was made for the special protection of cultural property in Article 27 of the Hague Regulations of 1899 and 1907 and Article 5 of the Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War of 1907. These provisions make it the duty to indicate cultural property by distinctive signs. Further provisions were included in the Hague Rules of Air Warfare of 1922/23, especially in Articles 25 and 26.

Following a suggestion made by Professor Nicholas Roerich, a Russian painter, philosopher and public figure, a draft treaty for the protection of cultural property in

the event of armed conflict was prepared at the request of the Roerich Museum of New York by Mr. Georges Chklaver of the Institut des Hautes Etudes Internationales of Paris. The draft was discussed by the International Museums Office of the League of Nations and at several conferences in Bruges (1931 and 1932) and in Washington (1933). In 1933, the Seventh International Conference of American States recommended the signature of the Roerich Pact. The treaty was drawn up by the Governing Board of the Pan-American Union and signed on 15 April 1935. It became the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments or “Roerich Pact”. It is still in force for its 10 States Parties: Brazil, Chile, Colombia, Cuba, Dominican Republic, El Salvador, Guatemala, Mexico, the United States of America and Venezuela. It recognizes that the defense of cultural property is more important than their use or destruction for military purposes and that their protection has precedence over military necessity. To be noted that The Hague 1954 Convention for the Protection of

Etienne Clement is an international lawyer from Belgium. From 1984 to 2015 he was a staff and later a Director at UNESCO Headquarters as well as in Cambodia, Thailand and in the Pacific where he worked on legal and operational issues regarding cultural heritage. He is currently a consultant on these issues, based in Bangkok, Thailand and teaches at the Science Po, in Lille (France). He is a Member of ICLAFI.



Cultural Property in the event of Armed Conflict, in its Article 36, paragraph 2, specifies that it is supplementary to the Roerich Pact in the relations between States which are bound by these two treaties. Furthermore, the distinctive flag under Article III of the Pact is replaced by the distinctive sign in Article 16 of the Convention of 1954.

Gradually these rules were integrated into the International Humanitarian Law as codified in the Geneva Conventions and their Protocols. The Geneva Convention (1949) contains certain provisions that specifically forbid intentional or gratuitous damage to undefended cultural heritage by invading or occupying forces. It is supplemented by two further Protocols (1977) which contain important provisions relating specifically to protection of cultural property.

The first and main international agreement dealing exclusively with the protection of cultural heritage in case of war is The Hague 1954 Convention for the Protection of Cultural Property in the event of Armed Conflict and its two Protocols (the First Protocol of 1954 and the Second Protocol of 1999).

The Convention was adopted at The Hague (Netherlands) in 1954, as a consequence to the massive destruction of the cultural heritage in the Second World War. The Convention was adopted together with a Protocol (the First Protocol or Protocol I) in order to prevent the export of cultural property from occupied territory, requiring the return of such property to the territory of the State from which it was removed. The States that are party to the Convention benefit from the mutual commitment of 127 States (104

for Protocol I) mainly with a view to sparing cultural heritage from consequences of possible armed conflicts through implementation measures.

The destruction of cultural property in the course of the conflicts that took place at the end of the 1980s and the beginning of the 1990s highlighted the necessity for a number of improvements to be addressed in the implementation of The Hague

Convention. A review of the Convention was initiated in 1991, resulting in the adoption of a Second Protocol to The Hague Convention in March 1999 (Protocol II).

The present paper gives a brief overview of the contents of the Convention and its two Protocols. It also recalls some of the milestones in the history of their implementation in time of peace and during military operations as well as occupation. Examples will be taken from the Middle East, Cambodia, former Yugoslavia and from more recent conflicts in Afghanistan, the Middle East and Mali.

The main provisions of The Hague 1954 Convention

In brief, the Convention contains several categories of rules covering the following areas:

- ⌘ the “Safeguard” of cultural property in time of peace, on a country’s own territory, such as the provision on the distinctive emblem of the Convention, “Special Protection”, or preventive measures of military and legal characters
- ⌘ the “Respect” (Art. 4) of cultural property during armed conflict and occupation, on a country’s own territory and on the territory of the enemy. It is important to stress that the obligation of “Respect” also applies for conflict not of an international character.
- ⌘ the “Occupation” (Art. 5), under which an “occupying power” shall support the competent national authorities of the occupied country in safeguarding and preserving its cultural property
- ⌘ the Mechanism of Control for its execution, including “Protecting Powers” and “Commissioners-General” (as elaborated under the “Regulations for the execution of the Convention”)
- ⌘ the issues of responsibilities and sanctions (Art. 28): *States Parties are required to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who committed or ordered to commit a breach of the convention.*

The “Respect” for cultural property (art 4) is an obligation to be respected within the own territory of the State Party to the Convention and within the territory of other States Parties, by refraining from any use of a cultural property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict. In other words, cultural property cannot be used for military purposes and/or be a “military objective”. This is applied by refraining from any act of hostility directed against such property. However, this obligation may be waived in case of “military necessity”. As the Convention does not give any definition of military necessity, this concept is left to interpretations. The principle of “Respect” also implies that no reprisals can be made against cultural property.

Some milestones of the implementation of the 1954 Convention and its First Protocol until the review of these instruments

A number examples of implementation of the Convention took place during the period from 1967 to 1992: in Jerusalem from 1967, in Cambodia from 1970 to 1989, during the war between Iran and Iraq from 1980, during and after the Iraq-Kuwait conflict in 1990 and in the former Yugoslavia (Croatia, Bosnia and Herzegovina, as well as Serbia) from 1990.



The use of the distinctive emblem of the Convention

The use of the distinctive emblem of the Convention is optional. It is widely used in several European countries. This was already the case in former Yugoslavia before the war (which started in the Nineties) and also in a few countries outside Europe, such as Cambodia and Lebanon. But the emblem is compulsory for specific cultural property which have been placed under the so-called “Special Protection” and therefore benefit from a higher level of protection under The Hague Convention. It can also be used by the personnel in charge of the protection of cultural heritage, such as on their identity cards, armbands or other equipment.



In Cambodia from 1970 to 1972, the emblem was placed on Angkor monuments, museums, on the wall of store-rooms in the two province towns of Siem Reap and Battambang, as well as on the uniform of the personnel in charge of their protection. It was also placed at the National Museum in Phnom Penh and at the Museum in Battambang.



In former Yugoslavia in the 1990s, the emblem was also used before and during the war, in particular in the old city of Dubrovnik, a World Heritage Site.

However, during the shelling of Dubrovnik in 1990, observers reported that the monuments bearing the emblem were not spared and would have even been targeted intentionally by the enemy.

Drawing the lessons of what happened in Dubrovnik, the experts who in 1990 started to review The 1954 Hague Convention recommended that the emblem be always accompanied by other measures, as its use does not necessarily lead to the respect of the cultural property. Indeed, in a number of recent armed conflicts, the cultural heritage has been targeted intentionally, as part of a strategy to affect enemy's morale. In this context, the emblem might have the reverse effect of attracting the attention to the most precious cultural property which can become a target.



Other preventive measures in time of peace

Article 23 of the Convention foresees that UNESCO can provide assistance for the adoption of preventive measures. This was the case in Cambodia from 1970 to 1972, through marking with the emblem, but also through training and equipment for monuments and museums staff. Moreover a large-scale operation of transportation of hundreds of cultural objects from the monumental complex of Angkor was organized under the supervision of UNESCO to presumably safer places such as the National Museum in Phnom Penh. The protection of the staff was a complete failure, as all of them were assassinated during the genocide perpetrated by the Khmer Rouge after they controlled the Angkor area. But a large number of cultural objects packed in protected boxes with the emblem were retrieved intact after the hostilities, in the basement of the Phnom Penh museum where they had been carefully stored in 1971. This was not the case, unfortunately, at the Battambang Museum where, despite the emblem, most cultural objects were stolen. Only a few, deeply buried around the museum, were recovered after the conflict.

Special Protection

The above-mentioned status of cultural property under “Special Protection” has also been largely a failure, despite a few properties registered as such by UNESCO, essentially refuges in a few European countries and the City of Vatican. In 1972 Cambodia requested the inclusion of several monumental complexes, namely Angkor. However four of the other States Parties lodged an objection on the ground that they did not recognize the legitimacy of the Cambodian authorities submitting the request. Consequently they were not placed under Special Protection.

The “Respect” during armed conflict

Article 4 of the Convention on the “Respect” of cultural property during an armed conflict has had a very uneven implementation throughout history. To improve its compliance during armed conflicts the Director-General of UNESCO and its Secretariat have played a role much larger than what is included in the Convention. At the occasion of a number of conflicts, the Director-General has reminded various Governments of States Parties of their obligation of Respect: during the conflict between India and Pakistan in 1971, in Cyprus in 1974, between Iran and Iraq in 1980, during the occupation of Kuwait by Iraq in 1990 and in former Yugoslavia in 1991 to name only a few. His initiatives included the sending of official letters, the issuing of public messages, face-to-face meetings with military commanders or the dispatch of special envoys to meet the belligerents. UNESCO Secretariat offered its services to the parties in conflict in Iraq and Iran in 1980, in Tyre (Lebanon) in 1982 and again in Yugoslavia in 1991. In a few cases, the Director-General sent longer-term technical cooperation missions. In the case of Dubrovnik, UNESCO used all these initiatives together. For

instance, several special envoys were sent to the capital cities of the conflicting parties and later to Dubrovnik in order to work with cultural and museum personnel. In Dubrovnik, the UNESCO envoys deployed the UN flag on the walls of the old city and alerted the UNESCO DG, the UN Secretary-General and the international press agencies when the city was again targeted. As a result, one can say that although the old City of Dubrovnik was significantly damaged by the shelling, it was not destroyed as it was unfortunately the case for Vukovar or the Mostar Bridge.

Control of the execution of the Convention

Under the 1954 Convention, the control for its execution is left to a complex mechanism involving “Protective Powers” and the designation of “Commissioners-Generals” by the Parties in conflict. It was applied in the conflict in the Middle-East from 1967 to 1977. Despite several attempts to apply it at the occasion of other conflict in the Eighties, this mechanism was considered by States Parties and by UNESCO as too complex to implement and was therefore abandoned.

Implementation of the First Protocol

The First Protocol (or Protocol I) prohibits the export of cultural property from occupied territory. In case it was nevertheless exported against this prohibition, the Protocol requires the return of such property to the territory of the State from which it was removed.

One of the most significant examples of implementation of the First Protocol was after the occupation of Kuwait by Iraq in 1990. During this occupation, Iraqi officials removed precious cultural objects from the museums of Kuwait and transported them to the Baghdad Museum, in the capital city of Iraq. In this case, UNESCO called for the respect of the First Protocol by Iraq which requires that cultural property exported illegally during an occupation be returned to the country of origin after the end of hostilities. It was followed by a UN General Assembly Resolution calling for the return of these cultural objects to Kuwait. This return finally took place after the conflict in 1991 under the supervision of the UN on the basis of the provisions of Protocol I by which both Iraq and Kuwait were bound.

The review of the 1954 Convention during the 1990s, leading to the Second Protocol.

Based on the successes and failure of this implementation, a review of the Convention, by its States Parties and by UNESCO, was undertaken from 1992, examining the impact and constraints of the two instruments. This review involved cultural and museum professionals, including a large number of ICOMOS members, as well as military and UN Peace-Keeping forces. The history of the implementation of the Convention clearly demonstrated that the efficiency of the Convention remained a challenging issue: for instance, the distinctive emblem has had sometimes a reverse effect by trans-

forming a protected cultural property into a target, only a very small number of sites were put under “Special Protection”, the mechanism of control involving the designation of Commissioners-Generals appeared to be too heavy when emergency requires flexibility and rapid reaction. The text of the Convention also remained silent on the definitions of “military necessity” and of “conflicts not of an international character”. It was also felt by a number of commentators of the Convention that it relied too much on States’ commitments and on the initiatives of UNESCO, an Organization with limited resources and leeway during armed conflict. Finally, criminal acts committed against cultural property in the course of the many conflicts that took place at the end of the 1980s and the beginning of the 1990s highlighted a number of deficiencies in the implementation of the Convention. The review was initiated in 1991 to draw up a new agreement to improve the Convention taking account of the experience gained from recent conflicts and the development of international humanitarian and cultural property protection law since 1954. Consequently, a Second Protocol to The Hague Convention was adopted at a Diplomatic Conference held at The Hague in March 1999. It includes a number of innovations. But the important distinction between the two principles of “Safeguard” (in peace time) and “Respect” (during armed conflicts) remains entirely valid under the new Protocol.

The Second Protocol of 1999 supplements the 1954 Convention. It does not replace it. It reflects new developments in international law, clarifies and strengthens the concepts of “Safeguard” and “Respect” by providing with clear definitions as to when waivers on the basis of imperative military necessity may or may not be applied. It also creates a new category of “Enhanced Protection”, clarifies and strengthen the criminal responsibility and sanctions, expands the protection of cultural property in situation of non-international armed conflicts and establishes a Committee for the Protection of Cultural Property in the event of Armed Conflict.

Brief overview of developments after 1999

The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage

Following the destruction of the Buddhas of Bamiyan, Afghanistan, subsequent widespread calls for improved protection of cultural heritage led to several discussions at UNESCO Governing bodies and the adoption in 2003 by the General Conference of UNESCO of the Declaration concerning the Intentional Destruction of Cultural Heritage. The Declaration is a soft-law text and is not intended to modify ex-



isting obligations of States under international agreements in force for the protection of cultural heritage. Its main purpose is threefold: (i) to state basic principles for the protection of cultural heritage specifically against intentional destruction in peacetime and wartime; (ii) to raise awareness of the growing phenomenon of intentional destruction of this heritage; and (iii) to encourage indirectly the participation of States not yet party to the 1954 Hague Convention, its two Protocols, the Geneva 1977 Additional Protocols and other agreements protecting cultural heritage.

UN Security Council Resolutions

Two Resolutions of the UN Security Council constitute significant developments in the legal protection of cultural property in the event of armed conflict. In 2012, The UN Security Council adopted its resolution 2085 on the situation in Mali. It condemned the destruction of cultural and religious sites and reaffirmed that they are war crime as regards to the Statutes of the International Criminal Court. Later, in 2015, it adopted its Resolution 2199 by which it condemns the destruction of the cultural heritage in Iraq and Syria, in particular that perpetrated by the Islamic State in Iraq and the Levant (ISIL, also known as Daesh, whether this destruction is incidental or deliberate. It also decides that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people.

The International Criminal Court (ICC)

Another most significant development took place on 27 September 2016 when the International Criminal Court (ICC) has recognized Ahmed Al-Faqi Al-Mahdi guilty of war crime and has sentenced him to 9 years in prison for his responsibility in the deliberate destruction in 2012 of nine mausoleums and the secret gate of the Sidi Yahia mosque in UNESCO's World Heritage site of Timbuktu (Mali). This sanction marks a key moment for justice and reflects the wider value of culture and of all the principles contained in the international instruments for the protection of cultural heritage.

Conclusion

For centuries the cultural heritage had much suffered from armed conflicts and occupation, in various parts of the world. To some extents the international agreements adopted since the early 20th Century have contributed to reduce its exposure to irreversible damages. In this respect the 1954 Convention for the Protection of Cultural Property in the event of Armed Conflict and its First Protocol were major milestones. Later on, its Second Protocol of 1999 brought considerable added value to Conven-

tion. Although UNESCO offers its services to the States Parties and encourages its Member States join the Second Protocol, the successful implementation of these instruments resides very much on the commitments from Governments and from the Military. It is indeed essential that the Military be made aware of the importance of the protection of cultural heritage and engage practically in its protection. This can be achieved through information and training of military of various levels, preferably in collaboration with monuments and museums professionals. In this respect, ICOMOS, a founder of the "Blue Shield", and its members could play a more important role to promote and sustain collaboration between heritage professionals and military personnel. As such awareness and training also cover legal issues, I also believe that it is an area where the ICLAFI and its members are well positioned and prepared to contribute.

Bibliography

Boylan, Patrick J. *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)*. Paris: UNESCO, 1993.

Clement, Étienne. "Some Recent Practical Experience in the Implementation of the 1954 Hague Convention." *International Journal of Cultural Property* (Berlin, New York) no. 1, Vol. 3 (1994).

Clement, Étienne and Farice Quino. "La protection des biens culturels au Cambodge pendant la période des conflits armés, à travers l'application de la Convention de la Haye de 1954." *Revue Internationale de la Croix-Rouge, Débat humanitaire: droit, politiques, action/ International Review of the Red Cross, Humanitarian Debate: Law, Policy, Action* Volume 86, no. 854 (2004).

Hladik, J. "Marking of cultural property with the distinctive emblem of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict." *Revue Internationale de la Croix-Rouge, Débat humanitaire: droit, politiques, action/ International Review of the Red Cross, Humanitarian Debate: Law, Policy, Action* Volume 86, no. 854 (2004).

Hladik, J. "Reporting system under the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict." *International Review of the Red Cross* no. 840, Vol. 82 (2000).

Hladik, J. "The Control System under The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and its Second Protocol." *Yearbook of International Humanitarian Law* Vol. 4, 2001. Hague: T. M. C. Asser Press, 2004.

Hladik, J. "The Main Activities of the UNESCO Secretariat Related to the Implementation of the Second Protocol to The Hague Convention of 1954." In *Culture and International Law*, edited by Paul Meerts. Hague: Hague Academic Press, 2008.

Hladik, J. "The Review Process of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Impact on International Humanitarian Law." *Yearbook of International Humanitarian Law* Vol. 1 (1998). Hague: T.M.C. Asser Press, 1998.



Hladik, J. "The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage." *Art Antiquity and Law* Vol. IX, issue III (June 2004).

Hladik, J. "The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Notion of Military Necessity." *International Review of the Red Cross* no. 835, Vol. 81 (1999).

Nahlik, Stanislaw E. "Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 1954: General and Special Protection", Istituto internazionale di diritto umanitario, La protezione internazionale dei beni culturali/The International Protection of Cultural Property/La protection internationale des biens culturels, Rome, Dragan European Fondazione, 1986.

Nahlik, S. E. J. "International law and the protection of cultural property in armed conflicts." *The Hastings Law Journal* no. 5, Vol. 27 (1976).

Nahlik, S. E. "On some deficiencies of The Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict." *Newsletter of the Association of Attenders and Alumni of The Hague Academy of International Law* (Hague) Vol. 44 (1974).

Nahlik, S. E. "Protection des biens culturels." [Protection of Cultural Property], *Les dimensions internationales du droit humanitaire* [The International Dimensions of Humanitarian Law]. Paris/Genève: Editions Pedone/ UNESCO/Institut Henry-Dunant, 1986.

Nahlik, S. E. "The Case of the Displaced Art Treasures, History and Appreciation of a Polish-Canadian Strife." *German Yearbook of International Law* Volume 23 (1980).

Niec, Halina. "The Human Dimension of the Protection of Cultural Property in the Event of Armed Conflict." *Humanitäres Völkerrecht – Informations-Schriften* (Bonn, German Red Cross) Vol. 4 (1993).

O'Keefe, Patrick J. "The First Protocol to The Hague Convention Fifty Years on." *Art Antiquity and Law* Vol. IX, Issue II (June 2004).

Pratt, Lyndel V. "The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954." *Humanitäres Völkerrecht – Informations-Schriften* (Bonn, German Red Cross) Vol. 4 (1993).

Pratt, L. V. "Commentary: 1954 Hague Convention for the protection of cultural property in the event of armed conflict." In Ronzitti, N., *The Law of Naval Warfare*. Dordrecht: Martinus Nijhoff Publishers, 1988.

Toman, Jiří. *Cultural Property in War: improvement in Protection. Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*. UNESCO Publishing, 2009.

Toman, J. "The Control System under the 1954 Hague Convention and its 1999 Second Protocol." *Culture and International Law*, edited by Paul Meerts. Hague: Hague Academic Press, 2008.

Toman, J. "The Hague Convention – A Decisive Step taken by the International Community." *Museum International* No. 228 (December 2005).

UNESCO. *Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two 1954 and 1999 Protocols, Report on the Activities from 1995 to 2004*, UNESCO, Document Ref. CLT-2005/WS/6, Paris.

UNESCO. *Information on the Implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 1954, 1995 Reports*, UNESCO, Document Ref. CLT 95/WS/13, Paris.

