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Legal Gazette

**Cultural Property
Protection:
NATO and other
Perspectives**

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Preface

Greetings from Brussels and NATO Headquarters. As the Legal Adviser to the Secretary-General of NATO, it is my pleasure to introduce the 38th edition of the *NATO Legal Gazette* — the most substantive issue in this publication's history.

The preamble of the Washington Treaty establishes the North Atlantic Alliance's determination to safeguard the rule of law.

At Warsaw in July 2016, Heads of States and Governments, reaffirmed that "NATO's essential mission is unchanged: to ensure that the Alliance remains an unparalleled community of freedom, peace, security, and shared values, including individual liberty, human rights, democracy, and the rule of law." Recognizing further the imperative to protect civilians from the effects of armed conflict, they also endorsed the NATO Policy on the Protection of Civilians.

Affirming this core value at the 32nd International Conference of the Red Cross and Red Crescent in December 2015, NATO also pledged to identify areas where training and education provided by NATO on International Humanitarian Law may be further enhanced.¹ In furtherance of the pledge and galvanized by on-going attacks on some of the world's most cherished cultural sites, this issue of the *NATO Legal Gazette* addresses the protection of cultural property during armed conflict.

21st Century NATO has continually sought to enhance its approach to Cultural Property Protection (CPP) be it through the perspective of Environment Protection or civil-military action. In 2014, 2015, and 2016 the NATO Science for Peace and Security Programme and NATO nations organized a series of workshops on "Best Practice for Cultural Property

¹ NATO pledge to strengthen training on international humanitarian law at http://www.nato.int/cps/en/natohq/news_125839.htm.

Protection in NATO-led Military Operations.”² In 2015, as part of its Makes Sense series, the NATO Civilian-Military Cooperation Centre of Excellence published a 79-page pamphlet, *Cultural Property Protection Makes Sense: A Way to Improve Your Mission*.³

Issue 38 of the *NATO Legal Gazette* continues this effort by offering 11 articles authored by distinguished academics, military, and civilian personnel, all dedicated to cultural property protection. These authors are commended for their significant contributions to NATO International Humanitarian Law education and training and the Headquarters Supreme Allied Commander Transformation is thanked for this publication.

Sincerely,



Steven Hill
NATO Legal Adviser and Director
NATO HQ International Staff Office of Legal Affairs

² Best Practices For Cultural Property Protection In NATO-led Military Operations flier at www.nato.int/science/country-fliers/BIH.pdf.

³ *Cultural Property Protection Makes Sense: A Way to Improve Your Mission* at <https://library.cimic-coe.org/cultural-property-protection-makes-sense/>.



SOURCE: www.nato.int

Introduction

Dear Fellow Legal Professionals and Persons interested in NATO,

Foremost, thanks to the distinguished group of authors who contributed the twelve articles composing this 38th Issue of the *NATO Legal Gazette*. As Mr. Steven Hill observed, it is the most substantive issue we've yet published. Credit for this must be given to Ms. Mette Prassé Hartov, our co-editor, who recommended we address as our theme Cultural Property Protection (CPP). Because much of the discussion of CPP is treaty based, to aid those who may be new to CPP, the last article of this issue, "Cultural Property Protection during Armed Conflict under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol: A Comprehensive Guide" was authored by our co-editor and former SHAPE Legal Intern, Zarghoen Rawan, as a quick reference to this large topic that may be consulted while reading the other eleven articles in this issue.

Second, in recognition of the 70th Anniversary of the North Atlantic Treaty, a special edition of the *NATO Legal Gazette* will be published in 2019. On page 124, the Legal Advisers at NATO Headquarters, Allied Command Operations, and Allied Command Transformation are pleased to issue a Call for Papers on the theme "The North Atlantic Treaty at 70 – Selected Legal Perspectives."

Third, the fourteen contributing authors to Issue 38 include many luminaries in the field of CPP. We begin with Lieutenant-Colonel David Burbridge, an Engineering Officer in the Canadian Armed Forces presently posted as the Environmental Management officer at SHAPE. He begins this

issue with his insightful article on cultural property protection as an essential part of the NATO Environmental Protection policy. Dr. Frederik Rosén, Senior Researcher at the Danish Institute for International Studies, provides a clarifying overview of the progress undertaken during the NATO Science for Peace and Security workshops and shares practical recommendations for NATO policy and doctrine enhancement. Mr. Jan Hladík, Chief of UNESCO's Cultural Heritage Protection Treaties Section, presents the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its 1999 Additional Protocol, and shares his views on peacetime responsibilities regarding CPP.

From University College London, Professor Roger O'Keefe addresses the relationship between the law of war crimes and the intentional destruction, damage or appropriation of cultural property during armed conflict. Whilst doing this, Professor O'Keefe provides a meticulous analysis of the rich case law on crimes against cultural property. Mr. Mark Vlasic, Senior Fellow and Adjunct Professor of Law at Georgetown University and Ms. Helga Turku, a rule of law consultant for US government funded projects in Africa and Latin America, jointly contributed an article that sheds light on the destruction of cultural property in Syria and addresses the ways in which international law could be utilised to hold the perpetrators of these heinous crimes accountable. Specifically focussing on ISIS' use of cultural property to finance its terrorist activities, Ms. Turku provides an additional article on the instrumental role of cultural property in terrorism and the international community's approach to prosecuting war crimes, crimes against humanity and genocide in light of crimes against cultural property.

Dr. Patty Gerstenblith, Distinguished Research Professor at DePaul University College of Law and Secretary of the U.S. Committee of the Blue Shield, together with Dr. Nancy C. Wilkie, Professor of Classics, Anthropology and the Liberal Arts and President of the U.S. Committee of the Blue Shield contribute to this edition an article on the Blue Shield Movement, an international NGO concerned with CPP in the event of armed conflict. Dr. Laurie Rush, the Cultural Resources Manager and installation Archaeologist of the US Army 10th Mountain Division at Fort Drum, zooms in on the importance of training members of the armed forces in CPP and provides a sharp overview of very practical steps that were taken by the United States Army in order to integrate CPP into the training of its personnel. From the United States Army Corps of Engineers, Dr. Kathryn Fay, a Post-Doctoral Researcher at the US Army Construction Engineering Research Laboratory (ERDC-CERL), and Dr.

George Calfas, ERDC-CERL Program Manager, address the development of the Contingency Base Site Identification for the Tactical Environment (CB-SITE); a new tool that assists in avoiding inflicting damage to cultural sites during the construction of overseas bases.

The Deputy Legal Advisor for HQ SACT, Ms. Mette Prassé Hartov presents a welcome review of the November 2016 launched UNESCO Military Manual on Cultural Property Protection. Drafted under the auspices of UNESCO and the International Institute of Humanitarian Law (Sanremo, Italy), the Manual aims to serve as a practical guide for military forces in their implementation efforts of CPP-related international law. Mr. Zarghoen Rawan who, as a SHAPE Legal Intern co-edited this issue, contributed two articles: "Great, Greatest or Outstanding: Defining Cultural Property in NATO Operational Context" and — as previously mentioned, "Cultural Property Protection during Armed Conflict under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol: A Comprehensive Guide."

I close by again thanking the fourteen dedicated authors who contributed their work to this issue of the *NATO Legal Gazette*. To this publication's audience, the authors, the editors, and I greatly appreciate your interest and hope you will find this edition interesting and informative.

Best wishes to all of you from Belgium.

Sincerely,

Lewis

Sherrod Lewis Bumgardner
Legal Advisor
ACT Staff Element Europe



SOURCE: www.nato.int

The Integration of Cultural Property Protection into NATO Environmental Protection Policy: An Example of Good Practice

by Lieutenant-Colonel David J. Burbridge ¹

Introduction

Military engineering (MILENG) capabilities shape the physical environment in support of operations during all types of missions.² These capabilities not only consists of improving and adapting the physical environment – such as to enable or inhibit movement, develop and maintain infrastructure, and provide life support – but it also includes protecting the physical environment. All activities that change or impact the physical environment must be undertaken with the appropriate amount of information and planning prior to execution. They will often require significant human and physical resources to complete, and can hold potential for adverse impacts ranging from difficult to impossible to reverse.

¹ Engineering Officer in the Canadian Armed Forces presently posted as the Staff Officer (Environmental Protection) within the Joint Engineering (JENG) Division at Supreme Headquarters Allied Powers Europe (SHAPE). In addition to the individuals whose highly informative personal communications are footnoted, this document greatly benefited from review by, and several enlightening discussions with, Colonel Bert Keij, Assistant Chief of Staff, JENG Division, SHAPE; and, Lieutenant-Colonel Stuart Barltrop, CIMIC Concepts and Doctrine, J9 Division, SHAPE.

The views expressed in this article are solely those of the author and may not represent the views of NATO, ACO, ACT, or their affiliated institutions, or any other institution.

² NATO, MC 0560//1 – MC Policy for Military Engineering (NATO Military Committee, 19 January 2012).

MILENG includes environmental protection (EP), an area of expertise that assists in the prevention or mitigation of adverse environmental impacts.³ NATO's attention towards EP commenced in 1969, with its first guidelines and standards being established in the late 1970's.⁴ NATO EP policy has greatly expanded in the last decade, and one aspect of this expansion has been an understanding of the link between EP and cultural property protection (CPP). In NATO EP policy, cultural property (CP) is understood from the words as informed by Protocol 1 of the Geneva Conventions and the 1954 Protection of Cultural Property Convention.

The most recent CPP developments in NATO arose from a 2012 lessons learned report⁵ produced by the NATO Joint Analysis and Lessons Learned Centre (JALLC) regarding Operation UNIFIED PROTECTOR, NATO's campaign in Libya in 2011. During operation's planning, Joint Force Command Naples included CPP data received from Operation ODYSSEY DAWN, UNESCO, academia, and other sources on their mapping information.⁶ Consequently, Libyan cultural property was spared from the worst effects of NATO air strikes. This was a significant example of where CPP data was positively employed by military planning staff, although the JALLC report also identified there was no clear delineation of CPP responsibilities within NATO. As such, the key stakeholders in CPP commenced discussions on the way ahead. These discussions led to the NATO Environmental Protection Working Group's consideration of EP's role in CPP, and also to the start of a two-year series of NATO Science for Peace and Security (SPS) Advanced Research Workshops known as the NATO SPS CPP Project.⁷ The NATO SPS CPP Project concluded with a conference in Sanremo, Italy, in December 2016.⁸

Since 2014, Allied Command Operations has informally assigned

³ NATO, 'Environmental Protection' (*NATOTerm: The Official NATO Terminology Database*, 31 October 2013) <https://nso.nato.int/natoterm/Web.mvc>, accessed 2 February 2017.

⁴ NATO, 'Environment – NATO's Stake' (*NATO*, 9 December 2014) http://www.nato.int/cps/en/natohq/topics_91048.htm, accessed 31 January 2017.

⁵ NATO, *Cultural Property Protection in the Operations Planning Process*, JALLC/CG/12/285 (NATO Joint Analysis and Lessons Learned Centre, 20 December 2012).

⁶ For a more complete description regarding how the CPP database used by NATO's Operation UNIFIED PROTECTOR evolved, see: NATO, *Cultural Property Protection in the Operations Planning Process*, JALLC/CG/12/285 (NATO Joint Analysis and Lessons Learned Centre, 20 December 2012) 8-9.

⁷ Information in the paragraph is based on a personal communication from Lloyd Chubbs to author (1 February 2016). Presently retired from the Canadian Armed Forces, Lieutenant-Colonel Lloyd Chubbs was the Staff Officer (Environmental Protection) within JENG Division, SHAPE, between July 2014 and July 2016.

⁸ Personal communication from Frederik Rosén, Co-Director, NATO SPS CPP Project, to author (16 February 2017).

responsibility to SHAPE's J9 Division for the coordination of CPP activities.⁹ Responsibility and authority for CPP, along with several other cross-cutting topics, is expected to be formally assigned to SHAPE J9 Division by 2018.¹⁰ EP will continue contributing to NATO CPP objectives in locations where engineering projects of other significant activities that may impact the environment¹¹ are executed. In addition to CIMIC and EP, other notable NATO functional and capability area stakeholders in CPP include intelligence, geospatial information, operations, plans, logistical, combat support (e.g., targeting and fire support; MILENG functions in addition to EP), legal advisor (LEGAD), and strategic communications (StratCom¹²). In order for the CPP efforts of these staffs to be successful, commanders at all levels must appreciate the relevant role of CPP in assisting NATO to achieve its objectives, and impart this understanding throughout their organizations.

Linkages Between EP and CPP and Their Importance to Modern Operations

EP and CPP share many characteristics that engender being considered jointly. They require detailed studies of the terrain both above and below the surface, an understanding of the terrain's former uses and of its inhabitants. Their success necessitates deliberate planning and strict management controls over human activities and possible contamination of sensitive sites. Furthermore, EP and CPP are both concerned with sustaining unique and valued resources. They consist of non-combat tasks whose proper execution may impose constraints on, or require the relocation of, military activities. Ecosystem components – in addition to physical structures – can be powerful elements of a society's culture, which if damaged due to military activities may require decades or generations to recover.¹³ Unfulfilled EP and

⁹ Day-to-day responsibility for CPP matters within SHAPE J9 Division is held by its Civil Military Interaction Branch.

¹⁰ Personal communication from Sera Gaeta, Branch Head, Civil Military Interaction, J9 Division, SHAPE, to author (3 February 2017). Other cross-cutting topics, in addition to CPP, that CIMIC will hold formal authority for includes: (i) protection of civilians (persons, objects, and services), (ii) children and armed conflict, and (iii) building integrity.

¹¹ NATO defines the environment as: "The surroundings in which an organization operates, including air, water, land, natural resources, flora, fauna, humans, and their interrelations." NATO, 'Environment' (*NATOTerm: The Official NATO Terminology Database*, 31 October 2013), <https://nso.nato.int/natoterm/Web.mvc>, accessed 2 February 2017.

¹² Not to be confused with STRATCOM: United States Strategic Command.

¹³ Laurie Rush, 'Cultural Property Protection as a Force Multiplier in Stability Operations: World War II Monuments Officers Lessons Learned' (2012) *XCII* (2) *Military Review* 36, 41. For example, in 1944, British forces began logging a virgin forest near Camaldoli, Italy, that had been protected since the 11th century or earlier when Saint Romauld established an order of monks that inhabited the area. Local protests resulted in British recognition of the need to protect the most sacred portion of the forest.

CPP obligations can lead to legal ramifications, but both protective functions may nevertheless be overridden by military necessity in justified circumstances following specific operational procedures.

EP and CPP have acquired increasing importance for modern military operations and it is not simply linked to their respective status as recognized issues of common interest or concern to humanity. The diligent execution of EP and CPP have very practical military roles - they can be of critical importance to the overall success of full spectrum operations,¹⁴ such as gaining and/or maintaining support from host nation and international populations, or influencing key actors in the operational area. Environmental and/or cultural property damage by deployed military forces can threaten local livelihoods,¹⁵ lead to increased tensions and violence, as well as threaten host nation and international support for a mission. Damage to cultural sites by military forces also has negative consequences for force protection. In a recent study incorporating data from villages in Afghanistan collected from 2004-2009, locations where the military had caused damage to a village cultural site – unintended or otherwise – experienced a 33 percent increase in insurgent attacks over the subsequent three months in comparison to the average number of attacks.¹⁶ In contrast, efforts by military forces to protect the environment and cultural property can contribute to stabilisation, foster and strengthen trust and cooperation with local populations, and enhance prospects for enduring security. The primacy of winning the hearts and minds of local populations was a central concept in *The Utility of Force* by General Sir Rupert Smith, former Deputy Supreme Allied Commander Europe (1998-2001),¹⁷ where he proposed that a new paradigm of warfare,

¹⁴ For example, since the mission was first created, the mandate for the United Nations Multidimensional Integrated Stabilization Mission in Mali has included a provision related to CPP: “Support for cultural preservation: To assist the Malian authorities, as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO”. United Nations, ‘Resolution 2100’ (S/RES/2100, United Nations Security Council, 25 April 2013)

http://www.un.org/en/peacekeeping/missions/minusma/documents/mali%20_2100_E_.pdf, accessed 4 February 2017. The UN recently published a military manual on CPP: Roger O’Keefe, Camille Péron, Tofiq Musayev, and Gianluca Ferrari, *Protection of Cultural Property Military Manual* (UNESCO 2016).

¹⁵ For example, cultural property is recognized as a “primary component” for establishing economic security following cessation of hostilities through tourism and related industries such as hotels, tour guides, and souvenir shops. Major Yvette Foliant, *Cultural Property Protection Makes Sense: A Way to Improve Your Mission* (Civil-Military Centre of Excellence, 2015) 3.

¹⁶ Jacob Aronson, University of Maryland, ‘Identifying the Impact of Heritage Site Damage in Afghanistan’ (Unpublished paper, 25 November 2016).

¹⁷ In 2005, General Sir Rupert Smith was described by renowned military historian John Keegan as being “widely recognized as Britain’s outstanding soldier of modern times”. John Keegan, ‘First Decommission the Machete...’ (*The Telegraph*, 10 October 2005), <http://www.telegraph.co.uk/culture/books/3647244/First->

“war amongst the people,” emerged beginning in the late 20th century that is:

...an inversion of industrial war, where the objective was to win the trial of strength and thereby break the enemy's will. In war amongst the people, the strategic objective is to capture the will of the people and their leaders...¹⁸

Some Challenges of Successful CPP

Successfully conducting CPP on military operations is not easily accomplished. There is a requirement for all military forces to receive qualified CPP training¹⁹ before deployment to assist in identifying cultural sites and provide guidance on actions to be taken if cultural property is encountered. Well-known, prominent, or culturally important sites may be pre-identified by military forces before deployment. However, smaller cultural sites may not be pre-identified and may not even be discovered and/or catalogued, therefore leading more easily to unintended damage or degradation by military forces.

Exacerbating the physical challenges of cultural property identification are military forces unfamiliar with the cultural setting into which they are deployed and with little or no understanding of what the local population may deem culturally significant. The cultural importance of a mound of soil, or a specific arrangement of rocks, may completely elude unwary military personnel. For instance, there exist dramatic differences between how cultures across the world mark human burial grounds; markings may only look like refuse or discarded debris.²⁰ Furthermore, cultural resources may be present that are considered of little value by the current local population, but may be considered of great value by displaced peoples, or parts of the international community.²¹

[decommission-the-machete.html](#), accessed 15 December 2016.

¹⁸ General Sir Rupert Smith, *The Utility of Force: The Art of War in the Modern World* (Allen Lane 2006) 277.

¹⁹ The Civil-Military Cooperation Centre of Excellence advises that two forms of CPP-related training should have occurred before forces are deployed: (i) Generic training that is routinely given to soldiers regarding the importance of cultural property and CPP, including associated legal obligations, and (ii) Country-specific cultural property pre-deployment training, which is given to soldiers in advance of a known mission in a given location, in order to assist in identifying and showing proper respect for cultural property in the mission area. Civil-Military Cooperation Centre of Excellence, *CIMIC Field Handbook* (4th edn, CIMIC COE, 2016) III-8-2.

²⁰ Laurie Rush (ed), *Cultural Property Protection as a Force Multiplier: Implementation for all Phases* (NATO Science for Peace and Security Cultural Property Protection Project, 2016) 19.

²¹ Laurie Rush (ed), *Cultural Property Protection as a Force Multiplier: Implementation for all Phases* (NATO

Military personnel need not possess the expertise to assess the value of cultural property, which can be conducted by archaeological professionals. However, EP and other personnel do need the CPP skills to plan adequate precautions, identify possible sites or objects as cultural property when encountered, take the necessary reporting and protective measures to assist in safeguarding them, and be empowered to liaise with subject matter experts and organizations that can provide support to the aforementioned. Before deploying, personnel will ideally receive adequate training from qualified cultural experts, have conducted coordination with academia²² and host nation cultural experts, and possess detailed maps, imagery, and any other types of geospatial or intelligence products that provide information on known cultural property in the deployment area. For example, CB-SITE,²³ presently being developed by the United States Army Corps of Engineers, is an emerging geospatial software tool that can assist in CPP. CB-SITE processes location-specific terrain, infrastructure, and socio-cultural data to holistically select and plan for camp and other contingency base locations, with one element of the data affecting site selection being cultural property.²⁴

CPP Within NATO EP Policy

It is in the execution of engineering projects, whether directly by MILENG personnel or by contractors managed by MILENG personnel, that EP has a role to play in identifying and safeguarding cultural property. Perhaps the most prominent type of engineering project that is regularly executed on operations is the construction of military camps. Camp construction is a MILENG task that includes clearing and levelling ground, construction of perimeter protection and facilities, and the provision of electricity, fuel, water, and wastewater systems. In addition, access roads, bridges, and airstrips may require repair or be newly constructed. Thus, military engineers not only participate in all reconnaissance tasks for planning deployed camps but they

Science for Peace and Security Cultural Property Protection Project, 2016) 9.

²² Some archaeological experts view collaboration with the military as a loss of professional impartiality, and may be critical of their peers who have chosen to work with the military. Joris D. Kila, 'Cultural Property Protection in the Event of Armed Conflict: Deploying Military Experts or Can White Men Sing the Blues?' in Laurie Rush (ed), *Archaeology, Cultural Property, and the Military* (Boydell Press 2010) 41.

²³ Contingency Base Site Identification for the Tactical Environment.

²⁴ See Kathryn Fay and George Calfas, 'Heritage at Risk: Mapping as a Form of Protection and Preservation for Global Heritage Sites' (2017) here in Issue 38 *NATO Legal Gazette*. Some open source information websites containing cultural property data include the UNESCO World Heritage List, the United Nations Environmental Programme (UNEP) Protected Planet database, and OpenStreetMap.

are also typically amongst the first elements to arrive in theatre in order to build the camp before the main body of the mission force arrives.

Documenting site-specific baseline conditions when deployed camps and other infrastructure projects – even small projects – are planned is essential for ensuring full knowledge of original conditions and identifying any potential hazards of placing the camp in a specific location. The importance of CPP planning has made it an essential factor in camp planning. Terrain selected for use by military forces during operations can often be collocated amongst cultural sites, with site selection criteria in the present day possibly being identical to those for which the cultural site was originally set there. Enduring site selection criteria include being the most suitable construction site in the area, the most defensible site, and/or for possessing a commanding view of the surrounding terrain. Hence, lack of attention to CPP can lead soldiers to unwittingly destroy culturally significant objects during ground preparations or other camp construction activities. For example, significant damage occurred to internationally important cultural property during non-NATO military operations in Babylon, Iraq, in 2003-2004, some of which were linked to camp construction. Large numbers of defensive barriers were filled with material from the site containing pottery sherds, bones, and other historically significant matter. In addition, large sections of the site were covered with gravel originating from a different location, compacted, and in some cases chemically treated to provide suitable areas for accommodations, vehicle parking, storage, and helipads.²⁵

Underpinning all actions by EP and other personnel to protect cultural property are various NATO EP policies that include CPP direction. *MC 0469//1 – NATO Military Principles and Policies for Environmental Protection (EP)* is NATO's highest-level EP policy. This document establishes the EP principles and policies to be implemented by commanders during the preparation and execution of all NATO-led activities. As of February 2017, this policy remains under a routine review led by NATO's Environmental Protection Working Group (EPWG). This review is expected to conclude during 2017, with the new draft version being submitted to NATO's Military Committee for approval. Although mention of CPP was not included in the current version when approved by the Military Committee in 2011, the EPWG intends to propose a statement for inclusion in the new version – which will become *MC 0469//2 –*

²⁵ Joris D. Kila, *Heritage Under Siege: Military Implementation of Cultural Property Protection Following the 1954 Hague Convention* (Brill 2012) 123-126.

that will highlight the contribution of EP to NATO CPP responsibilities.

The concepts within MC 0469//1 (and its future versions) are supported and amplified by numerous Allied Joint Environmental Protection Publications (AJEPPs), which themselves are implemented through NATO Standardization Agreements (STANAGs). Several AJEPPs address CPP in varying degrees.²⁶

AJEPP-2 (STANAG 2582), *Environmental Protection Best Practices and Standards for Military Camps in NATO Operations* (February 2016) identifies CPP as an environmental aspect deserving attention in EP assessments, and it devotes an annex – Annex I – to this topic. This annex is arranged into five sections: description of the situation, objectives, responsibilities, best practices, and standard operating procedures, with specific attention given to CPP requirements for the construction and management of military camps and other infrastructure. Annex I was developed in close collaboration with Dr. Frederik Rosén (Denmark) and Dr. Laurie Rush (USA), academics who are two of the four Co-Directors of NATO's SPS CPP project.

AJEPP-3 (STANAG 2583), *Environmental Management System in NATO Operations* (August 2011) mentions the concept of cultural resources, while AJEPP-4 (STANAG 7141), *Joint NATO Doctrine for Environmental Protection During NATO-Led Military Activities* (May 2014), contains two such references.

AJEPP-6 (STANAG 6500), *NATO Camp Environmental File During NATO-Led Operations* (August 2015) establishes the protection of cultural resources as an essential factor in all NATO environmental conditions studies, which are conducted (ideally) before occupation of a site (Environmental Baseline Study (EBS)), as well as upon either transferring the site to another force or closing the site and transferring it to host nation authorities (Environmental Closeout Study (ECS)). Thus, thorough identification of the locations, characteristics, and condition of cultural sites, and details of the cultural resources management plan, are critical to the handover process. AJEPP-6 also requires consideration for the protection of cultural resources during NATO Environmental Impact Assessments, which serve to “assess the potential

²⁶ AJEPP-1 (STANAG 2581) was cancelled in 2016 after its contents were amalgamated into the most recent version of AJEPP-2 (STANAG 2582), *Environmental Protection Best Practices and Standards for Military Camps in NATO Operations* (February 2016). The contents of AJEPP-5 (STANAG 2510), *Joint NATO Waste Management Requirements During NATO-Led Military Activities*, overlaps considerably with the latest version of AJEPP-2. Items currently contained in AJEPP-5 but not in AJEPP-2 will be included in the latter's next revision in 2019, after which AJEPP-5 will be recommended for cancellation. All AJEPPs and the corresponding STANAGs can be found at <https://nso.nato.int/nso/nsdd/listpromulg.html>, accessed 2 February 2017.

environmental impact of a proposed activity and to recommend measures for the prevention and/or mitigation of significant adverse impacts",²⁷ and during the preparation of a NATO Environmental Condition Report, whose purpose is to "document any changes or incidents which have occurred in a NATO Camp, specifically between the completion of the EBS and the ECS."²⁸

AJEPP-7 (STANAG 2594), *Best Environmental Protection Practices for Sustainability of Military Training Areas* (March 2014) is replete with references to the concepts of cultural heritage, cultural resources, cultural resource management, and cultural protected sites; however, this document also does not specifically use the term CPP.

All these publications are likely to be enhanced by future developments in CPP concepts, policy, and doctrine to achieve greater coherence and standardization across ACO and ACT.²⁹ This will be fostered by further initiatives, to include a Bi-SC CPP Directive in 2017-2018.

Both current NATO EP training courses include CPP in their content and are accessible to military and civilian personnel. The first, the one-week *NATO Military Environmental Protection Practices and Procedures Course* (NMEPPPC) is held at the Military Engineering Centre of Excellence in Ingolstadt, Germany. The NMEPPPC is a tactical-level course designed to familiarize the student with the knowledge and skills needed to integrate NATO-led military operations with NATO EP requirements in accordance with NATO STANAGs and policies. During this course, identification and respect for cultural property is contained within the class providing instruction on the conduct of an EBS, and successful identification and documentation of a cultural site is one aspect of the outdoor practical EBS exercise. The second NATO EP course, the two-week *M3-77 Environmental Management for Military Forces Course*, is an operational-level course held twice annually at the NATO School Oberammergau in southern Germany. This course aims to provide the student with foundational knowledge of environmental policies to enable the integration of EP into operational planning. The M3-77 course contains a 1.5-hour lecture devoted to CPP in times of armed conflict.

Recommendations

²⁷ NATO, AJEPP-6, *NATO Camp Environmental File During NATO-Led Operations* (NATO Standardization Office, August 2015) B-1.

²⁸ NATO, AJEPP-6, *NATO Camp Environmental File During NATO-Led Operations* (NATO Standardization Office, August 2015) 1-3.

²⁹ Personal communication from Maxime Leriche, J9 Division, SHAPE, to author (1 February 2016).

While CPP has found recognition and been incorporated into NATO EP policies, several steps need be taken to raise the profile of CPP more broadly across NATO – at the strategic, operational, and tactical levels. One such way to accomplish this is by better entrenching the concept of CPP into NATO policies and doctrine wherever appropriate. For example, although CPP is addressed in several EP publications implemented through STANAGs, NATO does not have a CPP STANAG. Creating a CPP STANAG would be a significant step towards raising the profile of CPP in NATO. In addition, the *Allied Command Operations Comprehensive Operations Planning Directive* (ACO COPD), for example, contains only a handful of very brief references to legal obligations such as limiting damage to cultural sites³⁰, or the importance of obtaining expert cultural advice. Many of these references appear only in footnotes. Furthermore, the term *cultural property protection* does not appear in this 400+ page document – the primary guide for the NATO operations planning process at the strategic and operational level.

Another method of promoting CPP more broadly across NATO is by including CPP scenarios within NATO exercises. This will further bolster awareness, education, training, and confidence in addressing situations in which CPP considerations are present or emerging. Efforts toward achieving this aim are already underway. NATO's Exercise Trident Juncture 2016 included notable events requiring CPP attention.³¹ In addition, the most recently published guidance on training priorities for the Supreme Commander Allied Powers Europe (SACEUR), SACEUR's Annual Guidance on Education, Training, Exercises and Evaluation 2018 (SAGE 18), for the first time included direction related to CPP.³²

Conclusion

EP and CPP have become increasingly important in modern full spectrum operations, which rely on winning the “will of the people and their leaders”.³³ Although informally, SHAPE J9 Division leads CPP efforts – a task

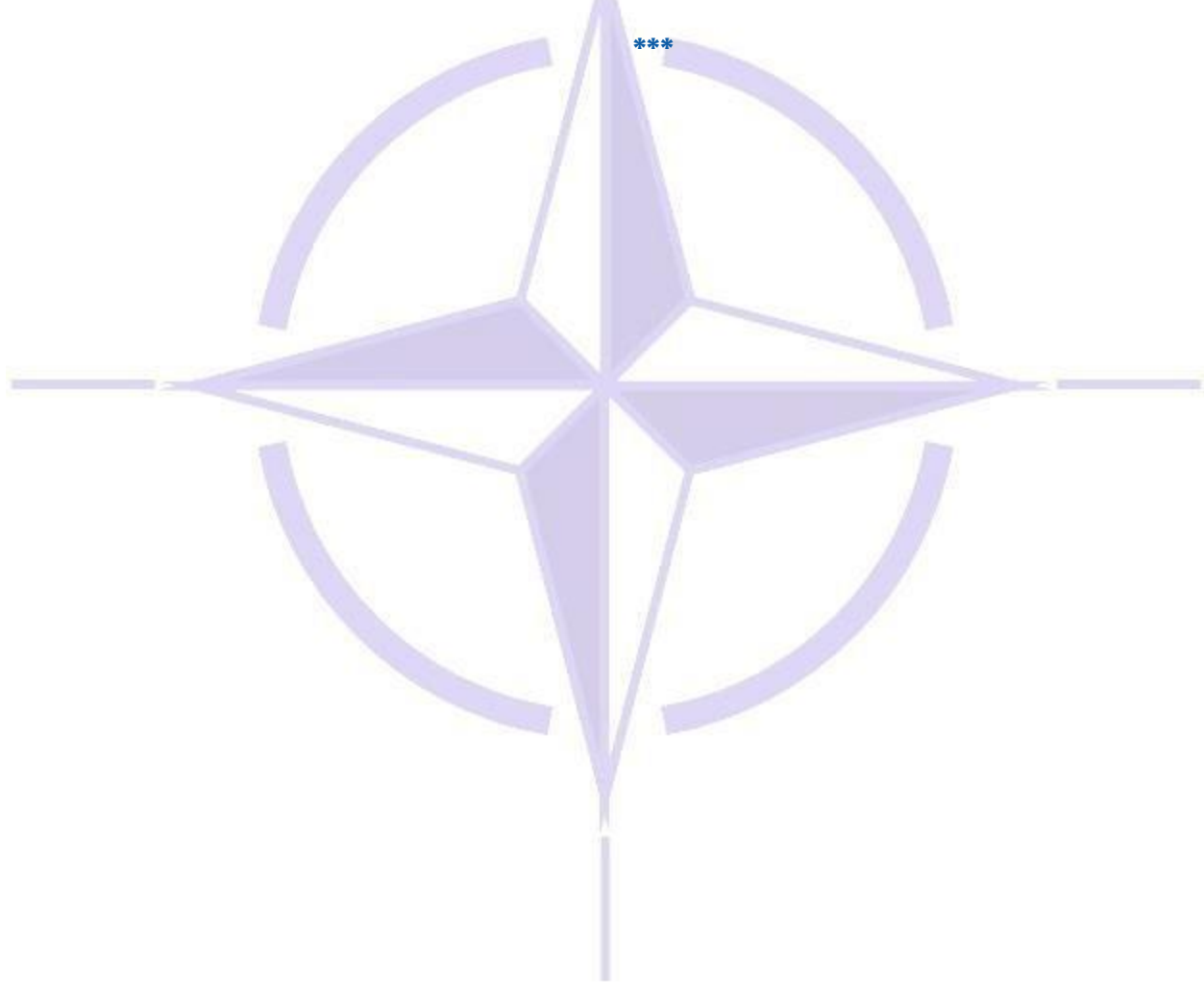
³⁰ These legal obligations stem from Customary International Law and Treaty Law.

³¹ NATO, ‘Staffs from J9 JFC Naples Attend the Final NATO International Conference on Cultural Property Protection in NATO-Led Military Operations’ (*Allied Joint Force Command Naples*, 16 December 2016), <http://www.jfcnaples.nato.int/newsroom/news/2016/staffs-from-j9-jfc-naples-attend-the-final-nato-international-conference-on-cultural-property-protection-in-natoled-military-operations>, accessed 5 February 2017.

³² NATO, *SACEUR's Annual Guidance on Education, Training, Exercises and Evaluation 2018 (SAGE 18)*, 23 August 2016.

³³ See ref. 18.

expected to be official by 2018³⁴ – the EP community contributes to fulfilling NATO CPP objectives. The conduct of successful CPP is extremely challenging and requires full support from commanders at all levels. Numerous NATO EP policies have embraced CPP concepts as an essential factor for consideration in assessments, and some training events have included CPP considerations. However, there remains more space for NATO to better embrace CPP, including but not limited to promulgating a STANAG on this concept, entrenching it in the ACO COPD and other NATO policies and doctrine where suitable, and better integrating CPP considerations into exercises. EP policies will need to be further strengthened as CPP is incorporated at all levels and in conjunction with the relevant topics.



³⁴ Personal communication from Sera Gaeta, Branch Head, Civil Military Interaction, J9 Division, SHAPE, to author (3 February 2017).



SOURCE: www.nato.int

NATO-led Military Operations and Cultural Property Protection

by Dr. Frederik Rosén¹

An overview of the NATO Science for Peace and Security project “Best Practice for Cultural Property Protection in NATO-led Military Operations”.

In 2014, NATO Member States approved a NATO Science for Peace and Security program (SPS) series of Advanced Research Workshops (ARWs) titled “Best Practice for Cultural Property Protection in NATO-led Military Operations” (NATO SPS CPP) that was to be held in 2014-2016. The NATO SPS Program is a NATO policy tool, which aims at increasing the cooperation and dialogue between NATO Member States and partners based on scientific research and knowledge exchange.²

¹ Danish Institute for International Studies.

The views expressed in this article are solely those of the author and may not represent the views of NATO, ACO, ACT, or their affiliated institutions, or any other institution.

² See http://www.nato.int/cps/en/natohq/topics_85373.htm. The SPS Award for this NATO SPS CPP was EURO 110.000 earmarked for operational costs of running workshops and containing no overhead for institutions or salary for co-directors or assistants. The NATO SPS Committee approved the NATO SPP CPP with co-directors from Bosnia-Herzegovina (Hadzim Hodsic) and Denmark (Frederik Rosén), while co-directors from UK (Richard Osgood) and US (Laurie Rush) were added immediately after project launch. The project is hosted by the Danish Institute for International Studies (DIIS) in Copenhagen, Denmark.

The NATO SPS CPP can be seen as a follow-up to NATO's role in Kosovo, where KFOR provided security for designated religious and cultural heritage sites³ and the lessons identified in Operation Unified Protector⁴ to protect Libya's cultural heritage.⁵ The NATO SPS CPP has offered an academic and analytical approach for NATO to consider further integrating and institutionalising CPP in its operational planning.⁶ The stated aim of the NATO SPS CPP includes developing recommendations on how NATO should approach the question of policy, doctrine and training related to CPP. Furthermore, it aims to stimulate NATO Headquarters and allied nations in thinking about the challenges posed by the increasingly complex role of cultural property in armed conflict. This article describes the NATO SPS CPP project, its methods, activities, and accomplishments so far.

NATO's readiness to address CPP

International Humanitarian Law (IHL) provides a comprehensive framework for protecting cultural property.⁷ As of 2016, 26 out of the then 28 NATO Member States are signatories to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict⁸ and its First Protocol, and many to its Second Protocol, as well as other relevant UNESCO Conventions. While NATO itself is not a signatory to these conventions, individual Member States bear the responsibility to comply with their international legal obligations. Under the 1954-regime, NATO Member States are under an obligation to take all feasible care during military operations to avoid harming cultural property, including avoiding causing damage as a result of base and infrastructure construction. More specifically, the 1954 Convention obligates Member States to "plan or establish in peace-time, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it."⁹

³ http://www.nato.int/cps/en/natohq/topics_48818.htm?selectedLocale=en.

⁴ http://www.nato.int/cps/en/natohq/topics_71652.htm?selectedLocale=en. See also http://www.jallc.nato.int/products/docs/factsheet_cpp.pdf.

⁵ http://www.nato.int/cps/en/natohq/news_82441.htm?selectedLocale=en.

⁶ Recognising the conceptual differences and overlap between the concept of "cultural heritage" and "cultural property", the concept of 'cultural property' will be used throughout this article.

⁷ For thorough account of the international legal framework of CPP, see Roger O'Keefe (2006): *The Protection of Cultural Property in Armed Conflict*. Cambridge: Cambridge University Press.

⁸ United Kingdom signed the Convention on 30 December 1954, and is currently considering to ratify: <http://www.bbc.com/news/uk-33213911>.

⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the

However, research conducted by the NATO SPS CPP in collaboration with SHAPE combined with the general information collected by the NATO SPS CPP throughout the project indicate that few states have taken steps to plan or set up a CPP capacity in their military forces, and CPP remains a somewhat overlooked topic in training. Considerations are most often limited to general principles of IHL. However, not least as response to how CPP has become a complex challenge in many contemporary conflicts, some states have started to establish more proactive approaches that moves beyond IHL obligations. For instance, the Italians demonstrates the most active commitment in the area; similarly, Poland has broad doctrine in place; the US Army hosts a world famous CPP program and training facilities at Fort Drum, New York; and the UK recently started to take steps to include dedicated CPP capacity in their defence forces. Hence, the lack of institutionalisation does not per se mean that military organisations do not consider CPP. Also, surveys conducted by the NATO SPS CPP and HQ SACT found plenty of CPP-relevant elements in NATO lower level doctrines, and CPP is indeed considered by NATO Military Headquarters and NATO COEs. Altogether, CPP is not an alien element to NATO, even if NATO lacks an overview of and a framework for mainstreaming CPP across the NATO work strands.

The Role of the NATO SPS CPP

When the NATO SPS CPP commenced, the Environment Protection Working Group (EPWG) provided the lead forum for CPP in the working group structure. The role of the EPWG was however limited to monitor CPP developments in NATO and keep the Military Committee Joint Standardization Board (MCJSB) informed without initiating any work on CPP. While EP naturally needs to consider CPP as one of its many elements, it was also clear that EP for various reasons should not be the primary “home” for CPP. The first task for the NATO SPS CPP was thus to start exploring where in the NATO-framework to accommodate CPP. Consultations were held with a range of representatives from NATO Headquarters (Brussels), SHAPE, HQ SACT, and NATO Civil-Military Cooperation Centre of Excellence (CCOE). In addition to gathering knowledge, this process contributed to identifying a network of relevant stakeholders across NATO and some of NATO’s Centres of Excellence, and to socialise the project with academia as well as other international organisations and non-governmental organisations.

Advanced Research Workshops

The subsequent series of Advanced Research Workshops (ARWs) arranged by the NATO SPS CPP Project brought together key stakeholders from NATO HQs, other international organisations (UNESCO, United Nations), Member States, and leading experts to offer different perspectives on CPP in a military and operational context. The workshops consolidated networks, partnerships, and provided a forum for disseminating and discussing findings, perspectives and recommendations of the NATO SPS CPP Project. The actual work of the NATO SPS CPP Project and the related work in NATO's different Headquarters however took place in-between the workshops. The ARWs mostly functioned as events for the NATO SPS CPP Project to coordinate work.

The first ARW was held in Sarajevo in June 2015. In order to align the workshop focus, format and participants as much as possible, the workshop was organised in close cooperation with key stakeholders in NATO Headquarters. The key topics addressed at the workshop were: 1) the conceptual dimension of CPP; 2) International law, CPP, and NATO; 3) the role of GIS in a NATO approach to CPP; 4) the role of SHAPE as a focal point keeper of CPP on behalf of NATO Allied Command Operations (ACO); 5) NATO and training related to CPP. The workshop participants included staff from SHAPE, the CCOE, the Protection of Civilians team in NATO Headquarters (Brussels), HQ SACT Office of the Legal Advisor, and SHAPE, as well as non-NATO subject matter experts.

A main conclusion was that 'Cultural property protection' (CPP) is not a legal term. Rather, the expression is a descriptive label for a range of practices geared towards respecting and safeguarding cultural property in the event of armed conflict. Some of these practices are obligatory as a matter of international law, whilst others are not. The workshop outcome emphasized the tactical and strategic value for NATO of observing CPP, and the crosscutting nature of CPP. The workshop also found that to bring forward the work on CPP, NATO would benefit from knowledge about already existing CPP activities in member nations. Consequently, SHAPE sponsored a survey among NATO nations with the purpose of identifying national best practice. HQ SACT on the other hand, reviewed the integration of CPP in NATO Standards and in exercises and training.

Furthermore, the workshop also identified GIS – Geospatial Imaging Systems – as a critical enabler for considering protection of cultural heritage during all phases of a military operation. Military operations are an inherently

geographical practice and maps are key to the planning and conduct of military operations. Hence, adding a cultural property layer to maps appears to be a precondition for engaging with this dimension of military geography at the strategic, operational and tactical levels.

The second ARW took place in April 2016 in Turin, Italy, where the two aforementioned surveys were presented and discussed. The SHAPE survey sent out on the 30 January 2016 by SHAPE Vice Chief of Staff to the National Military Representations at SHAPE, inviting information about national policy, doctrine, capacity and best practice related to CPP in order to support the work of the NATO SPS CPP Project. The survey responses indicated very diverging approaches to CPP. The HQ SACT survey (within the ACT Legal community) identified CPP-related material in NATO Standards and the existence of CPP or CPP-related material in NATO training and exercises. The findings showed that CPP is integrated in several fields such as a component of IHL instructions, and in the areas of environmental protection standards and civil-military relations. Moreover, CPP is included in NATO training and exercises, but on an ad hoc basis.

In addition to the ARWs in Sarajevo and Turin, an ARW on training was in August 2016 held in Krems, Austria. The Terms of References (ToR) for the NATO SPS CPP Project mentions the production of suggestions for NATO training material as a key outcome, in addition to suggestions for policy and doctrine. However, in the context of NATO, the development of training material is a long process that depends on training needs assessment, and thus not a feasible outcome of an SPS-project. The project therefore adjusted its outcome goal to developing a compendium of educational materials to be made available to NATO nations as well as non-NATO countries.

In September 2016, the NATO SPS CPP Project organised a technical workshop in New York City, USA, dedicated to NATO Headquarters' GIS initiative. A key finding of this workshop was that the technical platforms for launching a NATO "CPP Viewer" are simple and available, but that the building of cultural property inventories appears far more difficult: the barrier for realising a NATO CPP viewer is not technical but organisational and political. The lack of NATO capacity to source and organise data constitutes a key challenge. For NATO to receive inventory data from a single NATO Member State would require screening and approval by the other 27 states. In the end, NATO SPS CPP Project instigated a dialogue between NATO and UNESCO, UNOSAT, and the German Institute for Archaeology to find a

solution.

Finally, in December 2016, the NATO SPS CPP conference at the Sanremo Institute for Humanitarian Law in Italy brought together some 60 participants for a three-day conference on CPP in NATO and armed conflicts more broadly. In addition to NATO stakeholders, the conference enjoyed the participation of representatives from UNESCO, United Nations Department of Peacekeeping Operations /Department of Field Support (DPKO/DFS), UNOSAT/UNITAR, NATO Defence College, INTERPOL, Smithsonian Institute (US), International Criminal Court (ICC), International Tribunal for Former Yugoslavia (ICTY), US Army, US Defence Intelligence Agency, Defence ministries, and leading academic experts.

Cooperation and dialogue

Following the spirit of SPS, the NATO SPS CPP Project facilitated cooperation and dialogue between NATO member countries, partners including international organisations, and academic experts. Despite the high attention paid to cultural property in recent conflicts, the NATO SPS CPP Project stands as the only international initiative that seeks to advance a conceptual and practical military approach to CPP in close cooperation with key stakeholders. As such, the project came to play a role in connecting allied nations who are in the process of developing CPP mechanisms, as well as building ties between key initiatives in international organisations. Also, the United Nations Secretariat has been kept in the loop and received outcome documents, briefings and sometime participated in meetings.

Finally, the enabling role of the NATO SPS CPP Project with regard to bringing together stakeholders and “translating” across branches and functions not only stands as a success. It also presents some general lessons learned about installing crosscutting issues into the silo-world of defence organisations. Engaging with crosscutting issues in an organisation such as NATO requires skills to translate concepts and objectives across branches and stakeholders with very different organisational outlooks. In that regard, the NATO SPS CPP Project benefitted very much from the interdisciplinary team of co-directors, which possessed both broad academic skills as well as profound experience from working with military organisations.

Update of NATO doctrine AJEPP 2B

The NATO SPS CPP Project team drafted the ANNEX I to STANAG AJEPP 2B on Environment Protection best Practices and Standards for Military Camps

in NATO-Led Military Operations, which NATO updated in 2016. The annex seeks to remedy the situations we have seen in Afghanistan where ISAF forces generally failed to consider cultural property when building camps and other infrastructure. In fact, NATO SPS CPP has been able to identify little practical attention to the rich cultural property environment of Afghanistan in the processes of rolling out the enormous stabilisation project in Afghanistan including the construction of infrastructure for Afghan national forces and police. Annex I outlines best practice for considering cultural property building camps and other military infrastructure in areas of operation, as clearly required by International Humanitarian Law.

Policy and doctrine

As the NATO SPS CPP Project commenced its work, some confusion in NATO HQs surrounded the question of what kind of CPP policy or doctrine NATO needed to further integrate and institutionalise CPP in its operational planning. The international community and experts tend to address CPP as a separate thematic issue. Yet, from a military organisational perspective, CPP is a crosscutting issue that calls for awareness across operational planners and commanders. For that reason, a key finding of the NATO SPS CPP Project is that NATO does not need a stand-alone policy or a department for CPP. Rather, NATO needs a set of NATO standards, and a function to mainstream these standards across relevant stakeholders so that CPP becomes a natural outlook of the organisation during all phases of an operation. As NATO already considers CPP, as verified by the HQ SACT survey in combination with general findings of the NATO SPS CPP Project, such a mainstreaming is more about connecting the dots than building something new. Moreover, it would easily pave the way for adopting the more proactive outlook needed to deal with the increasingly complex CPP challenges in contemporary armed conflicts. Consequently, engaging CPP more effectively during NATO missions, planning and conduct is neither rocket science nor a zillion-dollar expense for NATO Member States. Rather, it seems like a low-cost high-gain step to take.

This is an important finding, as nations tend to push back new work areas that may entail financial costs. Hence, when the NATO SPS CPP Project asked a Member State to raise the question of CPP policy among the 28 nations, the answer was that they were concerned that this would create an expectation that they took the lead on the strategic work; something they could not prioritise under their current departmental dispositions. While such

concerns are understandable, the fear that introducing CPP in NATO would be a costly affair stands unsubstantiated.

In addition, a tendency in NATO HQs as well as among allied nations to complicate matters unnecessarily, at least that is the impression of the NATO SPS CPP Project, seems to cause NATO stakeholders to shy away from the topic. In that regard, the NATO SPS CPP Project noticed that military personnel, and particularly those who have served in countries rich with cultural property, like Iraq and Afghanistan, usually appreciate the importance of CPP based on their own experiences.

In order to ensure that CPP remains prominently addressed and incorporated in the operational planning and execution of operation, the NATO SPS CPP advises NATO to consider the development of a NATO STANAG (Standardization Agreement) on CPP. A STANAG is a 'normative document that records an agreement among several or all NATO member states – ratified at the authorized national level – to implement a standard, in whole or in part, with or without reservation.'¹⁰ The STANAG should embrace best practices for implementing IHL obligations as well as wider strategic and tactical considerations of relevance to CPP in the context of NATO-led operations. There are two good reasons for commencing this process. Firstly, to establish agreed NATO best practice on CPP as a crosscutting issue. Secondly, to establish a process that keeps alive the discussion of CPP in NATO (a STANAG takes around two years to complete).

If this approach is adopted, then it will require the active involvement and support of the allied nations. In this process, it may be very helpful to find dedicated support from one or two nations to underpin the development of STANAG and ensuring interim CPP readiness. As the NATO SPS CPP Project has formed the basis for CPP in NATO, this should not be difficultly nor costly. Alternatively, it could be considered a possibility to sustain the NATO SPS CPP Project for these activities. Furthermore, at the national level NATO Member States and partner nations may benefit from such an initiative when pursuing implementation of national IHL obligations as well as when thinking through CPP challenges and developing national capacities.

Conclusion

The NATO SPS CPP Project and related initiatives in NATO Headquarters

¹⁰ <http://www.nato.int/cps/en/natolive/publications.htm>.

has established NATO as the most progressive defence organisation when it comes to developing military approaches for handling challenges related to cultural property in armed conflicts. As military organisations generally lack policy, doctrine and dedicated capacities for addressing CPP, the developments enabled by NATO initiatives may blaze the trail and drive a global mainstreaming of military approaches to CPP broadly viewed. NATO member States and commands should embrace this opportunity and make sure that NATO takes the necessary steps to consolidate this development.





SOURCE: www.unesco.org

Presenting the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict and its 1999 Second Protocol with a special focus on peacetime responsibilities

by Jan Hladík¹

Introduction

Alas, the international community has recently witnessed the heinous crime of massive destruction of cultural property during armed conflicts such as those in Iraq, Libya, Mali, Syria and Yemen. One of the most tragic consequences of this process of destruction is the result in what has been referred to by the Director General of UNESCO, Ms Irina Bokova, as 'cultural cleansing'. The international community, though, does not come unprepared, having as fundamental tools to answer to this drastic situation the 1954 Hague Convention for the Protection of Cultural Property in the

¹ Chief, Cultural Heritage Protection Treaties Section, Division for Heritage, UNESCO, Paris. The current presentation is based on a number of my previous presentations on different aspects of the implementation of UNESCO's standard-setting instruments for the protection of cultural property. I wish to thank Ms Agata Russo for all her help.

The views expressed in this article are solely those of the author and may not represent the views of NATO, ACO, ACT, or their affiliated institutions, or any other institution.

Event of an Armed Conflict and its two (1954 and 1999) Protocols.² Nevertheless, in order for these instruments to fully reach their *raison d'être*, their universal ratification and implementation must be reached.³

1. Introducing the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict and its Second Protocol

1.1. 1954 Hague Convention

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter 1954 Convention or the Convention) represents the first international agreement of universal vocation focused *exclusively* on the protection of tangible cultural heritage in the event of armed conflict. Its scope covers *immovable* property - such as monuments of architecture, art or history and archaeological sites - and *movable* property – such as works of art, manuscripts, books and other objects of artistic, historical or archaeological interest as well as scientific collections and important collections of objects of art.⁴ Article 1 of the Convention provides for a definition of cultural property which expressly covers both immovable and movable property, distinguishing itself from other UNESCO Conventions. All such property is generally protected under the Convention, regardless of its origin or ownership. At time of its signature, the Convention was identified as the most important in the whole history of protection of works of art and every other kind of cultural property.⁵

Two fundamental principles lie at the grounds of the concept of the protection under the 1954 Convention: the safeguarding of and the respect for cultural property.⁶ States Parties to the Convention are therefore required to take preventive measures for the safeguarding of cultural property not only in the event of armed conflict, but fore mostly in peacetime before it is too

² 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted at The Hague, 14 May 1954, full text available at <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-hague-convention/text-of-the-convention-and-its-1st-protocol/#c284179>, accessed 13 September 2016.

³ Of the 193 member states of the United Nations, 127 states are party to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. A complete list of the member states can be found at <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E&order=alpha>, accessed 13 January 2016.

⁴ *Ibid* Article 1.

⁵ Anthi Helleni Poulos, 'The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: an Historic Analysis' 2000 *International Journal of Legal Information* 28:1, 41

⁶ 1954 Hague Convention (n 2), Article 2.

late. Such preventive measures include the preparation and periodic update of inventories of both movable and immovable cultural property, the marking of such property with the distinctive emblem of the Convention or the creation of special units within the military forces that are responsible for the protection of cultural property.⁷ The paramount importance of the abovementioned measures is to avoid the devastating consequences that an armed conflict and its aftermath have on cultural property.

Article 7 of the Convention is of particular relevance when dealing with the protection of cultural property in peacetime. The aforementioned article elucidates the relative military measures the High Contracting Parties have to insert into their military regulations to ensure observance of the Convention and foster in the members of their armed forces “a spirit of respect for the culture and cultural property of all peoples”.⁸

Furthermore, States Parties to the Convention are required, within the framework of their ordinary criminal jurisdiction, to prosecute and to punish those persons, regardless of their nationality, who violate its provisions or order such violations.⁹

In the event of a conflict not of an international character occurring within the territory of one of the Parties to the Convention, each party to the conflict is bound to apply, as a minimum, its provisions relating to respect for cultural property.¹⁰ This provision, which is comparable to common Article 3 of the four Geneva Conventions for the protection of war victims,¹¹ is of paramount importance as it sets forth certain standards of treatment during civil war.

The Convention, administered by the United Nations Educational, Scientific and Cultural Organization (UNESCO), has, as of 19 February 2017, 127 States Parties, 104 of which are also Parties to the 1954 Protocol prohibiting the export of cultural property from occupied territories and requires the return of such property to the territory of the state from where it came.¹²

⁷ *Ibid* Article 3. Cfr. also Article 5 of the Second Protocol.

⁸ *Ibid* Article 7.

⁹ *Ibid* Article 28, see also Article 10(b) of the 1999 Second Protocol.

¹⁰ *Ibid* Article 19.

¹¹ Common Article 3 of the four Geneva Conventions of 1949.

¹² First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed conflict 1954, full text available at <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-hague->

1.2. 1999 Second Protocol

In March 1999 the Second Protocol to the Hague Convention was adopted.¹³ The Second Protocol is supplementary to, and in no way replaces, the underlying Convention. Also, it is an instrument, which consistently advances the level of protection afforded to cultural property by the 1954 Hague Convention in the following respects: it provides for conditions in which the notion of 'military necessity' may be applied, thus preventing possible abuses; it further creates a new category of enhanced protection for cultural heritage of the greatest importance for humanity which is protected by relevant national legislation and is not used for military purposes; it elaborates on sanctions for serious violations of cultural property; and it defines conditions under which individual criminal responsibility applies. Finally, one of the most important achievements of the Second Protocol is the establishment of the Committee for the Protection of Cultural Property in the Event of Armed Conflict (in short 'the Committee').¹⁴ The Committee has been granted the powers to aid States that are Party to the Convention and the Second Protocol in their implementation efforts of both instruments.

The Second Protocol also focuses on the safeguarding of cultural property in times of peace. Article 5 elaborates further on Article 3 of the Convention by providing concrete peacetime preparatory measures. Specifically, it provides for the necessity of preparing inventories, planning emergency measures for protecting against fire or structural collapse, of the removal of movable property for its *in situ* protection, and the designation of competent authorities to enhance the protection of cultural property.¹⁵

Another fundamental aspect in the light of the present analysis is the introduced issue of enhanced protection. One should note that in addition to general protection under the Hague Convention, Article 8(1) of the Convention also provides for so-called special protection, which may be granted to three categories of property.¹⁶ Whilst general protection of cultural

[convention/text-of-the-convention-and-its-1st-protocol/#c284179](#), accessed 13 September 2016.

¹³ Second Protocol to the Hague Convention, adopted 26 March 1999, full text available at <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-2nd-protocol-1999/>, accessed 13 September 2016.

¹⁴ The current composition of the Committee is the following: Armenia, Cambodia, Egypt, Georgia, Greece and Mali elected for a four-year term (i.e. until 2017); Argentina, Azerbaijan, Belgium, Cyprus, Czech Republic and Morocco elected for a four-year term (i.e. until 2019).

¹⁵ *Ibid* Article 5.

¹⁶ 1954 Hague Convention (n 2) Article 8(1) providing special protection for a limited number of properties: (1) refuges intended to shelter movable cultural property in the event of armed conflict; (2) centres containing

property is automatic, the same cannot be said for special protection. Two further conditions must be met.¹⁷ In light of this, the following question arises: why has the vast majority of the States Parties abstained from placing their cultural sites under special protection?¹⁸ The difficulty in complying with the condition of adequate distance from a large industrial centre or military objective for densely-populated, the technical difficulties in submitting nominations and the fear of designating cultural property for special protection because of possible terrorist attacks are only some of the possible reasons one can imagine.

With the intention of filling in the gaps that have been left behind by the Convention and its regime of special protection, the Second Protocol introduced the new concept of enhanced protection. The concept of protection combines aspects of both the special protection regime and the criteria that are used for the inclusion of outstanding cultural property in the World Heritage List under the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage.¹⁹ Under the new regime of enhanced protection, three cumulative conditions are set: a) the cultural property in question must be of the greatest importance for humanity; b) it must be protected by adequate domestic legal and administrative measures; and c) it may not be used for military purposes or to shield military sites.²⁰ If all criteria are met, enhanced protection is granted following the inclusion of the cultural property in question on the List of Cultural Property under Enhanced Protection and a declaration of such a decision. Note that the three abovementioned criteria must be fully complied with in order for cultural property to be granted enhanced protection.²¹ Consequently, States Parties to the Second Protocol cannot object to requests for enhanced protection purely on the grounds of political animosity or mutual non-recognition, thus avoiding cases such as that of Cambodia in 1972. At that

monuments; and (3) other immovable cultural property of very great importance.

¹⁷ *Ibid* Article 8(1) (a) the cultural property in question must be situated at an adequate distance from any large industrial centre or any important military objective; and (b) such property may not be used for military purposes.

¹⁸ To date, only four High Contracting Parties, namely Germany, the Holy See, the Netherlands and Mexico, have listed cultural property under special protection in the International Register of Cultural Property Under Special Protection maintained by the Director-General of UNESCO. Full register available at

<http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Register2016EN.pdf>, accessed 12 September 2016.

¹⁹ Convention Concerning the Protection of World Cultural and Natural Heritage, adopted 16 November 1972, full text available at <http://whc.unesco.org/archive/convention-en.pdf>, accessed 12 September 2016.

²⁰ Second Protocol to the Hague Convention (n 13), Article 10.

²¹ *Ibid* Article 11 .

time Cambodia requested the entry of several sites within its territory in the Register. Due to the opposition of four High Contracting Parties to the Convention that did not recognize the Government of Cambodia at that time, the entry was not made.²²

As far as matters relating to criminal responsibility and jurisdiction in the Second Protocol are concerned, Article 15 sets out the categories of serious violations, forming a rather stark contrast with Article 28 of the Convention. Five violations fall within this category: making cultural property under enhanced protection the object of attack; using cultural property or its immediate surroundings in support of military action; extensive destruction or appropriation of cultural property protected under the Hague Convention and the Second Protocol; making cultural property protected under the Hague Convention and the Second Protocol the object of attack; and, finally, theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the Convention.²³ Article 16 of the Second Protocol establishes universal jurisdiction with regard to the first three categories of offences.²⁴ Article 16 of the Second Protocol also covers other penal aspects: jurisdictional issues, extradition, mutual legal assistance as well as other violations of the Protocol.²⁵ To facilitate the national implementation of Chapter 4 of the Second Protocol, in 2016 the Secretariat prepared a technical report on this implementation.²⁶

At this stage, it is useful to provide some concrete examples of countries implementing such safeguarding measures. In the Netherlands, for instance, the preparatory measures in peacetime for the safeguarding of cultural property are covered by the policy for disaster risk reduction, crisis and disaster response. '[N]etworks for the prevention of damage to cultural

²² Furthermore, it is useful to notice that, to date, the Committee has granted enhanced protection in twelve cases: at the Fifth Meeting in November 2010: Choirokoitia (Republic of Cyprus), Painted Churches in the Troodos Region (Republic of Cyprus), Paphos (Republic of Cyprus), Castel del Monte (Italy); At the Sixth Meeting in December 2011: Kernavé Archaeological Site (Republic of Lithuania); At the Eight Meeting in December 2013: Walled City of Baku with the Shirvanshahs's Palace and Maiden Tower (Azerbaijan), Gobustan Rock Art Cultural Landscape (Azerbaijan), Victor Horta's Museum and Workshop (Belgium), Neolithic Flint Mines at Spiennes (Belgium), Plantin-Moretus House-Workshops-Museum Complex (Belgium). At the Eleventh Meeting in December 2016: Historical Monuments of Mtskheta (Georgia) and Tomb of Askia (Mali).

²³ Second Protocol to the Hague Convention (n 13), Article 15.

²⁴ *Ibid* Article 16.

²⁵ *Ibid* Articles 17 ff.

²⁶ Available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Report-obligations-chapter4-en_20120306.pdf, accessed 5 October 2016. Please also note the Report prepared by Dr Roger O'Keefe, University of Cambridge with the author on the file.

heritage' have been established in towns and regions in the Netherlands. The networks include a broad scope of heritage institutions: museums, archives, libraries, churches, mills, management of monuments and archaeological services. Moreover, continuous co-operation is sought with the forces of the police and fire brigades. The network receives financial support from the Dutch government (through the Mondriaan Foundation).²⁷ Likewise, Finland has adopted relevant peacetime safeguarding measures against the foreseeable effects of an armed conflict in order to implement Article 3 of the Convention. The Ministry of Education and Culture set up an advisory body for the protection of cultural property from 19 May 2010 to 31 December 2012. The goal of this advisory body was to promote long-term cooperation between different stakeholders and to deal with issues involving various branches of administration.²⁸

The original Hague Convention is still open for ratification, accession and succession, and it will continue to grant a basic level of protection for its States Parties. The Second Protocol will instead grant an additional, more sophisticated form and a higher level of protection for the Parties wishing to obtain it. It is of the utmost importance that States implement the 1954 Hague Convention and its Second Protocol to increase the protection of cultural property both in peace and in wartime and protect the cultural property in their territories against the effects of dangers during armed conflict, such as illicit trafficking or human-caused or natural disasters.

2. Pre-conflict peacetime responsibilities

2.1. Guidelines for the implementation of the 1999 Second Protocol to the Hague Convention

The recent conflicts in Afghanistan, Iraq, Mali, Syria and Yemen, to name a few, have proven stronger than ever the deeply-rooted problems national authorities and the international community are confronted with in their attempts to protect cultural property in times of armed conflicts.

The Preamble to the 1954 Convention perfectly captures the general feeling of despair sensed across the world whenever images of intentional destruction of cultural property surface. The preamble states that "damage

²⁷ Consideration of national reports on the implementation of the Second Protocol, 2012 – 2013, considered during the Eighth Meeting of the Committee for the Protection of Cultural Property in the Event of an Armed Conflict, CLT-13/8.COM/CONF203/9, Paris 4 December 2013. See in particular para.35.

²⁸ *Ibid* para. 148.

to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind".²⁹ What then may mankind concretely do in order to prevent, or at least limit to the farthest extent possible, such destruction?

The answer is found in Part II of the Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention. Part II specifically focusses on possible preventive measure States could take to achieve an overall safeguarding of cultural property in time of peace.³⁰ Paragraphs 27 to 29 of the Guidelines mirror the provisions of Article 5 of the Second Protocol. Note however the suggested list of preparatory measures is, by no means intended to be exhaustive. Single State Parties are furthermore encouraged to take any measure which is deemed to be consistent with the purposes of the Second Protocol. The Committee encourages the States Parties to cooperate, both at the national and at the international level, with non-governmental organisations dealing with such matters, as well as to exchange information regarding national policies and practices.³¹ Additionally, paragraph 30 of the Guidelines obliges Parties, to the maximum extent possible, to remove movable cultural property from the vicinity of military objectives or to provide an adequate *in situ* protection and not to locate military objectives near cultural property, as stated in Article 8 of the Second Protocol.

The enhancement of the principle of protection at a pre-conflict stage, not only obliges the States Parties which are hosting the cultural property that is at risk, as mentioned up to this point, but also poses a positive obligation on whoever considers making cultural property the object of an attack. Therefore, limiting attacks to military objectives would be a large step towards achieving greater protection for cultural property.³² Being civilian property, cultural property as such should not be made the object of a direct attack.

²⁹ 1954 Hague Convention (n 2).

³⁰ Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 12 December 2011, Amended by the fourth Meeting of the Parties to the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (UNESCO Headquarters, 12 December 2011) full text available at <http://unesdoc.unesco.org/images/0018/001867/186742E.pdf>, accessed 14 September 2016, hereinafter 'the Guidelines'.

³¹ Annex II of the Guidelines additionally contains the form to request international assistance from the Committee.

³² Jean-Marie Henckaerts, 'New rules for the protection of cultural property in armed conflict', 1999 *International Review of the Red Cross* n 835 <https://www.icrc.org/eng/resources/documents/article/other/57jq37.htm>, accessed 14 September 2016.

This is one of the limits set out by international humanitarian law. Cultural property can only be attacked if it becomes a military objective. The definition of military objective, contained in Article 52(2) of the 1977 Additional Protocol I to the 1949 Geneva Conventions³³ and adopted by Article 1 of the Second Protocol contains two criteria which have to be fulfilled cumulatively before objects can be destroyed, captured or neutralized.³⁴ For this reason, the concept of military objective is tightly linked to that of the military necessity to attack certain objects during an armed conflict. The concept of military necessity aims to pose limits to armed conflict and such limits are imposed following humanitarian concerns. It is thanks to these limits that damage to cultural property, irrespective of the nature the damage, can be avoided in the event of an attack.

Additionally, Article 10(c) of the 1999 Second Protocol provides that in order for there to be the possibility of granting enhanced protection, cultural property must not be used for military purposes or to shield military sites, and a declaration by the involved State Party must be made in this sense.

One further issue that is worthy of being mentioned whilst analysing pre-conflict responsibilities, is the technical assistance provided by UNESCO as explained in paragraphs 150 and following of the Guidelines. States Parties may call upon UNESCO for its technical assistance in order to prepare the protection of their cultural property which is deemed to be at risk in case of an armed conflict.³⁵

2.2. Importance of the training of the military

It is of paramount importance to carry out activities aimed at raising awareness on the issue of protecting cultural property in the event of an armed conflict, such as training military forces. UNESCO has organized a number of workshops on the protection of cultural property, with a particular focus on the military. Furthermore, it commissioned the elaboration of a series of information notes on the implementation of military aspects of the Second Protocol. Two other specific activities should be mentioned. The Secretariat contracted the University of Newcastle to prepare training materials for the

³³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, full text available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470>, accessed 14 September 2016.

³⁴ Jean-Marie Henckaerts, 'New rules for the protection of cultural property in armed conflict' (n 26).

³⁵ Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention (n 25), paragraph 150.

military. The Secretariat also commissioned the International Institute of Humanitarian Law in Sanremo for the preparation of a military manual as a practical guide for military forces on the implementation of the rules of international law concerning the protection of cultural property during armed conflict. The Manual was launched officially at the beginning of December 2016.³⁶

3. Post-conflict peacetime responsibilities

3.1. Strategy for Reinforcing UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict

As mentioned above, the raising of awareness amongst the public is key to the central problem which we are confronted with. The Strategy for Reinforcing UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict, adopted by the 38th session of the General Conference (Paris, November 2015),³⁷ revolves around such a concept. The Strategy elucidates some of the most worrying consequences of armed conflict on cultural heritage. The targeting of individuals and groups on the grounds of their cultural and religious background, the intentional and systematic destruction of cultural heritage, the denial of cultural identity, defined by the UNESCO Director-General, Ms Irina Bokova, as 'cultural cleansing',³⁸ and the recognition of the fact that attacks against cultural heritage and diversity mirror attacks against people's rights and security are only some of the issues at stake. The Strategy highlights some necessary steps that should be taken in the immediate aftermath of an armed conflict. With the goal of granting people in areas affected by armed conflict access to culture in all its expressions, the Strategy highlights some necessary steps that should be taken to enable these people to preserve their identities and fundamental rights.³⁹

The objective of UNESCO is to strengthen Member States' ability to recover the loss of cultural heritage and diversity following an armed conflict.

³⁶ Full text available at <http://unesdoc.unesco.org/images/0024/002466/246633e.pdf>, accessed 19 February 2017.

³⁷ Please see further the Records of the General Conference 38th session Resolutions, Paris, 3 – 18 November 2015 <http://unesdoc.unesco.org/images/0024/002433/243325e.pdf>, accessed 03 October 2016.

³⁸ The term 'cultural cleansing' was used by the Director-General of UNESCO, Ms Irina Bokova in a public statement on the situation in Iraq in August 2014, and is now used to raise awareness on the systematic and deliberate nature of attacks on cultural heritage and diversity perpetrated by violent extremist groups.

³⁹ Strategy for Reinforcing UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict (n 31), paragraph 6.

UNESCO aims at developing new strategic partnerships with selected actors, with the aim of constructing operational tools and mechanisms that would enable States to effectively implement the provisions of the UNESCO Conventions.⁴⁰ One of the most challenging operations recognized within the Strategy is the monitoring and initial assessment of damage, destruction, looting and illicit trafficking of cultural property. It is necessary to preventatively prepare a capacity for collecting data in order to prevent additional losses and engage in long-term planning for recovery. Simultaneously, one could address impunity and ensure that perpetrators can be held accountable.⁴¹ If requested by national authorities, UNESCO provides assistance in the form of training, technical assistance, advice or, lastly, direct intervention by UNESCO and international stakeholders. The main aim of such efforts, however, must remain the raising of awareness amongst all involved parties. That means including in this process tourists, youth, museums and private collectors just to name a few.

Specific attention should also be paid to the fate of stolen cultural property in Iraq, Libya, Mali, Syria and Yemen and its reporting to the relevant authorities.⁴² The fundamental focus of UNESCO is therefore to enhance any possible support for national authorities in order to enable them in assessing, planning and implementing programmes for cultural heritage rehabilitation and preservation, as well as promoting the mentioned cultural diversity.

The latest effort by UNESCO is the intention to facilitate a stronger and more engaged cooperation with the International Criminal Court (ICC), in the investigation of cases regarding violations of Article 8(2)(e)(iv) of the Rome Statute, which qualifies as war crimes direct attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments.⁴³ Of particular interest in this regard was the recent decision of the ICC Trial Chamber VIII in the case of the Tuareg Islamic extremist Ahmad Al-Faqi Al-Mahdi, who was found guilty of the war crime of attacking, in 2012, nine mausoleums and the secret gate of the Sidi Yahia mosque - a UNESCO World Heritage Site - in Timbuktu, Mali. Al-Mahdi was sentenced to nine years imprisonment. This case constitutes a landmark judgement and represents a

⁴⁰ *Ibid* paragraph 12.

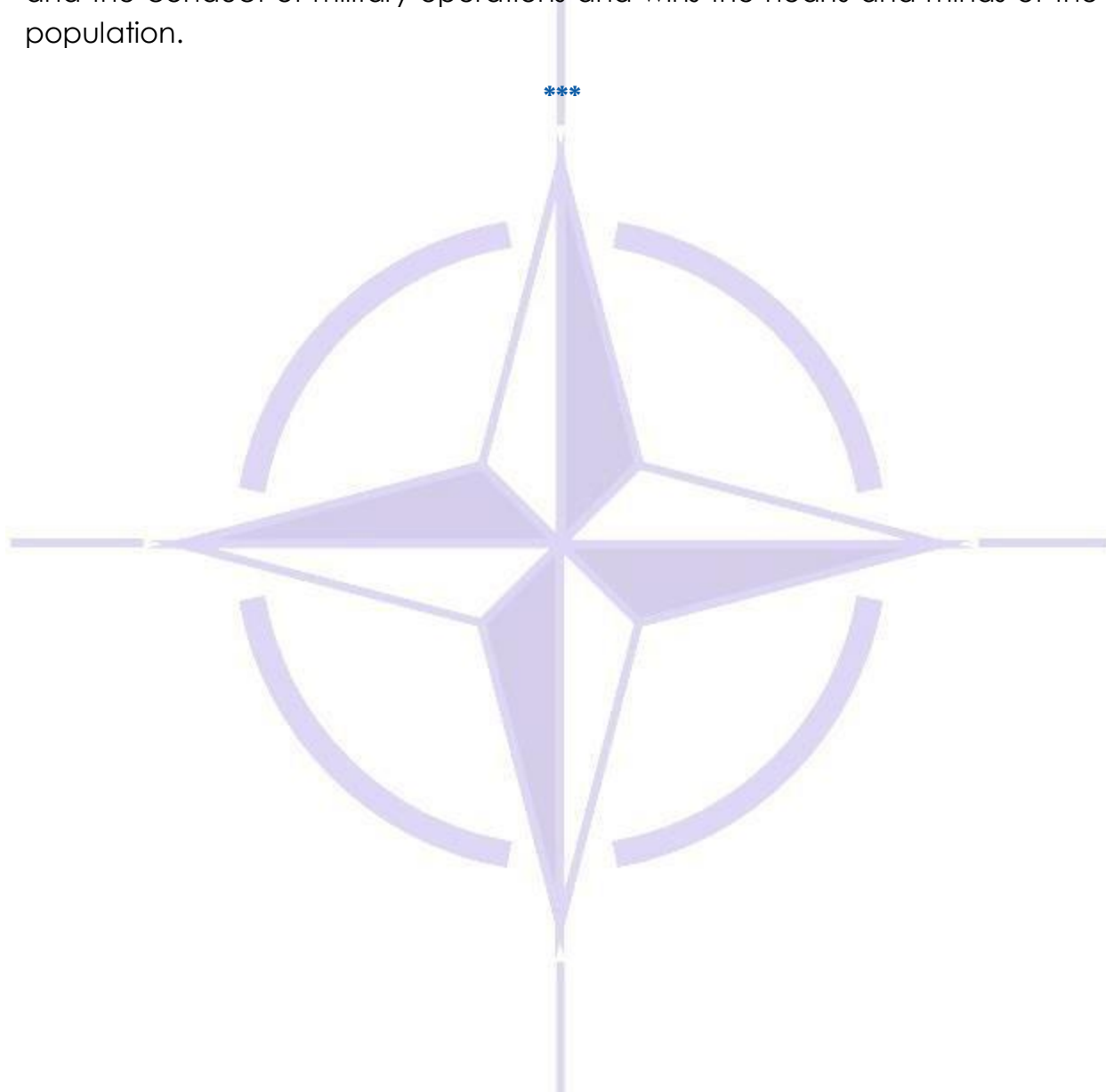
⁴¹ *Ibid* paragraph 20.

⁴² *Ibid* paragraph 21.

⁴³ Please view the Rome Statute of the International Criminal Court available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, accessed 5 October 2016.

crucial step towards the universal recognition of the importance of cultural heritage for humanity as a whole.⁴⁴

In light of the above, the importance of a joint cooperation between UNESCO and the military becomes quintessential, especially if one considers that respect for cultural property by military personnel facilitates the planning and the conduct of military operations and wins the hearts and minds of the population.



⁴⁴ See *The Prosecutor v. Ahmad Al Faqi Al Mahdi* ICC-01/12-01/15 <https://www.icc-cpi.int/mali/al-mahdi>, accessed 03 October 2016.



SOURCE: www.nato.int

Cultural Property Protection and the Law of War Crimes

by Prof. Roger O'Keefe¹

In September 2016 the International Criminal Court (ICC) convicted and condemned to imprisonment an Islamic militant for his part in the iconoclastic destruction during the civil war in Mali of ten precious historic and religious monuments, nine of them on UNESCO's 'World Heritage List'. Media commentary cast the decision as novel. In reality, it was nothing of the sort. The law of war crimes has long outlawed the wanton destruction or damage and the misappropriation of cultural property in armed conflict, and perpetrators of such acts have repeatedly been brought to book in both international and national criminal courts.

The ICC's judgment, alongside the obliteration and pillage of cultural treasures in Syria and Iraq, have thrown into relief the role, actual and potential, of the law of war crimes in the protection of cultural property in armed conflict. Yet it should not be thought that extremists alone are

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punishable under the laws of war in this regard. The intentional and unlawful destruction, damage or appropriation of cultural property in international or non-international armed conflict can result in the prosecution for a war crime, in an international or national court, of any culpable individual. This includes service personnel of all allied nations.

What follows is a brief account of the law of war crimes as it relates to the protection of cultural property in armed conflict.

War crimes in general

The law of war crimes comprises those rules of the law of armed conflict that give rise on their breach to the criminal responsibility of implicated individuals. Culpable persons may include not just those who physically commit a proscribed act, but also those who in some other way participate intentionally in it. They may include too military commanders who fail, intentionally or negligently, to take all necessary and reasonable measures within their power to prevent or repress such acts or to submit them to the competent authorities for investigation and, where appropriate, prosecution.

It should go without saying that a legal precondition to a war crime is the existence of an armed conflict, whether international or, in relation to a smaller range of offences, non-international. In order to qualify as a war crime, the act must also have some 'nexus' to the armed conflict² or, synonymously, must be 'closely related' to³ or 'associated with'⁴ it. That is, the existence of the conflict must, at a minimum, play 'a substantial part in the perpetrator's ability to commit [the crime], his [or her] decision to commit it, the manner in which it was committed or the purpose for which it was committed'.⁵ Next, the act must be committed intentionally and with knowledge of all legally relevant facts.⁶ Finally, and perhaps again obviously, the act must violate a substantive rule of the law of armed conflict and one

² See e.g. *Prosecutor v. Akayesu*, ICTR-96-4, Appeals Chamber, Judgment, 1 June 2001, para 444; *Prosecutor v. Stakić*, Appeals Chamber, Judgment, IT-97-24-A, 22 March 2006, para 342.

³ See e.g. *Prosecutor v. Tadić*, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70; *Prosecutor v. Rutaganda*, ICTR-96-3-A, Appeals Chamber, Judgment, 26 May 2003, paras 569–570.

⁴ ICC Elements of Crimes, ICC-ASP/1/3(part II-B), art 8(2), common final element.

⁵ *Prosecutor v. Kunarac et al*, IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgment, para 58. See also e.g. *Rutaganda* (n 3), paras 569–570; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04—01/07-717, Pre-Trial Chamber, Decision on the Confirmation of Charges, 30 September 2008, para 380.

⁶ See e.g. Rome Statute of the International Criminal Court, Rome, 17 July 1998, as amended ('Rome Statute'), art 30.

resulting on violation in individual criminal responsibility.

War crimes against cultural property

There is a range of customary and treaty-based war crimes to which unlawful acts of hostility against and misappropriation of cultural property may give rise. Some of these are expressed in general terms applicable variously to all civilian objects,⁷ to any town or place,⁸ to undefended towns, villages, dwellings or buildings,⁹ to ‘the enemy’s property’ or ‘the property of an adversary’,¹⁰ or to all property protected by the relevant Geneva Convention.¹¹ Others relate specifically to cultural property, even if the term itself may not be used.¹² The precise charge brought will depend on what is alleged and in what type of armed conflict, as well as on how the subject-matter jurisdiction of the international or national court in question and, in national cases, any applicable penal legislation or pertinent treaty provision is formulated. The same substantive violation of the international law of armed conflict may be prosecuted under different rubrics in different courts.

Starting with customary international law, one way or another—whether as an offence in relation to property more generally or as an offence specifically in relation to cultural property, however described—all intentional and unlawful destruction, damage and appropriation of cultural property in either international or non-international armed conflict is punishable under international law as a war crime. The same goes for intentionally launching an otherwise-lawful attack in the knowledge that it will cause incidental damage

⁷ See e.g. Rome Statute, art 8(2)(b)(ii) and (iv); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977 (‘AP I’), art 85(3)(b) and (c).

⁸ Rome Statute, art 8(2)(b)(xvi) and (e)(v). Consider also Statute of the International Criminal Tribunal for the former Yugoslavia, S/25704 (3 May 1993), Annex, as amended (‘ICTY Statute’), art 3(b) (‘cities, towns or villages’).

⁹ See e.g. Rome Statute, art 8(2)(b)(v); ICTY Statute, art 3(c).

¹⁰ See e.g. Rome Statute, art 8(2)(b)(xiii) and (e)(xii) respectively. Consider also ICTY Statute, art 3(e) (‘public or private property’).

¹¹ See e.g. Rome Statute, art 8(2)(a)(iv); ICTY Statute, art 2(d); Convention (IV) relative to the Protection of Civilian Persons in Time of War Geneva, 12 August 1949 (‘Fourth Geneva Convention’), art 147.

¹² See e.g. Rome Statute, art 8(2)(b)(ix) and (e)(iv) (‘buildings dedicated to religion, education, art, science or charitable purposes, [and] historic monuments’); ICTY Statute, art 3(d) (‘institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science’); Convention on the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954 (‘1954 Hague Convention’), art 28 and Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999 (‘Second Hague Protocol’), arts 15(1) and 21, referable to ‘cultural property’ as defined in 1954 Hague Convention, art 1; AP I, art 85(4)(d) (‘historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples’).

to cultural property which would be clearly disproportionate to the concrete and direct overall military advantage anticipated. The latter, however, could not be prosecuted before the ICC.¹³

In practice, the more generic war crimes pertaining to property have proved as useful when it comes to cultural property as the more specific.¹⁴ Take, for example, the war crimes of ‘plunder of public or private property’ and ‘devastation not justified by military necessity’ over which article 6(b) of the Charter of the International Military Tribunal at Nuremberg granted the Tribunal jurisdiction. It was under these heads that several of the major German war criminals were convicted for their roles, contrary to the customary laws of war, in the systematic emptying and levelling in World War Two of the galleries, museums, libraries and historic buildings and sites of occupied Poland and the Soviet Union, as well as in the continent-wide seizure of Jewish-owned collections.¹⁵ Almost sixty years later, in *Prlić*, Bosnian Croat forces were held by the International Criminal Tribunal for the former Yugoslavia (ICTY) to have committed the war crime of, *inter alia*, ‘devastation not justified by military necessity’, triable under article 3(b) of the Tribunal’s Statute, in relation to their deliberate, unlawful destruction of eleven Ottoman mosques in Mostar and Stolac and of the World Heritage-listed Ottoman Old Bridge (*‘Stari Most’*) from which the former town takes its name.¹⁶ The destruction of the Sultan Selim mosque in Stolac was additionally held to constitute the customary version of the grave breach of the Fourth Geneva Convention, triable under article 2(d) of the ICTY Statute,¹⁷ of ‘extensive

¹³ See Rome Statute, art 8(2)(b)(iv), with no equivalent provision for non-international armed conflict.

¹⁴ In addition to the cases mentioned in the text, see *Prosecutor v. MP et al*, Zadar District Court, K 74/96, 24 July 1997, in which nineteen persons were convicted *in absentia* of war crimes for their roles in the bombardment of the historic centre of Zadar, Croatia, in 1991, including the deliberate targeting of the pre-Romanesque church of Saint Donatius and the Romanesque cathedral of Saint Anastasia. Charges were brought by reference to, *inter alia*, the customary rule codified in art 25 of the 1907 Hague Regulations, which prohibits in international armed conflict the ‘attack or bombardment, by whatever means’, of ‘undefended’ places or buildings. The ICC enjoys jurisdiction over the same war crime pursuant to Rome Statute, art 8(2)(b)(v).

¹⁵ See Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946, Misc No 12 (1946), Cmd 6964, reproduced (1947) 41 *American Journal of International Law* 172, especially 237–8, 287 and 330.

¹⁶ See *Prosecutor v Prlić et al*, IT-04-74-T, Trial Chamber, Judgment, 29 May 2013, vol 3, paras 1579–1587 and 1590–1591. In the event, in accordance with the ICTY’s approach to cumulative convictions, the accused were convicted on these facts solely of the overlapping but more specific war crime, constituted by the same acts, of ‘destruction or wilful damage done to institutions dedicated to religion’ under ICTY Statute, art 3(d). This resulted in the unwitting failure to enter a conviction in respect of the Old Bridge, a point now on appeal by the Prosecutor.

¹⁷ See also Rome Statute, art 8(2)(a)(iv).

destruction ... of property, not justified by military necessity and carried out unlawfully and wantonly'.¹⁸

As for those war crimes pertaining to cultural property specifically, contemporary customary international law embodies individual criminal responsibility for,¹⁹ and the Rome Statute of the International Criminal Court grants the ICC jurisdiction over the war crime of,²⁰ intentionally directing attacks against 'buildings dedicated to religion, education, art, science or charitable purposes, [and] historic monuments', whether in international or non-international armed conflict, unless the building or monument constitutes a military objective. It was to this offence that the accused in *Al-Mahdi* pleaded guilty before the Court in 2016 for his role during the non-international armed conflict in Mali in the premeditated, systematic destruction of nine sacred mausoleums and a sacred mosque door,²¹ all many hundreds of years old, all of great spiritual significance and all but one inscribed on the World Heritage List pursuant to the World Heritage Convention.²² In trials before the ICTY, intentional unlawful acts of hostility against cultural property have been prosecuted as the war crime of 'destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science', as the offence is formulated in article 3(d) of the Tribunal's Statute, a provision treated as applicable to international and non-international armed conflict alike.²³ It was under this head that the respective accused in *Strugar* and *Jokić* were convicted for their parts in the bombardment of the World Heritage-listed Old Town of Dubrovnik on 6 December 1991.²⁴ The accused in *Blaškić*, *Kordić*, *Plavšić*, *Naletilić*, *Brđanin*, *Martić* and *Prlić* were similarly convicted of this offence in respect of the

¹⁸ See *Prlić et al* (n 16), vol 3, paras 1548–1549.

¹⁹ See e.g. *Prosecutor v. Brđanin*, IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para 337.

²⁰ See Rome Statute, art 8(2)(b)(ix) and (e)(iv).

²¹ *Prosecutor v Al-Mahdi*, ICC-01/12-01/15-171, Trial Chamber, Judgment and Sentence, 27 September 2016.

²² Convention concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972 ('World Heritage Convention').

²³ Article 3(d) of the ICTY Statute additionally grants the Tribunal jurisdiction over criminal misappropriation of cultural property, whether in international or non-international armed conflict, speaking of the war crime of 'seizure of ... works of art and science'. When it comes to the Rome Statute, criminal misappropriation of cultural property must be prosecuted as a more general war crime against property under Rome Statute, art 8(2)(a)(iv) ('[e]xtensive ... appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'), art 8(2)(b)(xiii) ('... seizing the enemy's property unless such ... seizure be imperatively demanded by the necessities of war') or (e)(xii) (ditto, *mutatis mutandis*), or art 8(2)(b)(xvi) or (e)(v) (pillage).

²⁴ See *Prosecutor v. Jokić*, IT-01-42/1-S, Trial Chamber, Sentencing Judgment, 18 March 2004; *Prosecutor v. Strugar*, IT-01-42-T, Trial Chamber, Judgment, 31 January 2005.

systematic destruction of cultural property under their own forces' control,²⁵ while those in *Hadžihasanović* and *Šešelj* were acquitted of the same offence in respect of analogous acts.²⁶

It might be noted by way of aside that the precise charge brought by the Prosecutor in *Al-Mahdi* and the acceptance of it by the Pre-Trial Chamber and Trial Chamber are open to question. The term 'attacks', within the meaning of the international law of armed conflict, means 'acts of violence against the adversary, whether in offence or defence', in the now-customary words of article 49(1) of 1977 Additional Protocol I to the Geneva Conventions ('AP I'). In other words, 'attacks' are acts of warfare against the other side, be it its military forces or persons, objects or places under its control. Even if committed in the context of an armed conflict, the hands-on razing with pickaxes and a bulldozer of cultural property under one's own control, for which the accused in *Al-Mahdi* was held to bear criminal responsibility, does not amount to an 'attack' against that property—let alone to 'directing' an attack against it, in the words of article 8(2) (e) (iv) of the Rome Statute, the war crime of which the accused was convicted.²⁷ It amounts, rather, to the war crime of '[d]estroying ... the property of an adversary unless such destruction ... be imperatively demanded by the necessities of the conflict', as found in Rome Statute, article 8(2) (e) (xii). But be that as it may.

As regards treaty-based war crimes, the 1954 Hague Convention, AP I and, most expansively, the Second Protocol to the 1954 Hague Convention each contains a provision or provisions on individual criminal responsibility for,

²⁵ See *Prosecutor v. Blaškić*, IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, one count being vacated in *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, one count being overturned in *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004; *Prosecutor v. Plavšić*, IT-00-39&40/1-S, Trial Chamber, Sentencing Judgment, 27 February 2003; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Trial Chamber, Judgment, 31 March 2003; *Prosecutor v. Brđanin*, IT-99-36-T, Trial Chamber, Judgment, 1 September 2004; *Prosecutor v. Martić*, IT-95-11-T, Trial Chamber, Judgment, 12 June 2007; *Prlić* (n 16) (in relation to the Baba Besir mosque in Mostar and the Sultan Selim mosque in Stolac), on appeal at time of writing. See also, not dissimilarly, the post-World War Two national case of *Trial of Karl Lingensfelder*, Permanent Military Tribunal, Metz, 11 March 1947, 9 Law Reports of Trials of War Criminals 67.

²⁶ *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Trial Chamber, Judgment, 15 March 2006; *Prosecutor v. Šešelj*, IT-03-67-T, Trial Chamber, Judgment, 31 March 2016, on appeal at time of writing.

²⁷ Indeed, see, previously, *Katanga and Ngudjolo* (n 5), paras 266–269; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-309, Pre-Trial Chamber, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para 45; *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Chamber, Judgment pursuant to article 74 of the Statute, 7 March 2014, paras 797–798, citing as authority the ICTY Appeals Chamber judgment in *Kordić* (n 25), where the Tribunal recalls that '[t]he term attack is defined in Article 49 of Additional Protocol I as "acts of violence against the adversary, whether in offence or in defence"'.

variously, unlawful acts of hostility against and misappropriation of cultural property in armed conflict,²⁸ although none of these has yet served as a basis for prosecution in international or national war crimes proceedings.²⁹ Each of these treaties also imposes obligations on States Parties with respect to the suppression of the relevant offences through their own or another state party's criminal law and courts.³⁰

Sentencing for war crimes against cultural property

When it comes to sentencing, international courts have considered three factors as especially relevant to the gravity of crimes against cultural property.³¹

The first is the social significance—local, national and international—of the cultural property and of its destruction or damage. The ICTY in *Krajišnik*, dealing with the destruction of Bosnian Muslim and Bosnian Croat cultural property, including the Alidža mosque in Foča (dating from 1550) and the Arnaudija mosque in Banja Luka (dating from 1594), held that the sentence could permissibly reflect the consequences of the property's destruction for the groups targeted.³² Likewise, in *Al-Mahdi*, the ICC had regard to the religious, symbolic and emotional value of the buildings destroyed to the inhabitants of Timbuktu when assessing the seriousness of the crimes committed.³³ In terms of national significance, the ICTY Trial Chamber in

²⁸ See 1954 Hague Convention, art 28; AP I, art 85(4)(d); Second Hague Protocol, arts 15(1) and 21.

²⁹ War crimes within the meaning of art 28 of the 1954 Hague Convention fall within the jurisdiction of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, a special national criminal court mandated to try the remnants of the Khmer Rouge leadership, but no charges have been laid on this basis. See art 7 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended 27 October 2004, NS/RKM/1004/006, read in combination with Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, Phnom Penh, 6 June 2003, art 2.

³⁰ See 1954 Hague Convention, art 28; AP I, art 85(1) and the grave breaches provisions of the respective Geneva Conventions; Second Hague Protocol, arts 15(2)–19 and 21.

³¹ More mundanely, the extent of the damage to the cultural property weighed against the accused in *Strugar* (n 24), para 461, *Jokić* (n 24), para 53 and *Al-Mahdi* (n 21), para 78.

³² *Prosecutor v Krajišnik*, IT-00-39-T, Trial Chamber, Judgment, 27 September 2006, para 1148, dealing not with war crimes but with the crime against humanity of persecution in respect of the discriminatory destruction of cultural property.

³³ *Al-Mahdi* (n 21), para 79. At *ibidem*, para 78, the Court observed: 'The mausoleums ... were of great importance to the people of Timbuktu, who admired them and were attached to them. They reflected their commitment to Islam and played a psychological role to the extent of being perceived as protecting the people of Timbuktu. ... [T]he people of Timbuktu were collectively ensuring that the mausoleums remained in good condition in the course of symbolic maintenance events involving the entire community ... The mausoleums

Strugar, quoting article 1(a) of the 1954 Hague Convention to the effect that cultural property protected by the Convention 'is, by definition, of "great importance to the cultural heritage of [a] people"',³⁴ held that 'the victim of the offence at issue is to be understood ... as a "people", rather than any particular individual', and that the consequences of the offence for this victim could be said to be grave.³⁵ In the same vein, the ICC in *Al-Mahdi* viewed the effect on the people of Mali of the demolition of the mausoleums as a factor going to the 'particular gravity' of the crime.³⁶ As for international significance, the ICTY in *Jokić*, describing the war crime of destroying or wilfully damaging historic monuments and works of art as 'a violation of values especially protected by the international community',³⁷ observed that the attack on the Old Town of Dubrovnik was an attack 'against the cultural heritage of humankind'.³⁸ In *Al-Mahdi*, the ICC remarked that 'the entire international community, in the belief that heritage is part of cultural life, is suffering as a result of the destruction of the protected sites'.³⁹

The presence of the cultural property on the World Heritage List was taken in *Strugar*, *Jokić* and *Al-Mahdi*⁴⁰ to add to the gravity of the crime, in the last two cases explicitly on account of what the List implied in terms of the social significance of the property. The ICTY drew attention in *Jokić* to the statement in the preamble to the World Heritage Convention that 'deterioration or disappearance of any item of the cultural ... heritage constitutes a harmful impoverishment of the heritage of all the nations of the world'.⁴¹ The ICC noted in *Al-Mahdi* that, as nine of the ten buildings destroyed were inscribed on the World Heritage List, their destruction affected 'not only ... the direct victims of the crimes, namely the faithful and

were among the most cherished buildings of the city and they were visited by the inhabitants of the city, who used them as a place for prayer while some used them as pilgrimage locations.'

³⁴ *Strugar* (n 24), para 232 (citations omitted). The reference in the provision is to the population as a whole of a state party. See e.g. Roger O'Keefe, 'Protection of Cultural Property' in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 435, 429.

³⁵ *Strugar* (n 24), para 232 (citations omitted).

³⁶ *Al-Mahdi* (n 21), para 80.

³⁷ *Jokić* (n 24), para 46.

³⁸ *Ibidem*, para 51.

³⁹ *Al-Mahdi* (n 21), para 80.

⁴⁰ See *Strugar* (n 24), para 461; *Jokić* (n 24), paras 49 and 51; *Al-Mahdi* (n 21), para 80.

⁴¹ *Jokić* (n 24), para 49 (emphasis omitted). See also, in this regard, the preamble (second recital) to the 1954 Hague Convention, which expresses the conviction of the States Parties that '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'. Consider too the cultural property protected under the regime of 'enhanced protection' provided for chap 3 of the Second Hague Protocol, which is defined in art 10(a) as 'cultural heritage of the greatest importance for humanity'.

inhabitants of Timbuktu, but also people throughout Mali and the international community'.⁴²

Next, some international courts, when assessing the seriousness of war crimes against cultural property, have stressed the particular historical and architectural importance of the property. In *Plavšić*, speaking of the cultural property across Bosnia-Herzegovina, whose razing was held to be 'a crime of the utmost gravity',⁴³ the ICTY observed:

Some of these monuments ... dated from the Middle Ages. They were, quite obviously, culturally, historically and regionally significant sites. As one example, the Prosecution referred to the wanton destruction of the Alidža mosque in Foča, which had been in existence since the year 1550. According to the witness, this mosque was a 'pearl amongst the cultural heritage in this part of Europe'.⁴⁴

In *Jokić*, the ICTY noted that the Old Town of Dubrovnik, which it referred to as 'an especially important part of the world cultural heritage'⁴⁵ whose bombardment represented 'especially unlawful conduct',⁴⁶ constituted 'an outstanding architectural ensemble illustrating a significant stage in human history' and a "'living city" ... the existence of [whose] population was intimately intertwined with its ancient heritage'.⁴⁷ In *Al-Mahdi*, the ICC recounted:

Timbuktu was an emblematic city with a mythical dimension and ... played a crucial role in the expansion of Islam in the region. Timbuktu is at the heart of Mali's cultural heritage, in particular thanks to its manuscripts and to the mausoleums of the saints. The mausoleums reflected part of Timbuktu's history ...⁴⁸

The inscription on the World Heritage List of nine of the ten buildings destroyed 'reflect[ed] their special importance to international cultural heritage'.⁴⁹

Lastly, in at least one case the irreplaceability of the historic physical fabric of the destroyed or damaged property has weighed against the convict. In *Jokić*, the ICTY considered relevant to any sentence for criminal destruction or damage of cultural property the fact that '[r]estoration of

⁴² *Al-Mahdi* (n 21), para 80.

⁴³ *Ibidem*, para 52.

⁴⁴ *Plavšić* (n 25), para 44 (citations omitted). The Alidža mosque is also known as the Aladža mosque, the Coloured Mosque and the Mosque of Hasan Nazir.

⁴⁵ *Jokić* (n 24), para 46.

⁴⁶ *Ibidem*.

⁴⁷ *Ibidem*.

⁴⁸ *Al-Mahdi* (n 21), para 78 (citations omitted).

⁴⁹ *Ibidem*, para 46.

buildings of this kind, when possible, can never return [them] to their state prior to the attack because a certain amount of original, historically authentic, material will have been destroyed'.⁵⁰

Conclusion

One would not expect military personnel of allied nations intentionally to destroy, damage or appropriate cultural property in violation of the international law of armed conflict. Yet there is no room for complacency. Compliance with the law of war crimes, in this area as in others, calls as much for appropriate instruction and training, careful pre-deployment planning and rigorous targeting processes as it does for vigilance on the part of commanders and discipline on the part of every man and woman in uniform.

⁵⁰ *Jokić* (n 24), para 52.



SOURCE: www.nato.int

War Crimes & Cultural Heritage: Syria and Beyond

by Prof. Mark V. Vlasic¹ and Dr. Helga Turku²

Introduction

The civil war in Syria and the rise of ISIS are perhaps some of the most tragic events humanity has witnessed in recent history. In addition to the macabre destruction of the very fabric of Syrian society, this conflict is also destroying some of the world's most important archaeological sites. It is well known that ISIS has destroyed and looted antiquities to raise money, remain

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visible in international news headlines, disseminate its ideology, and recruit fighters. Nevertheless, they are not alone in this endeavour for all parties involved in this civil war have been accused of looting and destroying historical sites across Syria.³ Over the past five years, all of Syria's UNESCO World Heritage sites have either been damaged or destroyed.⁴ These sites include: Palmyra, Old city of Aleppo, Ancient city of Damascus, Bosra, Krak des Chevaliers fortress, and the Dead Cities of Northern Syria.

Ironically, Syria is a party to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, which requires 'refraining ... from any act of hostility directed against' cultural property unless 'military necessity imperatively requires ... a waiver.'⁵ Given that the Assad regime has used barrel bombs – known to be highly inaccurate⁵ – throughout this conflict, it is questionable whether the regime is adhering to its international obligations on the protection of cultural property.⁶

Any future international tribunal adjudicating the long list of war crimes, crimes against humanity and genocide in this conflict undoubtedly will also address questions of military necessity and indiscriminate attacks against civilians and civilian objects. In an effort to highlight the gravity of this issue, this article gives a brief summary of the damage done to the World Heritage Sites in Syria.⁷ Second, it discusses some new developments in the legal realm aimed at protecting cultural property and the principle of military necessity during armed conflict. Finally, it suggests some alternatives for combating the destruction of Syria's cultural heritage.

Damage to Syria's Cultural Property

³ Brigadier General (Ret.) Russell Howard, Jonathan Prohov, Marc Elliott, 'Digging in and trafficking out: How the destruction of cultural heritage funds terrorism,' *Combating Terrorism Centre at West Point* (27 February 2015) www.ctc.usma.edu/posts/digging-in-and-trafficking-out-how-the-destruction-of-cultural-heritage-funds-terrorism, accessed 13 March 2015, (hereafter 'Trafficking out').

⁴ '6 out of 6: All of Syria's UNESCO Heritage sites damaged or destroyed during civil war,' *Reuters* (15 March 2016) www.rt.com/news/335619-syria-unesco-heritage-damage/, accessed 13 September 2016

⁵ 'Syria barrel bomb attack: At least 16 killed at wake in Aleppo,' *CNN* (28 August 2016) <http://www.cnn.com/2016/08/28/middleeast/aleppo-barrel-bomb-wake-bombed/>, accessed 15 September 2016.

⁶ This article uses the terms 'cultural property' and 'cultural heritage' interchangeably, acknowledging that there are significant differences between these two terms. Cultural property encompasses tangible property, while cultural heritage is more expansive, as it includes language, tradition, and rituals. However, the two are linked as the destruction of one impacts the other.

⁷ See the list of World Heritage Sites in Syria on www.whc.unesco.org/en/statesparties/sy (last accessed on 20 January 2017).

Syria's civil war and the rise of extremists are being partially financed by the wealth of past civilizations that inhabited this historically significant area. In 2015, the Wall Street Journal claimed that looting activities by ISIS in the region were the second largest income for the criminal organization, after the sale of oil.⁸ After taking over large territories in both Syria and Iraq – home to more than 4,500 archaeological sites – ISIS escalated the exiting low level theft of antiquities in the region to industrial scale proportions.⁹ There is little transparency on how much ISIS' was able to profit from such illicit trade, but estimates range from millions to hundreds of millions of dollars annually. In September 2015, after the US troops were able to collect evidence during an operation against Abu Sayyaf – ISIS chief financial officer and purported head of the Natural Resources department – the US State Department declared: 'The U.S. government assesses that ISIL has probably earned several million dollars from antiquities sales since mid-2014, but the precise amount remains unknown.'¹⁰ Brigadier General (Ret.) Russell Howard notes that: 'Terrorists and looters are opportunists; given that ISIL derives much of its income from various illicit activities, it would be surprising if the group were not involved in what is believed to be the world's third largest illicit market, particularly in a region that is home to some of the world's oldest and most valuable antiquities.'

While ISIS has profited from trafficking of antiquities since its rise in 2014, they are not alone as other groups are involved in this enterprise. Specifically, the Bashar al-Assad regime, Al-Nusra Front for the People of the Levant (an Al Qaeda affiliate in Syria), Hesbollah, and other non-state actors operating in Syria's civil war are believed to be involved in various degrees and capacities.¹¹

The destruction of Syria's historical¹² sites is a combination of intentional attacks to destroy other cultures/religions, use of these sites for military

⁸ 'Calculating the revenue from antiquities to Islamic State,' *The Wall Street Journal* (11 February 2015) www.wsj.com/articles/calculating-the-revenue-from-antiquities-to-islamic-state-1423657578, accessed 13 March 2016.

⁹ Mark Vlasic and Helga Turku, 'Congressional Monuments Men? The Role of Congress in Fighting Terrorist Financing, While Preserving Our Cultural Heritage,' *Huffington Post* (6 December 2014) http://www.huffingtonpost.com/mark-v-vlasic/congressional-monuments-m_b_6281664.html, accessed 18 September 2016.

¹⁰ 'Senior ISIS Leader Killed in U.S. Raid in Syria' *The Washington Post* (16 May 2015) www.washingtonpost.com/world/national-security/us-kills-islamic-state-leader-in-syria-raid/2015/05/16/31280b26-fbca-11e4-a13c-193b1241d51a_story.html, accessed 12 May 2016.

¹¹ Howard, 'Trafficking Out,' n 1.

¹² It is important to note that the situation in Syria is fluid and the ongoing conflict and bombardment by multiple States Parties may have caused additional damage to important historical sites in the country.

purposes, intentional/unintentional bombing during combat, and excavations to find and sell antiquities in the black market.¹³

The Crusader castle Krak des Chevaliers – a UNESCO World Heritage Site - was bombarded by Syrian government troops in March 2014, whilst opposition forces had used the site for military operations.¹⁴ In May of 2014, Bosra, another UNESCO World Heritage site, was used by Syrian army snipers to attack rebels in the Old Town of Bosra.¹⁵ In May 2016, air strikes damaged



SOURCE: www.unesco.org

the Church of Saint Simeon.¹⁶ In response, UNESCO Director-General called on 'all parties to the conflict to refrain from any military use and from targeting cultural heritage sites and monuments across all of Syria, in respect of their obligations under international treaties, particularly the 1954 UNESCO Convention... [and] the 1972 World Heritage Convention.'¹⁷

Likewise, the Old City of Aleppo and most of the surrounding historical sites have been severely damaged or completely destroyed during the five-year civil war.¹⁸ A similar fate has befallen the Ancient City of

However, these are a few highlights that demonstrate the extent of the damage and perhaps disregard for international law protecting cultural property during war.

¹³ For a detailed list of the destruction of Syrian cultural heritage see APSA, 'Syrian Cultural Heritage: APSA-report – April, May and June 2015' (June 2015) https://en.unesco.org/syrian-observatory/system/files/Syrian_Cultural_Heritage_APSA-report-April-May-and-June-2015-.pdf, accessed 12 September 2016.

¹⁴ 'Syria Crusader castle Krak des Chevaliers has war scars,' *BBC* (22 March 2014) www.bbc.com/news/world-middle-east-26696113, accessed 12 September 2016.

¹⁵ Witnesses believe that the shabiha militia used the UNESCO site for military purposes as well. See more: 'How Syria's ancient treasures are being smashed,' *BBC* (10 July 2014) www.bbc.com/news/magazine-28191181, accessed 16 September 2016.

¹⁶ 'Syrian monastery where St Simeon sat on a pillar for four decades damaged by missile attack,' *The Telegraph* (13 May 2016) www.telegraph.co.uk/news/2016/05/13/syrian-monastery-where-st-simeon-sat-on-a-pillar-for-four-decade/, accessed 15 September 2016.

¹⁷ UNESCO Press, 'Director-General of UNESCO deplors severe damage at Church of Saint Simeon, in northern Syria' (17 May 2016) <http://whc.unesco.org/en/news/1499/>, accessed 13 September 2016.

¹⁸ 'Photos reveal 'great damage' to mighty Aleppo Citadel,' *The Telegraph* (5 February 2016) www.telegraph.co.uk/travel/destinations/middle-east/syria/articles/Photos-reveal-great-damage-to-mighty-Aleppo-Citadel/, accessed 27 September 2016.

Damascus.¹⁹ But perhaps the most painful and extensive destruction to witness was the damage to the ancient site of Palmyra, where over the course of a year, ISIS destroyed the Arch of Triumph, temple of Bel, and temple of Baalshamin.²⁰ During their raid of Palmyra, ISIS additionally tortured and brutally murdered the renowned archaeologist Khaled al-Assad, reportedly because he refused to divulge where Palmyra's valuable artefacts had been hidden.²¹ In March 2016, Syrian forces, aided by Russian airstrikes, re-took Palmyra.

International law and responses to the destruction of cultural property during conflict

Given that ISIS operates both in Syria and in Iraq, it is relevant to highlight the UN's 'Saving the cultural heritage of Iraq' resolution, which 'affirms that attacks intentionally directed against buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments, may amount to war crimes.'²² Furthermore, the resolution 'stresses the importance of holding accountable perpetrators'²³ who directly attack cultural property.

In addressing the question of ISIS' acts against groups in areas under its control, Secretary Kerry noted that, in his opinion, this terrorist group has committed genocide, crimes against humanity, and ethnic cleansing. In the long list of violent acts against various groups in Syria, he included the intentional acts of destroying cultural property.²⁴

Prosecuting deliberate acts against cultural property

The international community has been proactive in both condemning and prosecuting the destruction of cultural property in war zones. In September of 2015, the International Criminal Court (ICC) issued an arrest

¹⁹ UNESCO Press 'Ancient City of Damascus' (February 2016) <http://en.unesco.org/syrian-observatory/news/ancient-city-damascus>, accessed 28 September 2016.

²⁰ 'The Strategy Behind the Islamic State's Destruction of Ancient Sites,' *The New York Times* (28 March 2016) www.nytimes.com/interactive/2015/06/29/world/middleeast/isis-historic-sites-control.html.

²¹ 'Beheaded Syrian scholar refused to lead Isis to hidden Palmyra antiquities,' *The Guardian* (19 August 2015) www.theguardian.com/world/2015/aug/18/isis-beheads-archaeologist-syria, accessed 28 September 2016

²² GA Res. 69/281, 28 May 2015, para 5.

²³ *Ibid*, para 6.

²⁴ US State Department, 'John Kerry Remarks on Daesh and Genocide' (17 March 2016) <http://m.state.gov/md254782.htm>, last accessed 28 September 2016.

warrant for Ahmad Al Faqi Al Mahdi, who was accused of deliberately destroying nine mausoleums and one mosque in Timbuktu, Mali.²⁵ Al Mahdi was the chief of the Malian Hesbah, an Islamic 'morality' brigade that regulated, suppressed, and repressed anything that could have been perceived as a vice.²⁶ During this time, he oversaw and participated in the destruction of the mausoleums and mosque in Timbuktu.²⁷

The prosecution accused him of a single charge, that is, the war crime of attacking protected cultural objects under Article 8(2) (e) (iv) of the ICC Statute.²⁸ Al Mahdi plead guilty²⁹ and urged fellow Muslims to refrain from similar acts 'because they are not going to lead to any good' for humanity.³⁰ In September 2016, Al Mahdi was convicted 'of the war crime of attacking protected objects as a co-perpetrator under Articles 8(2) (e) (iv) and 25(3) (a) of the Statute [and sentenced] to nine years of imprisonment.'³¹

While the case of Al Mahdi constitutes an important step towards future prosecutions of those who deliberately destroy cultural property, the range of acts against cultural property in Syria is much more expansive. Cultural property in Syria is not only deliberately destroyed in the name of religion or ethnic cleansing or damaged through illegal excavations, but it is also used and attacked during combat. The 'Saving the cultural heritage of Iraq' resolution, reiterated an important principle of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, and called on 'all parties to an armed conflict [to] refrain from committing any act of hostility directed against cultural property.'³² Furthermore, it reminded the parties involved that 'the use of cultural property, its immediate surroundings or the appliances in use for its protection, for purposes which are likely to expose it to destruction or damage in the event of armed conflicts, is prohibited and such obligations may be waived only in cases where military necessity imperatively requires such a waiver.'³³

²⁵ Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras 3-5.

²⁶ *ibid* para12.

²⁷ *ibid* paras 45, 54.

²⁸ '*Chef d'accusation retenu par l'Accusation contre Ahmad AL FAQI AL MAHDI*,' (17 December 2015), ICC-01/12-01/15-62.

²⁹ 'Al Mahdi Trial Hearing,' ICC-01/12-01/15-T-4-Red-ENG (23 August 2016).

³⁰ ICC-01/12-01/15-T-4-Red-ENG, p. 9, lines 16-18.

³¹ *Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016).

³² GA Res. 69/281, 28 May 2015, para 4.

³³ *ibid*.

Military necessity doctrine

Due to the fact that military necessity is an exception to attacks against cultural property both under war crimes and crimes against humanity, it is necessary to examine this doctrine. It may be argued that, under its conventional form, military necessity, transforms cultural property into legitimate military targets, thus 'privileg[ing] military considerations over humanitarian values.'³⁴ Under such a position, the military necessity justification can be invoked during combat if its partial/total destruction is deemed to achieve a definite military advantage.

Arts 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute both state that intentional attacks against buildings dedicated to religion, education, art, science, historic monuments, and hospitals can constitute a war crime 'provided they are not military objectives'.

Military advantage and proportionality

The question of what constitutes a military necessity and what kind of acts may be disproportionate to the military gains has been discussed within the legal jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The Appeals Chamber in *Brđanin* discussed the use of cultural property for military purposes, and noted 'that the Prosecution must establish that the destruction in question was not justified by military necessity'.³⁵ The Appeals Chamber recalled that:

'Determining whether destruction occurred pursuant to military necessity involves a determination of what constitutes a military objective. Article 52 of the Additional Protocol I contains a widely acknowledged definition of military objectives as being limited to 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'.³⁶

Therefore, under such jurisprudence, determining military necessity involves a two-prong test. First, the object must become a military objective because of its nature, its location, its purpose or its use. Second, when and so

³⁴ Craig J.S. Forrest, 'The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflict,' (2007) 37(2) Cal. West. Int'l L. J., 177, 219.

³⁵ *Brđanin* (Judgment) ICTY-99-36-A (3 April 2007) para 337.

³⁶ *ibid* .

long as it is a military objective,³⁷ it may be attacked only if based on the information available at the time, its total/partial destruction 'offers a definite military advantage'.³⁸ When an object is 'rendered a military objective, it is its use to make an effective contribution to military action which will be the principal one on the basis of which an attack against cultural property may not be a war crime.'³⁹

Even when there is a military necessity and an object has become a military objective, the attack on such object must be proportionate to the military advantage.⁴⁰ Under this principle, a military force must assess any concrete and direct military advantage, against the humanitarian harm, be that in short/long term or their cumulative effect.⁴¹ In *Prlić*, the Trial Chamber discussed the principle of proportionality when discussing the destruction of the Old Bridge of Mostar and held, by a majority, that although the bridge's destruction 'may have been justified by military necessity, the damage to the civilian population was indisputable and substantial... [The impact on the civilian population] was disproportionate to the concrete and direct military advantage expected by the destruction of the Old Bridge.'⁴² Thus, the military necessity waiver is not a *carte blanche* to attack cultural property in the course of fighting. Even when such attacks may be justified by this doctrine, the damage must be proportionate to the anticipated military advantage.

In the case of Syria, all parties involved in the civil war have used

³⁷ *Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1999, 26 March 1999, UN Reg. No. 3511, Article 6 of this document sheds some light onto the application of the Hague 1954 Convention in Syria. Specifically, it states:

a. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as: i. that cultural property has, by its function, been made into a military objective; and ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.

³⁸ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125, art 52 (2) ('Additional Protocol I').

³⁹ R. O'Keefe, 'Protection of Cultural Property under International Criminal Law', 11 *Melbourne J. of Int'l Law* (2010) 339 at 351.

⁴⁰ Article 51 (5) of *Additional Protocol I* highlights two instances where such attacks are considered indiscriminate:

(a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
(b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

⁴¹ *Kupreškić* (Judgment) ICTY- 95-16-T (14 January 2000) para 526.

⁴² *Prlić* (Judgment) ICTY-04-74-T (29 May 2013) para 1584.

cultural property for military purposes. Furthermore, the use of barrel bombs,⁴³ which are highly inaccurate, may fall under the Article 51 (5) of Protocol I definition of indiscriminate attacks on civilians and civilian objects. It is imperative that all parties to the conflict recognize that their acts may have surpassed any and all international legal limits to what is deemed 'appropriate' war act during combat, and hopefully adjust their behaviour accordingly.

Alternatives for combating the destruction of Syria's historical heritage

The international community is limited in its ability to stop the destruction and the use of cultural property for military purposes in Syria. Continued calls to adhere to international law, prosecutions of violations and the strengthening of international/domestic laws to combat the destruction of cultural property are certainly steps in the right direction. However, the destruction of cultural property in Syria is not just the result of military attacks or use of cultural property during combat, but also the result of theft and deliberate destruction to finance terror and to destroy ancient communities.

The United Nations Security Council Resolution 2199 (2015), and in particular paragraphs 15 to 17, unanimously condemned the destruction of cultural heritage in Iraq and Syria and called on member States to adopt 'appropriate steps' to combat the illicit trafficking of antiquities and cultural objects from these conflict zones.⁴⁴

The international community⁴⁵ and individual states⁴⁶ have been proactive in condemning the plundering of Syria's cultural heritage and have taken steps to fight the sale of such items on the black market.⁴⁷ Yet, law

⁴³ 'Syria Conflict: Hospital in rebel-held Aleppo 'bombed again,' *BBC* (3 October 2016) www.bbc.com/news/world-middle-east-37542860, accessed 14 October 2016.

⁴⁴ 139 SC Res. 2199 (2015) paras 15–17.

⁴⁵ Council of the European Union, 'Council conclusions on the EU Regional Strategy for Syria and Iraq as well as the ISIL/Da'esh threat' (16 March 2015) www.consilium.europa.eu/en/press/press-releases/2015/03/16-council-conclusions-eu-regional-strategy-for-syria-and-iraq-as-well-as-the-isil-daesh-threat/a, accessed 13 September 2016.

⁴⁶ FBI Press Release, 'ISIL and Antiquities Trafficking; FBI Warns Dealers, Collectors About Terrorist Loot' (26 August 2015) www.fbi.gov/news/stories/2015/august/isil-and-antiquities-trafficking, accessed 14 September 2016.

⁴⁷ For example the US passed a new law to help combat trafficking of looted antiquities from Syria. See Protect and Preserve International Cultural Property Act (PPICPA), Public Law No: 114-151 (05/09/2016). The US State Department, the International Council of Museums and UNESCO have worked together to develop Red Lists of items likely to be trafficked from war zones. See *Emergency Red List of Syrian Antiquities at Risk is launched in New York*, UNESCO (26 September 2013) www.unesco.org/new/en/media-services/single-

enforcement alone cannot stop the trafficking of antiquities, because it is an intricate process with a wide range of actors and dimensions. The private sector is in a unique position to help implement international standards and codes of ethics when trading antiquities.

Since cultural property is linked to peace and development, protecting looted items from war zones would support the UN Sustainable Development Goals (SDG) agenda.⁴⁸ The Director General of UNESCO also shares this belief, in that '[c]ultural heritage is part of the communities' memory and identity and is a significant resource for future reconciliation and sustainable development. This is why it must be respected and protected by all means.'⁴⁹

It is important to acknowledge that applying due diligence to recent acquisitions involves a critical observation of the likelihood that an object is associated with fraudulent provenance. Perhaps a global stakeholder engagement group should come together, under the umbrella of World Economic Forum or perhaps, the Organization for Economic Co-operation and Development (OECD) and its Task Force on Charting Illicit Trade. In working together, institutions and global forums could explore possibilities to facilitate transparency and avoid trading antiquities from conflict zones.⁵⁰

Conclusion

The immense destruction and theft of cultural property in Syria is a blatant disregard for its legal obligations under international law. UNESCO has declared that 'cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights'⁵¹ Given that the ICC has already made substantial

[view/news/emergency_red_list_of_syrian_antiquities_at_risk_is_launched_in_new_york/#.VLwjGGTF--o](#), visited 9 September 2016.

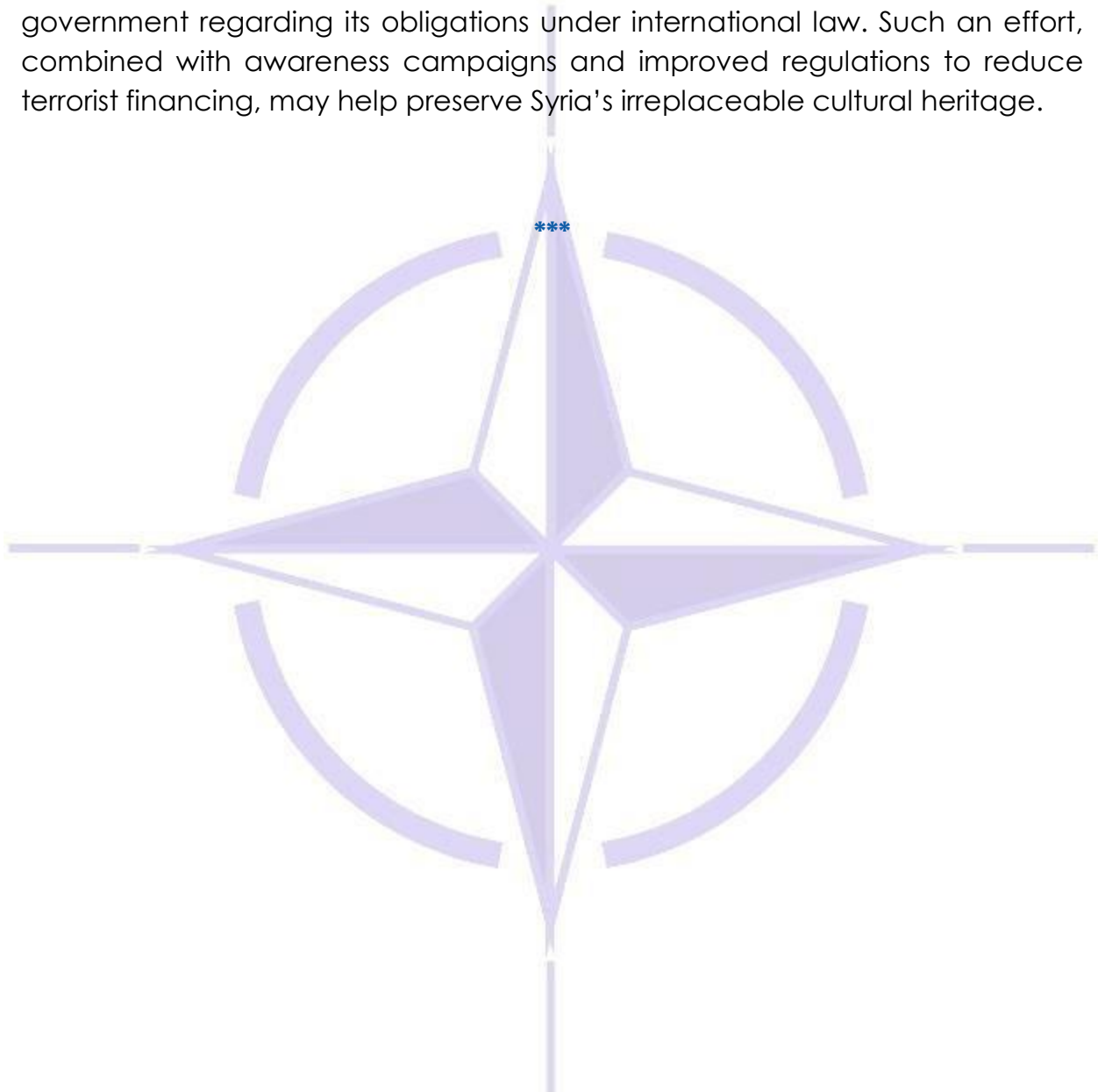
⁴⁸ G.A. Res 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (25 September 2015) www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/1 http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/1, accessed 13 September 2016.

⁴⁹ UNESCO, 'Director-General of UNESCO deplores severe damage at Church of Saint Simeon, in northern Syria' (17 May 2016) <http://whc.unesco.org/en/news/1499/>, accessed 14 September 2016.

⁵⁰ See also Mark V. Vlastic and Helga Turku, 'International Law, Blood Antiquities & Protecting Cultural Heritage as a means for International Peace, Security and Stability: The case of ISIS, Syria and Iraq,' 49 Vand. J. Transnat'l L. 1371 (2017) at 1415; Mark V. Vlastic and Helga Turku, 'Blood Antiquities' - Protecting Cultural Heritage Beyond Criminalization,' 14 J. Int. Crim. J. 1175 (2016) at 1194 (discussing a similar proposal).

⁵¹ UNESCO, 'UNESCO Declaration concerning the intentional destruction of cultural heritage,' Resolution adopted on the report of Commission IV at the 21st plenary meeting on 17 October 2003, http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed 13

efforts to highlight the gravity of destroying cultural property during armed conflict, it is perhaps understandable that the International Court of Justice (ICJ) might become interested in this area of law. UNESCO might be in a position to ask ICJ for an advisory opinion on the violent acts against cultural property committed by a State party like Syria.⁵² While expectations should be modest, one could make a case for having the ICJ remind the Assad government regarding its obligations under international law. Such an effort, combined with awareness campaigns and improved regulations to reduce terrorist financing, may help preserve Syria's irreplaceable cultural heritage.



September 2016.

⁵² Having signed the Hague Convention for the protection of Cultural Property in the Event of Armed Conflict on 14 May 1954, the Syrian Arab Republic is one of the original signatories See, www.portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html#STATE_PARTIES, (last accessed on 20 January 2017).



SOURCE: www.nato.int

ISIS' use of Cultural Property as a Tool for Terrorism and a Means to Finance It

by Dr. Helga Turku¹

Introduction

Representation and iconoclasm have co-existed perhaps since humans have been able to create and believe. However, the post 9/11 era conflicts have a renewed focus on culturally motivated attacks on the other. The rise of the so-called Islamic State of Iraq and Syria (also referred to as ISIS, ISIL, the Islamic State, and Daesh) has brought the protection of cultural property during armed conflict to the forefront of many policy discussions. This organization seeks to create a caliphate,² thus positioning itself to become the model and leader of the Muslim world. As such, it has undertaken the task of systematically destroying all manifestations of idolatry in an attempt to create a 'pure' religious society.³ However, in an interesting and self-serving

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The views expressed in this article are solely those of the author and may not represent the views of NATO, ACO, ACT, or their affiliated institutions, or any other institution.

² Christopher M. Blanchard and Carla E. Humud, 'The Islamic State and U.S. Policy,' *Congressional Research Service* (27 June 2016) <https://fas.org/sgp/crs/mideast/R43612.pdf>, accessed 26 January 2017; Yasmine Hafiz, 'What Is A Caliphate? ISIS Declaration Raises Questions,' *The Huffington Post* (30 June 2014) http://www.huffingtonpost.com/2014/06/30/what-is-a-caliphate-meaning_n_5543538.html, accessed 26 January 2017.

³ Cole Bunzel, 'From Paper State to Caliphate: The Ideology of the Islamic State,' *The Brookings Project on U.S.*

scheme, ISIS is not only destroying antiquities, but also selling them to finance its reign of horror. This article seeks to highlight the link between destruction of cultural property and propaganda warfare. Second, it argues that protection of cultural heritage is a short-term and long-term security concern. Finally, it highlights some elements of international criminal law that apply to ISIS' acts against cultural property.

Cultural Property used as a tool for terror

An 'important nexus'⁴ exists between terrorist acts and the target audience(s) they are trying to reach. It is possible that 'the actual victims are merely an instrument used by the perpetrators to send messages to those wider audiences.'⁵ Terrorists deliberately create and exploit fear, violence, or the threat of violence in the pursuit of their political goals. The tools used to propagate their political message can be wide ranging, from torture, mass killing, and rape, to destruction of cultural monuments and arts.⁶

ISIS has been particularly attentive to the need for advertising its acts of horror. The gruesome execution video of 25 Syrian soldiers on the ground of Palmyra's amphitheatre⁷ was doctored with the right visual effects, sounds, and lighting, to create a particular emotional impact. This exhibition of pain is sure to capture the audience's attention and serves as a medium to facilitate a structured form of transmitting ISIS' worldview. The utilitarian function of such videos is calibrated to portray the right amount of horror, pain, and suffering blended with a dose of ideology and propaganda. 'Photographs really are experiences captured, and the camera is the ideal arm of consciousness in its acquisitive mood. ... [They create] a [...] relation to the world that feels like knowledge—and, therefore, like power.'⁸ Armed with the enough social media savviness, ISIS is actively using treasured historical sites as a platform to exercise power over humanity's irreplaceable cultural heritage, and indirectly

Relations with the Islamic World, No. 19 (March 2015) at 38 <https://www.brookings.edu/wp-content/uploads/2016/06/The-ideology-of-the-Islamic-State-1.pdf>, accessed 26 January 2017.

⁴ Jeffrey M. Bale, 'What is Terrorism,' *Monterey Terrorism & Research Education Program at Middlebury Institute of International Studies at Monterey*, http://www.miis.edu/academics/researchcenters/terrorism/about/Terrorism_Definition, accessed 26 January 2017.

⁵ *Ibid.*

⁶ Bruce Hoffman, *Inside Terrorism*, (Columbia University Press, 2006) 40-41.

⁷ 'ISIS release sickening video of 'boy soldiers executing 25 captives in amphitheatre as audience watches on' *Mirror*, (4 July 2015) <http://www.mirror.co.uk/news/world-news/isis-release-sickening-video-boy-6002223>, accessed 26 January 2017.

⁸ Susan Sontag, *ON PHOTOGRAPHY*, 4th ed (1973) at 3–4.

over the people who care about it. Ironically, one of the first sculptures destroyed in Palmyra was the Lion of al-Lat built in 1st century BC. The giant lion (weighing more than 15 tons) once adorned the temple of goddess al-Lat, and on his left paw there was a Palmyrene inscription, which said: 'May al-Lat bless whoever does not spill blood on this sanctuary.'⁹

In addition to careful documentation of executions, ISIS has also carefully filmed and documented destruction of historical items and places. In early 2015, ISIS released a video where its fighters appear to destroy artefacts at the Mosul Museum.¹⁰ This is an interesting example of how ISIS used images and media to transmit several messages to its followers and to its enemies. One of the perpetrators explained the destruction as follows: 'These antiquities and idols behind me were from people in past centuries and were worshiped instead of God. When God Almighty orders us to destroy these statues, idols and antiquities, we must do it, even if they're worth billions of dollars.'¹¹ What the fighter fails to mention is that there is overwhelming evidence that links ISIS to trafficking of looted antiquities from Iraq and Syria.¹² In May 2015, the US military raided the Syrian compound of Abu Sayyaf, who was ISIS' chief financial officer and purported President of the Antiquities Department.¹³ The evidence seized during this operation reveals ISIS' bureaucratic process of 'regulating' the trafficking of antiquities and actual artefacts.¹⁴ ISIS implemented a strict system of taxation and authorization/licensing¹⁵ in order to secure a dependent form of income. According to the US government, ISIS levied a 20% tax on sales of antiquities by private smugglers in its controlled territory.¹⁶ Moreover, in January 2017, the

⁹ 'Museum of Lost Objects: The Lion of al-Lat,' BBC (4 March 2016) <http://www.bbc.com/news/magazine-35720366>, accessed 26 January 2017.

¹⁰ 'Isis fighters destroy ancient artefacts at Mosul museum,' *The Guardian* (26 February 2015) <https://www.theguardian.com/world/2015/feb/26/isis-fighters-destroy-ancient-artefacts-mosul-museum-iraq>, accessed 26 January 2017.

¹¹ 'Tracking a trail of historical obliteration: ISIS trumpets destruction of Nimrud,' *CNN* (13 April 2015) <http://www.cnn.com/2015/03/09/world/iraq-isis-heritage/>, accessed 26 January 2017.

¹² Andrew Keller, Deputy Assistant Sec'y for Counter Threat Fin. and Sanctions, U.S. Dep't of State (DOS), Bureau of Econ and Bus. Affairs, 'Documenting ISIL's Antiquities Trafficking: The Looting and Destruction of Iraqi and Syrian Cultural Heritage: What We Know and What Can Be Done,' (29 September 2015) <http://www.state.gov/e/eb/rls/rm/2015/247610.htm>, accessed 26 January 2017 (hereafter 'Documenting ISIL').

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *United States of America v. One Gold Ring with Carved Gemstone, An Asset of ISIL Discovered on Electronic Media of Abu Sayyaf, President of ISIL Antiquities Department et al.*, 16-cv-02442-TFH, 15, (hereafter 'United States v. One Gold Ring').

¹⁶ *Ibid.* 12,15; see also see Attachments B, C, E and F of the *United States v. One Gold Ring* available online at <https://www.justice.gov/usao-dc/press-release/file/918541/download>; 'Isis Fills War Chest by Selling Looted

Iraqi government reported that it found more than 100 priceless antiquities – dug up from Nineveh ruins and Nimrud – hidden in the home of an ISIS leader.¹⁷

Why should we care?

Cultural property is not only a source of knowledge and aesthetics but also a form of political expression because it embodies meaning and pride. As such, ISIS' use of cultural property as part of their warfare is a short-term and long term security concern. First, terrorist attacks are relatively cheap to execute. As the latest wave of horrors in Berlin,¹⁸ Nice,¹⁹ Brussels,²⁰ and Paris (estimated to have cost around \$10,000)²¹ show us that even a few hundred dollars can be sufficient to cause a large number of civilian casualties. Therefore, it is important to cut off any and all revenues, however small or large they may be.²²

Moreover, there are some reports linking known terrorists to illicit art dealings. In October 2016, Paris Match Belgium reported that one of the terrorists involved in the Brussels airport and Maalbeek metro station in March 2016, was actively involved in art trafficking. The newspaper also alleges that these art traffickers were linked to Salah Abdeslam, who was part of the November 2015 Paris massacre.²³ A few days later, another investigative article by RTBF claimed that Khalid El Bakraoui – the suicide bomber at the

Antiquities to the West' *The Times* (17 December 2014)

www.thetimes.co.uk/tto/news/world/middleeast/article4299572.ece, accessed 26 January 2017.

¹⁷ 'Priceless' ancient artefacts found hidden in Isis commander's house in Mosul,' *The Telegraph* (26 January 2017) <http://www.telegraph.co.uk/news/2017/01/26/priceless-ancient-artifacts-found-hidden-isis-commanders-house/?platform=hootsuite>.

¹⁸ 'Berlin lorry attack: What we know,' *BBC* (24 December 2016) <http://www.bbc.com/news/world-europe-8377428>, accessed 26 January 2017.

¹⁹ 'Nice attack: What we know about the Bastille Day killings,' *BBC* (19 August 2016) <http://www.bbc.com/news/world-europe-36801671>, accessed 26 January 2017.

²⁰ 'Brussels explosions: What we know about airport and metro attacks,' *BBC* (9 April 2016) <http://www.bbc.com/news/world-europe-35869985>, accessed 26 January 2017.

²¹ Robert Windrem, 'Terror on a Shoestring: Paris Attacks Likely Cost \$10,000 or Less,' *NBC News* (18 November 2015) <http://www.nbcnews.com/storyline/paris-terror-attacks/terror-shoestring-paris-attacks-likely-cost-10-000-or-less-n465711#%2410,000>, (noting that these terrorist attacks are sophisticated but not expensive enough to be easily deterred due to finances).

²² Estimates of ISIS' profit from trafficking of antiquities from Syria and Iraq range from a few million to 200 million dollars. See. US Department of State, 'Documenting ISIL,' n 11; Permanent Rep. of Russian Federation to the U.N., Letter and Annex dated Mar. 31, 2016 from the Permanent Rep. of Russian Federation to the United Nations addressed to President of the Security Council, U.N. Doc. S/2016/298 (31 March 2016).

²³ 'Khalid El Bakraoui, le kamikaze du métro, impliqué aussi dans le trafic des œuvres d'art,' *RTBF Belgium* (27 October 2016) <https://www.rtf.be/info/belgique/detail-traffic-d-art-l-un-des-terroristes-des-attentats-de-bruxelles-et-paris-trafiquait-des-uvres-d-art?id=9440962>, accessed 26 January 2017.

Maalbeek metro station – had been involved in the alleged illicit art deal.²⁴

Second, preserving national heritage is a long-term security matter because there is scholarship to suggest that linking oneself to a glorious past may help national re-conciliation efforts.²⁵ The study and use of national heritage for citizens' education helps foster common perceptions of culture and community.²⁶ National patrimony is a conceptual representation of group membership, and consequently it is an important element in the narrative of national reconciliation.²⁷ A state can only be successful in the long run if it has a principled basis to rule, that is, at a basic level its citizens appreciate a shared history/heritage, a sense of common identity, and some shared values.²⁸

Prosecuting war crimes, crimes against humanity, and genocide

Over the past two and half years, United Nations Educational, Scientific and Cultural Organization (UNESCO) Director General Irina Bokova has consistently called such acts of violence against cultural property 'cultural cleansing.'²⁹ She has also observed that destruction of culture is the destruction of identity,³⁰ adding that depriving people of 'their culture, [deprives] them of their history, their heritage, and that is why it goes hand in hand with genocide.'³¹

²⁴ 'Un auteur des attentats de Bruxelles impliqué dans un trafic d'objets d'art,' *Paris Match* (27 October 2016) <http://www.parismatch.com/Actu/International/Un-auteur-des-attentats-de-Bruxelles-implique-dans-un-traffic-d-objets-d-art-1104647>, accessed 26 January 2017.

²⁵ See Mark V. Vlasic and Helga Turku, 'International Law, Blood Antiquities & Protecting Cultural Heritage as a means for International Peace, Security and Stability: The case of ISIS, Syria and Iraq,' 49 *Vand. J. Transnat'l L.* 1371 (2017) at 1384-1388.

²⁶ Paul M. Bator, 'An Essay on the International Art Trade,' 34 *STAN. L. REV.* 275, 295 (1981–1982).

²⁷ David Butz, 'National Symbols as Agents of Psychological and Social Change,' 30 *Pol. Psychol.* 779, 780 (2009).

²⁸ Helga Turku, *ISOLATIONIST STATES IN AN INTERDEPENDENT WORLD* (2009) 60. See also G.A. Res. A/69/L.71, para 7, Saving the Cultural Heritage of Iraq (21 May 2016) http://www.un.org/ga/search/view_doc.asp?symbol=A/69/L.71.

²⁹ "Destroying Palmyra is cultural cleansing of Syrian people" – UNESCO,' *Reuters* (21 January 2017) <https://www.rt.com/op-edge/374554-syria-palmyra-war-isis/?platform=hootsuite>; 'Director-General Irina Bokova firmly condemns the destruction of Palmyra's ancient Baalshamin, Syria,' UNESCO (24 August 2015) <http://en.unesco.org/news/director-general-irina-bokova-firmly-condemns-destruction-palmyra-s-ancient-temple-baalshamin>; 'UNESCO calls for mobilization to stop 'cultural cleansing' in Iraq,' UNESCO (27 February 2015) <http://en.unesco.org/news/unesco-calls-mobilization-stop-cultural-cleansing-iraq-0>.

³⁰ Madeleine Grant, 'Head of UNESCO Accuses ISIS of Trying to 'Delete' Civilizations,' *Newsweek* (14 November 2014) <http://www.newsweek.com/head-unesco-compares-isis-methods-nazis-brands-destruction-archeological-sites-284456>.

³¹ *Ibid.*

Although the terms 'cultural cleansing' and 'cultural genocide' have been used interchangeably in the media and academia, the existing body of international law does not recognize cultural genocide.³² The text adopted by the International Law Commission (ILC) at its forty-eighth session in 1996,³³ article 4(2) of the *International Criminal Tribunal for the former Yugoslavia (ICTY) Statute*,³⁴ and article 6 of the *Rome Statute*³⁵ all use the same definition as article II of the *Convention on the Prevention and Punishment of the Crime of Genocide*. The ICTY discussed genocide in the context of destruction of cultural property during war. In *Krstić*, the Trial Chamber held that 'customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group'.³⁶ Therefore, acts aimed at undermining the cultural aspects of a particular group in order to divest them of identifying elements, such as religion, language, literature, works of art, or monuments, do not constitute genocide as recognized by the current body of law.³⁷ The Tribunal acknowledged that when physical/biological destruction is carried simultaneously with attacks on cultural property, it serves 'as evidence of intent to destroy the group'.³⁸

Although the ISIS' systemic attacks on Syria's and Iraq's cultural heritage may not be prosecuted as genocide, they may amount to crimes against humanity—persecution.³⁹ In *Blaškić*, the Trial Chamber held that the crime of persecution as defined in Article 5(h) of the ICTY Statute 'encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less serious, such as those targeting property, so long as the victimized persons were specially selected on grounds linked to their belonging to a particular community'.⁴⁰ Deliberate attacks on cultural property 'when perpetrated with the requisite discriminatory intent, amounts to an attack on the very [...] identity of a people. As such, it manifests a nearly pure expression of the notion of 'crimes

³² *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 2. For a substantive discussion of international law on cultural property see Roger O'Keefe, *THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT* (2006).

³³ *Ibid.*

³⁴ U.N. Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 808*, U.N. Doc. S/25704 (May 3, 1993) art 4(2).

³⁵ Rome Statute of the International Criminal Court, UN Doc. No. A/CONF. 183/9 art. 6.

³⁶ *Krstić* (Judgment) IT-98-33-T (2 August 2001) para 580.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Tadić* (Judgment) IT-94-1-T (7 May 1997) para 713.

⁴⁰ *Blaškić* (Judgment) IT-95-14-T (3 March 2000) para 233.

against humanity', for all of humanity is indeed injured by the destruction of a unique ... culture and its concomitant cultural objects [... which] may amount to an act of persecution.'⁴¹ In *Karadžić*, the Trial Chamber reaffirmed that acts against cultural property with a discriminatory intent may amount to a crime against humanity.⁴²

The purposeful destruction of cultural property, such as, bulldozing, mining, drilling, smashing, and other means of wrecking, give rise to individual criminal responsibility under international law in both international and non-international conflict. Several Nazi war criminals tried at Nuremberg were convicted for their roles in premeditated destruction of cultural property in occupied territories.⁴³ The ICTY also discussed acts of hostility against cultural property other than attacks in *Brdanin*.⁴⁴ The Tribunal held that the destruction of institutions of religion targeted specific ethnicities, and 'their destruction [did not provide] any kind of advantage' to the Bosnian Serbs 'or was otherwise justified by military necessity.'⁴⁵ As such, destruction of cultural property outside the context of an attack is not unlawful if and to the extent that there is an imperative military necessity and there is no feasible alternative for dealing with the situation.⁴⁶ In the case of ISIS, the carefully recorded acts of destruction, which include music and reciting, provide indisputable evidence that these acts do not constitute a military necessity.

In addition to intentional destruction of cultural property as a means of warfare and persecution of anyone that does not comport to their worldview, ISIS has appropriated cultural property. International law recognized individual responsibility for the illicit plunder of cultural property, both in international and non-international armed conflict.⁴⁷ London Charter article 6(b) vested the International Military Tribunal (IMT) at Nuremberg with jurisdiction over the war crime of 'plunder of public or private property.'⁴⁸ The IMT held Rosenberg 'responsible for a system of organized plunder of both public and private property'⁴⁹ in occupied European states. The ICTY also

⁴¹ *Kordić & Čerkez* (Judgment) IT-95-14/2-T (26 February 2001) para 207.

⁴² *Karadžić* (Public redacted Judgment) IT-95-5/18-T (24 March 2016) para 207.

⁴³ *Judicial Decisions Involving Questions of International Law-International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. OF INT'L L. 172, 249 (1947).

⁴⁴ *Brdanin*, (Appeals Chambers Judgment) IT-99-36-A (3 April 2007) para 341.

⁴⁵ *Ibid.*

⁴⁶ Rome Statute, Articles 8(2)(b)(xiii) and 8(2)(e)(xii).

⁴⁷ *Kordić & Čerkez* (Appeals Chamber Judgment) IT-95-14/2-A (17 December 2004) para 78.

⁴⁸ Control Council Law No. 10 Art II(1)(b) also recognizes this crime.

⁴⁹ International Military Trials at Nuremberg, Nazi Conspiracy and Aggression, Opinion and Judgment, Office of

adjudicated cases dealing with this war crime.⁵⁰ The ICTY held that the offense encapsulates 'all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally describe as 'pillage.'⁵¹ Furthermore, the offense includes 'both widespread and systematized acts of dispossession and acquisition of property in violation of the rights of the owners and isolated acts of theft or plunder by individuals for their private gains.'⁵²

Conclusion

The trafficking of cultural property is not new, but ISIS' use of antiquities to fund terrorism has created a strong need to fight this issue. The trade in cultural property has been characterized as a grey market, because 'it is neither entirely legal nor illegal.'⁵³ One of the reasons why cultural property trade exists in two worlds stems from the fact that market regulations differ in different jurisdictions. At any point in the supply chain, antiquities can become illegal/legal, which helps traders find loopholes and 'cultural property [may] be frequently laundered or blackened'⁵⁴ depending on circumstances. Inconsistency between market regulations makes enforcement of laws challenging. However, the heightened international attention toward the protection of cultural property has created a positive momentum on this issue.

Prosecuting crimes against cultural property in war zones,⁵⁵ heightening legal protection,⁵⁶ designing incentives to disrupt sale and/or trade of

United States Chief of Counsel for Prosecution of Axis Criminality (United States Government Printing Office Washington: 1945) at 122 (hereafter 'Nuremberg Judgment'). The main perpetrator and head of Einsatzstab Rosenberg was Alfred Rosenberg. He was mandated by Hitler to plunder public artworks of Central/Eastern Europe and private Jewish-owned art collections. Others involved in this endeavour include Martin Bormann, Hermann Goring, and Joachim von Ribbentrop.

⁵⁰ 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, Art 3(e).

⁵¹ *Hadžihasanović and Cubura* (Judgment) IT-01-47-T (15 March 2006) para 49, quoting *Delalić* at al. (Judgment) IT-96-21-T (20 February 2001) para 591 (case is also known as 'Čelebići Camp').

⁵² *Ibid* quoting *Kordić & Čerkez*, Trial Judgment, para 352.

⁵³ Siobhán Ní Chonaill, Anaïs Reding, and Lorenzo Valeri, *Assessing the Illegal Trade in Cultural Property from a Public Policy Perspective* (RAND Europe 2011), 11.

⁵⁴ *Ibid* Rand Corporation uses the term 'laundering' to describe the process by which illegal artefacts enter the legal market, while 'blackening' refers to the process through which legal artefacts enter the black market.

⁵⁵ See *Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016).

⁵⁶ The US is using its anti-terrorism laws (18 U.S.C. § 2339A and 18 U.S.C. § 981 (a)(1)(G)(i)) to combat trafficking of antiquities from war zones. See FBI Press Release, 'ISIL and Antiquities Trafficking; FBI Warns Dealers, Collectors About Terrorist Loot,' (26 August 2015) <https://www.fbi.gov/news/stories/isil-and-antiquities-trafficking>, accessed 26 January 2017; US Department of Justice, 'United States Files Complaint

antiquities, creating databases for stolen antiquities,⁵⁷ and providing safe havens for items at risk (e.g. new measures in the US⁵⁸ and France⁵⁹) are positive steps in the fight against terrorist financing and protection of cultural heritage. As governments and international bodies continue their good work, it is important to remember that fighting the illicit trade of antiquities can only succeed through organized efforts of law enforcement agencies,⁶⁰ the judiciary, legislative bodies, and private institutions. The successful investigation (code-named Pandora) led by police in 18 countries, supported by the Interpol, Europol and UNESCO⁶¹ shows that cooperation and goodwill can make a difference in the fight against terrorism and destruction of cultural property.

Seeking Forfeiture of Antiquities Associated with the Islamic State of Iraq and the Levant (ISIL),’ (15 December 2016 <https://www.justice.gov/usao-dc/pr/united-states-files-complaint-seeking-forfeiture-antiquities-associated-islamic-state>, accessed 26 January 2017.

⁵⁷ ICOM, ‘Red Lists Database, <http://icom.museum/resources/red-lists-database/>.

⁵⁸ Public Law No: 114-151 (05/09/2016) (creating a safe haven for antiquities at risk in Syria and prohibiting the import of looted cultural items from this state).

⁵⁹ ‘Louvre to offer shelter for world treasures rescued from war zones,’ *The Guardian* (1 November 2016) <https://www.theguardian.com/world/2016/nov/01/louvre-safe-haven-world-treasures-rescued-war-zones-secure-facility-hollande>, accessed January 26 2017.

⁶⁰ See ‘75 Arrested in European crackdown on art trafficking,’ *New York Times* (22 January 2017) <https://www.nytimes.com/2017/01/22/world/europe/75-arrested-in-european-crackdown-on-art-trafficking.html?smprod=nytcare-ipad&smid=nytcare-ipad-share>, accessed 26 January 2017 (reporting the arrest of 75 people and the recovery of 3,500 stolen artefacts and other artworks as part of the dismantling of an international network of art traffickers. Some of the pieces originated from war zones).

⁶¹ *Ibid.*



U.S. soldiers protect the ziggurat at Aqar Quf in Iraq, SOURCE: <http://uscbs.org/>

The U.S. Committee of the Blue Shield and the Blue Shield Movement

by Prof. Patty Gerstenblith and Prof. Nancy C. Wilkie¹

Introduction

International legal instruments have long called for the marking of cultural property that is to be protected during armed conflict with a distinctive and visible sign, in accordance with the duty of those under siege to communicate the special status of protected property through the use of such signs. Although the duty to mark protected cultural property has been part of international law for more than a century, the first universally

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accepted emblem -the Blue Shield- was adopted by the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Second Protocol to that treaty also set forth provisions for the involvement of non-governmental organizations in the protection of cultural property, including national committees of the Blue Shield. The U.S. Committee of the Blue Shield, founded in 2006, has actively pursued the goals of the 1954 Hague Convention by working with the military to train troops prior to deployment and to provide them with lists of cultural property to be protected in countries where they are currently engaged.

Background

Provisions for the marking of protected cultural property are first found in Article 16 of the draft of an international agreement submitted to delegates of 15 European states at Brussels in July 1874.² The draft was adopted with few revisions on August 27, 1874 and became commonly known as the Brussels Declaration. In the final text, Article 17 calls for the marking of protected buildings with “distinctive and visible signs to be communicated to the enemy beforehand.”³

Although the Brussels Declaration was never ratified, similar provisions were included in article 34 of the Manual of the Laws and Customs of War at Oxford in 1880 and in Article 27 of the Regulations Respecting the Laws and Customs of War on Land of 1899 (Annex to the Hague Convention of 1899). The former provision prohibits bombardment of buildings dedicated to religion, art, science and the care of the sick and wounded, provided that the buildings are not being used in any way for military purposes. Moreover, like the Oxford Manual, it requires that those being besieged mark such property with “particular and visible signs notified to the assailant beforehand.”⁴

The Ninth Hague Convention (adopted October 18, 1907) Concerning Bombardment by Naval Forces in the Time of War was the first instrument to provide explicit details as to the design of signs used to indicate protected

² Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (UNESCO 1996) 177.

³ International Committee of the Red Cross, ‘Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874’ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=C0F8D113444B0916C12563CD0051557D>, accessed 6 February 2017.

⁴ International Committee of the Red Cross, ‘The Laws of War on Land. Oxford, 9 September 1880’ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/140-80035?OpenDocument>, accessed 6 February 2017.

property. Article 5 of that convention states that signs should consist of “large, stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white.”⁵ Despite the abovementioned efforts, the 1935 Roerich Pact prescribed a very different emblem. Article III of the latter instrument specifies the use of a distinctive flag, the Banner of Peace, bearing the Pax Cultura emblem, to mark protected cultural property. That emblem consists of a large red circle enclosing an equilateral triangle of three solid red dots on a white background.⁶

Although both emblems have been superseded by the Blue Shield symbol, the Pax Cultura emblem remains a valid emblem for use by States that are party to the 1935 Treaty. All of the aforementioned States are located in the Americas and are not members of the 1954 Hague Convention.⁷

As aerial bombardment became more frequent during warfare, the need to mark protected property with a distinctive and easily recognizable symbol increased. This eventually led to the designation of the Blue Shield as the internationally recognized symbol in Articles 16 and 17 of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict. The distinctive emblem of the 1954 Convention takes the form of a blue and white shield with a pointed base. A royal blue square forms the point at the base of the shield. Directly above it is a royal blue triangle while white triangles fill the space on either side (Fig. 1).

Today the Blue Shield is understood by some as the international equivalent of the Red Cross or Red Crescent, used to mark both protected cultural property and cultural heritage professionals. Its use, however, is considered voluntary. Moreover, it has been recognized, particularly in the aftermath of the Balkan Wars of the 1990s, that marking of protected sites could lead to their destruction rather than their protection. As a result, the

⁵ International Committee of the Red Cross, ‘Convention (IX) concerning Bombardment by Naval Forces in Time of War. The Hague, 18 October 1907’ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?documentId=EF261A05DD371F44C12563CD00516DF5&action=OpenDocument>, accessed 6 February 2017.

⁶ International Committee of the Red Cross, ‘Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact). Washington, 15 April 1935’ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/325-480004?OpenDocument>, accessed 2 October 2016.

⁷ 1954 Hague Convention, Article 36 s 2.

recording of protected sites through a registry has been suggested as an alternative to the actual marking of sites with the Blue Shield.⁸

The International Blue Shield Movement

In his 1993 Report, commissioned by UNESCO and the Netherlands to study the effectiveness of and improvements to the 1954 Hague Convention,⁹ Patrick Boylan emphasized the need for greater preparation during peacetime for the protection of cultural property in the event of armed conflict, pointing to the role that non-governmental organizations could take in this effort.¹⁰ While recognizing the important work already undertaken by various NGOs, he noted that no State Party to the 1954 Hague Convention had yet established a national advisory committee, despite its recommendation by the 1954 Hague Intergovernmental Conference.¹¹

In preparation for the drafting of the Second Protocol to the 1954 Hague Convention, UNESCO, in 1994, formulated a working document that included a provision for the establishment of the International Committee of the Blue Shield (ICBS) by the Director of ICOMOS, the Secretary-General of ICOM and the Director of the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM).¹² This provision stated that “ICBS shall maintain a network of cultural experts who will be willing to act in emergencies and shall provide advice to the Director-General of UNESCO in any emergency concerning cultural property.”¹³ It was anticipated that, as a non-governmental organization, ICBS would be more nimble and flexible than inter-governmental organizations, and thus able to respond more effectively during emergency situations. During the negotiations of the Second Protocol, Professor Boylan proposed that ICBS also

⁸ Toman (1996) 177. The creation of lists of protected cultural property was first included in the Roerich Pact, which assigned the Pan-American Union as the depository organization for the lists. Friedrich T. Schipper and Erich Frank, ‘A Concise Legal History of the Protection of Cultural Property in the Event of Armed Conflict and a Comparative Analysis of the 1935 Roerich Pact and the 1954 Hague Convention in the Context of the Law of War’ [2013] 9.1 *Archaeologies: Journal of the World Archaeological Congress* 13, 16.

⁹ Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)*, UNESCO Doc. CLT93/WS/12 101, 53 (1993) <http://unesdoc.unesco.org/images/0010/001001/100159eo.pdf>, accessed 3 October 2016.

¹⁰ *Ibid* 5.44, pp. 71-72.

¹¹ *Ibid* 5.48, p. 72.

¹² Jiri Toman, *Cultural Property in War: Improvement in Protection* (UNESCO 2009) 508.

¹³ *Ibid*.

be designated as “an emergency coordinating committee of UNESCO,” but this suggestion was not adopted.¹⁴

In 1996, several international cultural organizations joined to form the ICBS and to set forth a mechanism for the creation of national Blue Shield committees.¹⁵ Originally, ICBS consisted of representatives of four non-governmental organizations: the International Council on Archives, the International Council of Museums, the International Council on Monuments and Sites, and the International Federation of Library Associations and Institutions. A fifth organization, the Co-ordinating Council of Audio-visual Archives Associations, joined the ICBS in 2005.¹⁶

Article 27(3) of the Second Protocol to the 1954 Hague Convention designates the ICBS as an advisory body to the Committee for the Protection of Cultural Property in the Event of Armed Conflict.¹⁷ This 12-member committee was established by Article 24 of the Second Protocol to oversee implementation of the 1954 Hague Convention and its Second Protocol.¹⁸

The Charter of the International Committee of the Blue Shield, adopted in Strasbourg on 14 April 2000, was approved by the ICBS at its meeting in Paris on 8 June 2001. The charter expanded the role of the ICBS to include preparation for and response to natural disasters, substituting the term ‘cultural heritage’ for ‘cultural property’, the term that had been used in prior treaties, including the 1954 Hague Convention.¹⁹

The Strasbourg Charter also set forth the requirements that must be met by national initiatives seeking recognition as national Blue Shield committees. In addition to securing support of the national representatives of the four non-governmental organizations that originally formed the ICBS, applicants must agree to adhere to the following principles: joint actions, independence, neutrality, professionalism, respect of cultural identity, and work on a not-for-

¹⁴ Toman (2009) 53.

¹⁵ Susan Cole, ‘War, Cultural Property and the Blue Shield’ in P. G. Stone and J. Farchakh Bajjaly (eds), *The Destruction of Cultural Heritage in Iraq* (Boydell Press 2008) 65, 67.

¹⁶ ICBS, ‘Creation of a National Committee of the Blue Shield’ p. 2

http://www.ancbs.org/cms/images/120709_icbs_kit_manual.pdf, accessed 3 October 2016.

¹⁷ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999 http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed 3 October 2016.

¹⁸ *Ibid.*

¹⁹ ICOM ‘International Committee of the Blue Shield (ICBS). Requirements for National Committees of the Blue Shield’ http://archives.icom.museum/icbs_requirements.html, accessed 3 October 2016.

profit basis. The sole right to decide whether to accord recognition to national committees was vested in the ICBS.²⁰

In 2006, representatives of the Blue Shield national committees met in the Hague to determine the most effective way to support the new International Committee for the Protection of Cultural Property in the Event of Armed Conflict.²¹ The result of these deliberations was the decision to form the Association of National Committees of the Blue Shield (ANCBS) in 2009. ANCBS' purpose was defined as coordinating and strengthening international efforts to protect cultural property at risk of destruction during armed conflicts or natural disasters. In addition, ANCBS was to serve as the communication centre, archive and resource base for ICBS and the Blue Shield national committees, as well as to facilitate communication between all levels of the Blue Shield network. This structure changed in 2014, when at a general meeting of the ANCBS the members voted to merge with the ICBS, forming a single new organization known simply as "Blue Shield".²²

The Board of the Blue Shield, its principal governing body, is comprised of nine members: the President, a representative of each of the four Founding Organisations, and four individual members elected by the General Assembly of members.²³ The day-to-day activities of the Blue Shield are overseen by the Bureau, whose membership consists of the President, one of the representatives of the four Founding Organisations, and the Secretary and Treasurer who are elected from among the Board members.²⁴

Currently there are twenty-six national committees of the Blue Shield, twelve of which are located in NATO member states. Additionally, twenty-three national committees of the Blue Shield are in the process of formation, five of which are located in NATO member states. In cases where no national committee exists, an interested individual may be identified by the Board of the Blue Shield to act as a National Correspondent for the Association in that

²⁰ *Ibid.*

²¹ 'The 2006 Hague Blue Shield Accord. 28th September 2006'
<http://www.ancbs.org/cms/images/The%202006%20Hague%20Blue%20Shield%20Accord.pdf>, accessed 4 October 2016.

²² Amendment to the Articles of Association. Association of National Committees the Blue Shield [Article 1] (6 April 2016).

²³ *Ibid* [Article 6.1].

²⁴ *Ibid* [Article 7].

country. However, the Blue Shield Board retains the right to remove this status.²⁵

Impetus for the international Blue Shield movement and for the formation of national committees can be attributed to the 2003 Gulf War and, in particular, to the extensive media coverage of the looting of Iraq's National Museum. Widespread looting of archaeological sites in southern Iraq and more recently in Syria and other Middle Eastern countries has provided additional motivation for the formation of national Blue Shield committees.

A central function of Blue Shield national committees is to promote ratification and implementation of the 1954 Hague Convention and its Protocols. Moreover, national committees also collaborate with the military to educate their members about their obligation to avoid damaging protected cultural property during military operations. The promotion of community engagement with and participation in the protection of cultural property is an equally important goal.²⁶

As required by Article 7 of the 1954 Hague Convention, Blue Shield national committees seek to assure adequate presence of cultural heritage professionals within the military. They also provide militaries with the necessary subject matter expertise to identify protected sites and to coordinate cultural heritage preservation in areas of armed conflict and natural disaster.

Non-governmental organizations are particularly well positioned to provide specialist and subject matter expertise to the military. Under current conditions, no one should expect that members of the military will receive the appropriate training to become conservators, archaeologists or art historians. The situation during World War II was quite different in that the military had available within it, or quickly brought within it, a broad array of experts, including historians, art historians, archaeologists, museum professionals, conservators and classicists.²⁷ Because it is unrealistic to expect that such expertise is or will be located within today's military, it is vital that organizations such as the Blue Shield coordinate with the military and provide connections to appropriate cultural heritage experts. To be most effective, this coordination must take place well in advance of any specific conflict.

²⁵ *Ibid* [Article 3.4].

²⁶ *Ibid* [Article 2.3].

²⁷ Laurie Rush, 'Cultural Property Protection as a Force Multiplier in Stability Operations: World War II Monuments Officers Lessons Learned,' *Military Review* (March-April 2012) 36.

The U.S. Committee of the Blue Shield

Immediately after the founding of the United States Committee of the Blue Shield in 2006, its first goal was to encourage United States' ratification of the 1954 Hague Convention. That goal was accomplished in 2009. Simultaneously, in an effort to protect cultural heritage during both armed conflict and natural disasters, the USCBS was involved in many areas of cooperation and coordination with the U.S. military. In conjunction with other actors, USCBS trained more than one thousand Army Reserve Civil Affairs troops before their deployment to Iraq, Afghanistan and the Horn of Africa.²⁸ In addition, retired U.S. Major Corine Wegener, the founder of the USCBS, provided 1954 Hague Convention training for military officers from more than fifty nations.

Another major area of focus of USCBS has been the creation of cultural site inventories, or "no-strike" lists. At the beginning of both the 1991 Gulf War and again in 2003, archaeologists in contact with military planners drew up a list of several thousand archaeological and other cultural sites in Iraq to be placed on a "no strike" list.²⁹ While cultural heritage professionals provided similar information to the Allied forces during the Second World War, the 1991 and 2003 Iraq lists were the modern prototypes for the "no strike" lists that are now being developed by USCBS and other Blue Shield national committees. These lists are shared with the military and other government agencies in an effort to assist them in identifying and avoiding damage to cultural sites in fulfilment of their obligations under Article 4 of the 1954 Hague Convention. USCBS creates these lists at its own initiative and neither the Department of Defence nor any other U.S. government agency orders or subsidizes the lists.

An example of the successful use of a "no-strike" list was the campaign in Libya in the spring of 2011 that was designed to enforce United Nations Security Council Resolution 1973 to protect civilians.³⁰ The first few days of this campaign, Operation Odyssey Dawn, were conducted by a coalition of France, the United Kingdom, and the United States. USCBS coordinated with archaeologists who have worked in Libya and are specialists in that country's cultural heritage, to compile a list of site coordinates for important Libyan

²⁸ For a partial list of these training events, see 'Military Training' <http://uscbs.org/military-training.html>, accessed 4 October 2016.

²⁹ Lawrence Rothfield, *The Rape of Mesopotamia: Behind the Looting of the Iraq Museum* (University of Chicago 2009) 39-40, 66-67.

³⁰ [www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973\(2011\)&referer=/english/&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973(2011)&referer=/english/&Lang=E), accessed 3 February 2017.

cultural heritage sites. USCBS passed this list on to contacts within the U.S. Department of Defence and to Blue Shield national committees in other NATO countries, which in turn shared the information with their own military contacts.³¹ This list, along with data compiled by the US Defence Intelligence Agency, the NATO Intelligence Fusion Centre, UNESCO, and other sources, became part of the total package of data regarding non-targets in Libya,³² which helped preserve cultural heritage from any significant damage during the NATO action.³³

In 2015, USCBS received a grant from the J.M. Kaplan Fund to support, in part, a larger project to create additional “no-strike” lists. In collaboration with the Centre for Middle Eastern Landscapes (CAMEL) Lab of the Oriental Institute at the University of Chicago and other partners, USCBS has completed, or is in the process of completing, lists for Afghanistan, Iraq, Syria, South-eastern Turkey, Lebanon, and Jordan. In addition, a list for Yemen is being compiled in collaboration with Endangered Archaeology of the Middle East and North Africa (EAMENA). USCBS is also assembling lists of sites in regions outside of the Middle East where the possibility of military conflict exists, such as in Ukraine.

As part of the project to create “no-strike” lists, USCBS has collaborated with various governmental agencies to develop a uniform template for the recording of site information that can be used throughout major sectors of the U.S government. In addition to their use in targeting data, these lists can be employed to prevent military activity that may have an adverse impact on cultural sites in other military activities. An important example is in the siting of installations that might impinge upon cultural sites, such as when the United States placed military bases at or near the historically and culturally significant archaeological sites of Babylon³⁴ and Ur during the 2003 Iraq War.³⁵

³¹ Blue Shield and IMCuRWG, ‘2nd Civil-Military Assessment Mission for Libyan Heritage’ (November 12-16, 2011) <http://blueshield.de/libya2-report.html>, accessed 4 October 2016.

³² NATO Joint Lessons Learned Analysis Centre, *Cultural Property Protection in the Operations Planning Process* (12 December 2012).

³³ NATO, ‘Protecting Libya’s Heritage’ (4 January 2012) http://www.nato.int/cps/en/SID-65C15F94-D3CDC3FF/natolive/news_82441.htm, accessed 4 October 2016.

³⁴ Zainab Bahrani, ‘The Battle for Babylon’ in Peter Stone and Joanne Farchakh Bajjaly (eds), *The Destruction of the Cultural Heritage of Iraq* (Boydell 2008) 165.

³⁵ Abdulamir Hamdani, ‘The Damage Sustained to the Ancient City of Ur’ in Peter Stone and Joanne Farchakh Bajjaly (eds), *The Destruction of the Cultural Heritage of Iraq* (Boydell 2008) 151, 154-155.

Summary

The U.S. Committee of the Blue Shield is supported through membership donations and grants from organisations that actively support the protection of cultural heritage. It actively cooperates with other Blue Shield Committees and with the international Blue Shield organisation.

On the national level the USCBS is dedicated to working with other cultural organisations in order to protect cultural heritage in times of armed conflict and natural disasters. Such cooperative agreements are crucial to the success of the mission of the USCBS and the Blue Shield in general.

As USCBS is currently celebrating its tenth year, it recognizes that it is a young organisation. While it has accomplished much in its short existence, a great deal remains to be done in order for it and the other national committees to achieve the recognition necessary for them to fulfil their role in protecting cultural heritage.





SOURCE: <http://uscbs.org/>

The Importance of Training Cultural Property Protection An Example from the U.S. Army

by Dr. Laurie W. Rush¹

Introduction

During the course of recent conflicts, NATO forces have been required to operate in cross cultural environments, encountering battle spaces characterized by people and communities very different from their own. Attempts to teach cultural awareness and to map the “human terrain” resulted in a serious gap in preparation when these efforts failed to include discussions of material culture and cultural property geo-spatial data layers. Based on U.S. deployment lessons learned, the cultural resources team at Fort Drum, New York a group of qualified archaeologists trained as anthropologists developed a series of new models and pilot projects in order to support pre-deployment Cultural Property Protection (CPP) training for deploying elements of the 10th Mountain Division and National Guard and Reserve units from the U.S. northeast.

These models and projects included construction of replica

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archaeological sites and cultural features as training assets; creation of opportunities for soldiers to train on actual archaeological properties; incorporation of these sites and assets into actual exercise training scenarios; support for other aspects of cross cultural training like preparation for Key Leader Engagements (KLEs); development of professional military education (PME) presentations discussing CPP for all levels of military personnel and their families; development of training materials like playing cards; establishment of PME programs like Reserve Officer Training Corps (ROTC) internships; and reaching out to international colleagues and programs to develop and share best practices. Partnership with the academic community of archaeologists and museum professionals has played a critical role in the success of all the nascent US Department of Defence CPP efforts including those at Fort Drum.²

Creating Opportunities to Train CPP in the Field

Modern military organizations across the world train on land that was previously occupied by ancient people over the course of millennia. In the U.S., significant traces of past occupation are protected by the National Historic Preservation Act³, so all large acres U.S. military installations have a cultural resources team composed of archaeologists, most of whom trained first as anthropologists. The research specialties of these professionals tend to focus on better understanding of the former occupants of the land for which they are responsible. For example, the research specialties of the Fort Drum archaeology team concentrate on Native Americans of the Great Lakes region of the U.S. and the local history of northern New York State. The known and protected archaeological sites on the installation range from paleo occupation of Native Americans dating to the end of the Pleistocene, continuing through all phases of aboriginal occupation up to and through Late Woodland people, commonly known as Iroquoians, and terminating with the farms and villages of European settlers who, along with the Indians, lost their homes when Fort Drum expanded for increased military training required by World War II.

Five of the villages destroyed when Fort Drum expanded in 1941 are now managed as National Register Listed archaeological historic districts. Originally, the management strategy was to simply declare these districts to

² Laurie Rush, "Working with the Military to Protect Archaeological Sites and other Forms of Cultural Property," [2012] *Journal of World Archaeology*, 43:3, 359, 365.

³ National Historic Preservation Act [1966] 16USC470.

be off limits to military personnel. However, after twenty years, the archaeological remains were being destroyed by weathering and vegetation. After September 11, 2001, elderly citizens who had lost their homes back in 1941 pointed out to Fort Drum officials that they wanted their sacrifice to support military training, and they expressed concern that archaeological protection was preventing soldiers from using the properties. As a result, the cultural resources staff worked with the Integrated Training Area Management Team (ITAM) to stabilize the deteriorating ruins; covering some with filter fabrics and fill while reinforcing others with protective frameworks. Once ITAM had stabilized the archaeological remains to the point where personnel hazards were minimized and soldier occupation would not do any damage, the historic village of Sterlingville with its key crossroads intersection was opened for historic area training. The cultural resources team posted signs clearly indicating that the area is a heritage property of special significance where training is encouraged and digging forbidden. The signage also includes the Blue Shield, the symbol agreed upon to identify protected cultural sites in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Fort Drum lawyers actually permitted use of the symbol as a training aide prior to US ratification of the convention in 2009.

Currently, over 10,000 U.S. soldiers per year have the opportunity to train at Sterlingville, offering them an opportunity to occupy a historic property without doing any damage, essentially minimizing their footprint. Once they were permitted access, the soldiers and training community became increasingly interested in the history of the village, its past as an iron foundry company town, and its founder, James Sterling. In response, cultural resources added an interpretive sign that also includes images of the inhabited village dating to the 1940s.

Once the installation archaeologists had established the opportunity to train on an actual archaeological site, the team realized that it would be helpful to supplement existing urban sprawl training sites with cemeteries and replica ruins. The 10th Mountain Division is one of the most, if not the most, deployed Division in the United States Army. Returning Division soldiers are very pro-active about wanting to insure that lessons they have learned forward are addressed in the form of training opportunities for future deployments. Soldiers returning from Iraq, for example, requested new training options like opportunities for engaging structures with courtyard walls and opportunities to practice backing military vehicles down narrow dead

end allies draped with electrical wires. In the realm of cultural property protection, they asked for assets where they could prepare to be fired upon from cultural sites like cemeteries, places of worship, and ruins. The soldiers also requested chances to train for securing cultural sites being used as firing points and/or weapons caches while minimizing collateral damage.

In response to these needs, the archaeologists built replica ruins out of stone that looked like mud brick and identified these structures as protected cultural sites. They also added replica cemeteries since soldiers had reported being fired upon by insurgents using grave markers as cover. These replicas were interspersed with mock village and urban sprawl features, and the trainers chose how to incorporate these sites into meaningful scenarios. The cultural resources team made an effort to create grave markings that looked similar to ones that 10th Mountain Division soldiers were encountering in Iraq and Afghanistan.

In addition to the assets created for infantry training, replica ruins were added in the immediate vicinity of the actual targets at the aerial gunnery range so that air crews could practice approaches that would minimize their potential for collateral damage. Essentially, these features offered opportunities for operators of aerial weapons systems to practice for implementation of "no strike" listing or non-lethal targeting.

Incorporation of Aboriginal Archaeological Features into CPP Training

Native Americans moved onto the land we now know as Fort Drum as soon as the ice began to melt at the end of the last ice age. Essentially, for over 10,000 years, people have modified the installation landscape, leaving evidence of their passing. At Fort Drum, the ancient places include piles of stone that may mark memorials and locations of significant past events, stone features that reflect celestial events, campsites, villages, and even tiny sites where an individual may have stopped to sharpen a stone tool and then moved on. In combination, these features offer a cross cultural landscape and the opportunity to teach deploying personnel how to look for features in a landscape that matter to those who have come before and have not been left behind by natural forces.

It is still common for military cultural resources managers to protect archaeological sites of aboriginal origin by posting or fencing them and placing them off limits to military personnel. However, the ability to identify and protect cultural property is important for deploying personnel, and these

sites offer a chance to hone that skill. Fort Drum uses these sites in two ways. The first is to add them to the inventory of actual archaeological sites available for incorporation into training scenarios. Generally, these sites are treated as extremely sacred places of the indigenous peoples of the scenario and are to be avoided, respected, and protected by the force. The second is to use them for field exercises, where the archaeologists challenge soldiers to analyse the landscape for identification of the features that “don’t fit.” This exercise not only offers the opportunity to engage the training areas in a new way, it also offers the cultural property protection specialist a chance to teach appropriate responses, once a significant cultural feature has been identified.

Incorporation of Cultural Property Training Assets into Actual Scenarios

In keeping with the motto, ‘train as you fight,’ an effective way for military personnel to gain experience with the concept of cultural property protection (CPP) is to draft and implement CPP injects into military exercises. Military exercises are organized by MSELs, Master Scenario Event Lists, and when an event is unexpectedly added to the list, it is called an “inject.” To our knowledge, in late 2016, the 10th Mountain completed the first ever CPP inject during the course of a U.S. Army major division field exercise. This accomplishment offers an experiential foundation for the more specialized pre-deployment training events where CPP is beginning to be included.

The premise of the exercise scenario was that insurgents were invading the fictitious country of Atropia. In keeping with Fort Drum’s pro-active approach to encouraging training on real and replica archaeological sites, the cultural resources team met with exercise planners on multiple occasions as part of the preparation. Initially, the Division representatives thought that the meeting with the archaeologists would be review of off limits properties, so the planners were surprised by and appreciative of the realism offered by presentation of the cultural resources of Fort Drum as training assets. The village, farmstead and aboriginal features became Atropian cultural property and sacred sites like the birthplace of the revered Atropian founding leader, ethnic shrines, and ancient battlegrounds. The cultural resources team made new signage for many of the sites, identifying them with property names that fit the scenario. The replica archaeological ruins and cemeteries were also offered to the trainers to be used in any way they wished.

The next step was to complete field tours with the exercise planners. For the Mountain Peak CPP inject, the Deputy G9 Civil Affairs Officer participated

in the field tour. A field tour with cultural resources personnel can enrich the exercise experience in multiple ways. First, the field archaeologists at any military installation are well equipped to educate soldiers on how to read the cultural landscape, an extremely useful skill in the deployed environment. For example, on Fort Drum, the tall shade trees growing in the midst of the brush along the tank trails indicate the presence of the historic farmsteads. Supplementary clues include the presence of garden flowers like day lilies and lilacs, and food plants like apple trees. Knowing where the farmsteads are is useful information because their foundation features offer excellent cover for insurgency role players, who are placing Improvised Explosive Devices. These properties also may contain hazards like open wells and rusting barbed wire fences, so the ability to identify an historic farmstead complex benefits the soldiers operating in unfamiliar territory. The tour can become a training exercise of its own as the tour participants further develop their ability to identify cultural features in the training area landscape.

The field tour also included introductions to a wider range of historic area cultural features that could be used for future scenarios. These assets can range from historic dams that offer opportunities to train for insurgent attacks on critical infrastructure to artificial pine plantations that can substitute for agricultural assets forward.

When the tour was complete, the G9 began to draft the CPP inject, designed to offer the combatant commander a realistic training experience involving cultural property. It also fell to the G9 to make the case for the value of the CPP inject. The G9 decided to use a replica temple located in an urban sprawl training area as the basis for a scenario where artefacts sacred to the Atropian people had been looted from the temple museum. In the scenario, the Atropian Minister of Culture sent a request to the Brigade Commander requesting a meeting to discuss not just the missing artefacts but also the status of the sacred sites located in territory recovered from the insurgents by the Division.

The Brigade Commander agreed to the request for a meeting, and with support from the Civil Affairs staff prepared the headquarters for the key leader engagement. It was clear that the Commander's staff had attended to every detail; greeting the delegation as they exited their vehicles; offering food and warm beverages; preparing for hosting delegation security; and completing research and intelligence on Atropian cultural property issues. The Cultural Resources Manager played the role of Atropian Minister of Culture

accompanied by the archaeology field team who represented Atropian Museum professionals, faith based Humanitarian Aid Societies, Ethnic Indigenous Atropians, and even the Atropian Minister's Security detail.

The Brigade Commander demonstrated his genuine concern for the Atropian sites by using the installation cultural resources Geographical Information System coverage to prepare a detailed map of all of the known sites within his Area of Responsibility (AOR). He requested more information concerning each of the sites, asked well prepared and thoughtful questions, and explained that one of the mission goals was to secure and protect these very important places. The conversation then turned to the missing artefacts. Again, the Brigade Commander demonstrated genuine concern and comprehension of the significance of the objects and the importance of securing their recovery. The Atropian delegation left the meeting with a sense of confidence and trust in the U.S. Force.

Upon completion of the meeting, the Brigade Commander issued orders that made recovery of the artefacts a priority, increasing the value of the inject as a form of realistic training. For example, the military police participating in the exercise immediately recognized the importance of their role in the search and recovery, and the Civil Affairs officers made preservation of religious facilities a priority so that they could be used as a base for humanitarian aid operations during the stability operations phase of the exercise. The After Action Report gave all participants opportunities to consider improvement, and without question, the inject improved the Division's preparation for the extremely complex cultural property issues they will encounter during the course of their next deployment.

Development of Professional Military Education for Teaching Cultural Property Protection

One of the challenges for educating the force with respect to CPP is creating specialized training customized for a wide range of military occupational specialties (MOS). In the author's experience, informed commanders generally agree that an entry-level introduction to the concept is useful for all deploying personnel. To that end, a pair of retired Navy Commanders are working on a CPP video game designed to convey the basic concepts of CPP in an interactive format that can easily be delivered to all personnel with computer access. The game is called "Culturalrecon"

and should be available for wide distribution by the end of 2017⁴.

Advocates of CPP, with the support of MG Erik Peterson, then Deputy Commanding General of Cadet Command, were successful in establishing an introduction to CPP as a curriculum requirement for all U.S. Army ROTC cadets. The ROTC military science module includes a practical exercise that challenges cadets to consider the mission implications of protecting or failing to protect cultural property in the battlefield environment. In addition, Fort Drum offers an ROTC CPP internship where ROTC cadets in the summer prior to their senior year are immersed into an active installation cultural resources management program and experience the field exercises in addition to be offered opportunities to meet representatives of the Native American nations whose ancestors once lived on Fort Drum.⁵ The cadets also select and complete a project during the course of the internship. The goal for these projects is to add to the compendium of CPP reference and education products available worldwide. Successful projects have ranged from introductory briefings on the cultural property of specific countries to development of cultural property inventories for four Baltic nations in support of NATO exercises.

Another approach for educating the force writ large has been development of cultural property training materials for wide distribution. The most successful effort along these lines was creation of archaeology awareness playing cards for military personnel, the result of a partnership between Fort Drum and Colorado State University Centre for the Environmental Management of Military Lands (CEMML). Each card in a deck of 52 offers a different educational message related to the importance of heritage protection. The first deck focused on Iraq and since its introduction in 2007, the partners have distributed over 150,000 decks to deploying military personnel. The Iraq deck organized the messages by suit, so hearts discussed CPP issues related to “winning hearts and minds,” the spades warned about the dangers of digging, the clubs focused on cultural preservation and the diamonds conveyed messages about the value of artefacts. The designer created each suit to work as a puzzle, so that the pieces could be combined to make an image of a piece of cultural property. The team followed the

⁴ Kim Himmer and Keith Himmer, ‘Culturalrecon’ Presentation at the NATO SPS Krems Training Workshop (2016).

⁵ Laurie Rush, ‘Introduction of Cultural Heritage Management to the U.S. Military’ in Robert Albro and Bill Ivey (eds), *Cultural Awareness in the Military* (Palgrave MacMillan 2014), 9, 17.

original deck with a bilingual English/Arabic deck focusing on Egypt for distribution during the Bright Star War Games, and a third deck on the Cultural Heritage of Afghanistan intended for all forces serving in that country. The Egypt and Afghanistan decks also work as puzzles. The Drum CEMML team supplemented the playing cards with soldier pocket cards designed to easily fit into a uniform pocket, and these cards were translated into multiple European languages in addition to Arabic.⁶

Graphic training aides like playing cards also offer an opportunity to engage families of military personnel on this important subject. The Fort Drum cultural resources team also offers educational programming to soldier spouses and children of all ages whenever the opportunity arises. Whether it is “Be an Archaeologist Day” on the installation or a discussion of mummies with first graders, the protection message often makes it home to the deploying family member.

An internet presence is also critical when working to provide awareness and information to large numbers of people. For nearly a decade, the Combatant Command Cultural Heritage Action Group (CCHAG) hosted a website that offered PowerPoint briefings for download, pdf versions of all of the playing card decks and soldier pocket cards, and current events related to CPP. The CEMML website supplemented the CCHAG website by offering detailed reach back information concerning archaeological sites in Iraq and Afghanistan with interactive maps. The CCHAG website is currently in the process of transitioning to a different host as the CCHAG works toward its goal of becoming a more influential organization.

Introductory and awareness training is only a beginning. Effective implementation of a CPP program also depends upon customized training for a wide range of military specialties. When we consider the wide range of jobs and challenges in the deployed environment, it is immediately clear that CPP courses for a site surveyor, a bulldozer operator, a planner, and a targeteer are going to be very different. Just as air crews use the avoidance targets on the aerial gunnery range at Fort Drum to practice minimization of collateral damage, site surveyors need to learn how to potentially identify the presence of an archaeological site in order to avoid damage during base construction

⁶ James Zeidler and Laurie Rush, ‘In-Theatre Soldier Training through Cultural Heritage Playing Cards: A US Department of Defense Example’ in Laurie Rush (ed), *Archaeology, Cultural Property, and the Military* (Boydell and Brewer 2010), 73, 77.

or expansion. Heavy equipment operators need to be able to determine conditions where an archaeology monitor might be appropriate and what types of inadvertent discoveries would warrant a work stoppage. A planner needs to be sure that a sufficient cultural property geo-spatial data layer is available for the battle space. An imagery analyst needs to know what the signatures of past cultural behaviour might look like from the sky, and legal advisors need to know the requirements faced by their commanders.

One area where CPP education is gaining traction is in the arena of combat engineering. In the US and the UK, protection of cultural resources falls within the portfolio of the combatant command environmental engineer. For the U.S., U.S. Central Command and U.S. Southern Command have been especially pro-active when it comes to education and awareness. U.S. Southern Command sponsored CPP training for the entire headquarters in 2012, and has developed a series of CPP briefings focusing on four specialized areas: legal requirements for protection of cultural property; how to identify cultural property; CPP specifically for Engineers; and the potential contributions that understanding cultural property can make to intelligence gathering. In 2010, the CENTCOM Environmental Engineer included cultural property as a key topic in a series of environmental shuras held in Kabul. He also made every effort to insure that the forward environmental engineer not only understood the significance of the issue to the Afghan people but also made a point of introducing the forward engineer to members of the Afghan government ministry of culture.

Members of the Civil Affairs community have also worked to insure that their officers and soldiers develop competence in the realm of CPP. The U.S. Army published a Graphic Training Aid (GTA)⁷ that outlines some guidance for appropriate response when soldiers encounter cultural property on the battlefield. The Smithsonian Institution has also stepped up to offer educational events to civil affairs units that include behind the scenes visits to collections; visits to conservation laboratories; and briefings by leaders in the field. The Smithsonian even partnered with the Metropolitan Museum of Art in Manhattan, who hosted a major training event for Civil Affairs officers that included a tour of the Islamic collection and a special briefing by the Museum's armorer concerning the arms and armour collection. The U.S. Marine Corps has strengthened their Civil Affairs curriculum to include a museum collection evacuation exercise in addition to their more formal CPP

⁷ GTA 41-001-002 (2009) Civil Affairs Arts, Monuments, and Archives Guide.

introduction and briefings.

Academic Partnership with the Military for Development of an Effective CPP Training and PME Program

Every aspect of CPP program development at Fort Drum and in the U.S. Department of Defence has depended upon partnership with academic experts.⁸ As explained above, most of the U.S. military archaeologists are anthropologists who specialize in specific areas of North America. When the global media covered the story of U.S. Marine Corps damage at Babylon, it immediately became clear that expertise would be required from archaeologists with experience studying Ancient Mesopotamia, the Middle East, and the Silk Road. Scholars from the Archaeological Institute of America (AIA) volunteered to provide informational lectures to deploying personnel and worked pro-actively on a voluntary basis advising U.S. military archaeologists who were beginning to work with the soldiers on their installations. For over a decade, academic partners have welcomed military representatives at their annual meetings; have provided subject matter expertise for all of the training products and PME materials; have volunteered to provide lectures for ROTC participants attending their universities; have travelled to military bases to offer briefings for deploying personnel; and have shared archaeological data to contribute to Defence Intelligence Agency (DIA) cultural property inventories. As recently as January of 2017, the AIA hosted a heritage preservation workshop at their annual meeting where over fifty members met with representatives of DIA, the US Army, the Iraq Conservation Institute, and the US Committee of the Blue Shield to discuss how AIA can continue to support CPP in the military context.

International Engagement on CPP

Modern warfare often involves multinational forces on the battlefield requiring a coalition approach to meaningful preparation and training in all shared mission requirements, not just cultural property protection. In 2015, the NATO Science for Peace and Security Program funded a project to explore development of CPP Policy, Doctrine, and Best Practices, and Fort Drum provided one of the project co-directors. Over the course of two years of

⁸ Laurie Rush, 'Cultural Property Protection: The Critical Role of Partnership Between Academia and the Military' in Serenella Ensoli (ed), *For the Preservation of the Cultural Heritage in Libya; a dialogue among institutions, Proceedings of Conference 1-2 July 2011, monumental complex of Belvedere, San Leucio, Caserta.* (Fabrizio Serra Editore 2011), 165, 167.

subject matter expert workshops, the project, in cooperation with the NATO CIMIC Centre of Excellence produced a compendium of potential training materials that includes publications, fact sheets, the prototype CPP video game, and suggestions for injects. Members of the SPS working groups also drafted and incorporated the NATO exercise inject mentioned above. In addition to the training materials, there have been additional significant outcomes of the NATO project including a commitment to add a cultural property geo-spatial data layer to NATO Geographic Information Systems and more proactive partnering across military specialties to include military police, stability police, and legal advisors.

The Future of CPP Training at Fort Drum and Beyond

With the successful inject of a CPP scenario into a 10th Mountain Division exercise, there is renewed interest and enthusiasm for CPP at Fort Drum, for both the Division and the Archaeologists. Current plans include repetition of the inject with additional brigade exercises along with incorporation of the topic into the Division Command's pre-deployment academic week in the fall. The Division would like to continue to use the archaeology team as role players, and the archaeological sites will continue to serve as training assets into the foreseeable future. The Division G9 is also very interested in using the cultural property inventories managed by DIA as information assets for ground operations planning.

Fort Drum hopes to continue to be a pioneer and DoD model for effective Cultural Property Protection as a force multiplier.



SOURCE: www.nato.int

Heritage at Risk: Mapping as a Form of Protection and Preservation for Global Heritage Sites

by Dr. Kathryn O. Fay Ph.D., RPA¹ and Dr. George W. Calfas Ph.D., RPA²

Introduction

Safeguarding heritage sites during wartime has been a concern of most cultures throughout history and constitutes a challenge that nations still deal with today. Despite the familiarity with this challenge, armed forces unfortunately have a historical track-record of unintentionally damaging the cultural and natural heritage sites of the nations they operate in. Due to its size and the nature of its ground-based missions, the U.S. Army too is no stranger to such incidents. This was most clearly evidenced by the storm of public attention following multiple events within the recent campaigns in Iraq and Afghanistan. Figures from within and outside the Army have been

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pushing the organisation to recognise the problem and begin measures to correct it. In addition to new Army regulations, expanding no-strike lists for aerial assaults, and pre-deployment training courses for some soldiers, the Army Corps of Engineers' Engineer Research and Development Centre, Construction Engineering Research Laboratory (ERDC-CERL) is developing a new tool that will assist with avoiding damage when building bases overseas. This tool is a computerised mapping program that is designed to aid in the location selection, or siting, of contingency bases overseas. Contingency bases are designed to be short-term use locations for housing and conducting operations, but on occasion they may become permanent installations through the process of transfer to the host nation.

This program, CB-SITE, contains multiple overlays for the base geographical map, containing a variety of information pertinent to a military unit needing to choose a location for a new contingency base. It is designed to be, in essence, a one-stop-shop for all the relevant information needed to find the optimum location for the new base. Information relevant to watersheds, floodplains, building material availability, roadways, and elevation are available, in addition to the independent layer containing the locations of all natural and cultural heritage sites in the chosen area. This layer ensures that all known heritage areas will always be marked as off-limit no-build zones for the purposes of Army construction. This prohibition of building within the boundaries of any known site, and not within a one hundred metre buffer around them, will provide much more protection for these sites than has occurred in the past.

The CB-SITE program aims to fill a gap in the Army's planning for overseas missions, allowing for proactive cultural property protection measures relating to the placement of contingency bases. Most of the Army's admittedly few plans, programs, and resources dealing with cultural property and heritage sites at present are reactive measures, utilised only if and when damage has occurred. As evidenced by recent historical events in Iraq and Afghanistan, reactive measures alone are not sufficient to deal with cultural property and heritage site issues that will arise when moving, re-siting, and deploying Army units overseas. Stronger, more substantive plans need to be put into place to not only deal with potential damage, but to prevent it from occurring at all. Both proactive and reactive measures should be in place, and more personnel and training need to be given to each type. The inclusion of heritage site location data within the CB-SITE program is one of the first steps toward accomplishing this goal.

CB-SITE

To sustain itself as the world's premier land power, the U.S. Army needs the capability to support expeditionary forces by projecting a minimal basing footprint with reduced logistical burdens. Strategically sited contingency bases (CB) allow the Army's expeditionary forces to rapidly respond and operate throughout the joint area of operations. Strategic conditions are analysed through the lens of eight operational environment variables: political, military, economic, social, information, infrastructure, physical environment, and time (PMESII-PT).³ The Army has neither a well-grounded methodology, nor the tools that enable this strategic decision making capability. Decision makers require reliable information about the situational dynamics of the operational environment to anticipate the impacts that siting and operating CBs will have on the local context, and to consider the effects of the site on the operation of CBs. This capability to anticipate CB impacts in a local context becomes particularly important for engagement operations when CBs will have a longer duration of use and interaction with the local populace. An understanding of these potential impacts enables decision makers to evaluate implications of the effects of the CB lifecycle in the pre-operational planning stage.

CBs can be thought of as operating in an ecosystem that encompasses a local context comprised of physical, built environment, and sociocultural structures. The construction and operation of a CB can have local to global effects on the physical and sociocultural systems within this ecosystem. Identifying the effects of a CB on a context and considering how these effects may play out in possible courses of action is analogous to the process of conducting an environmental or social impact assessment, and to the Army's Intelligence Preparation of the Battlespace or the Joint Intelligence Preparation of the Operational Environment.

CB-SITE provides military planners with the ability to remotely sense potential CB locations through weighted algorithms based upon military planning factors. The research of the CB-SITE program creates an impact assessment methodology to operationalise the physical, ecological, and sociocultural attributes for transition into existing Programs of Records. The development of the Qualitative Assessment Framework allows physical, ecological, and sociocultural environmental attributes to be spatially defined

³ Operational Environments to 2028: The Strategic Environment for Unified Land Operations, AUG 2012.

in support of the commander's intent. Furthermore, research as part of CB-SITE develops a statistical algorithm to classify physical, ecological, and sociocultural environmental attributes (Figures 1 and 2).

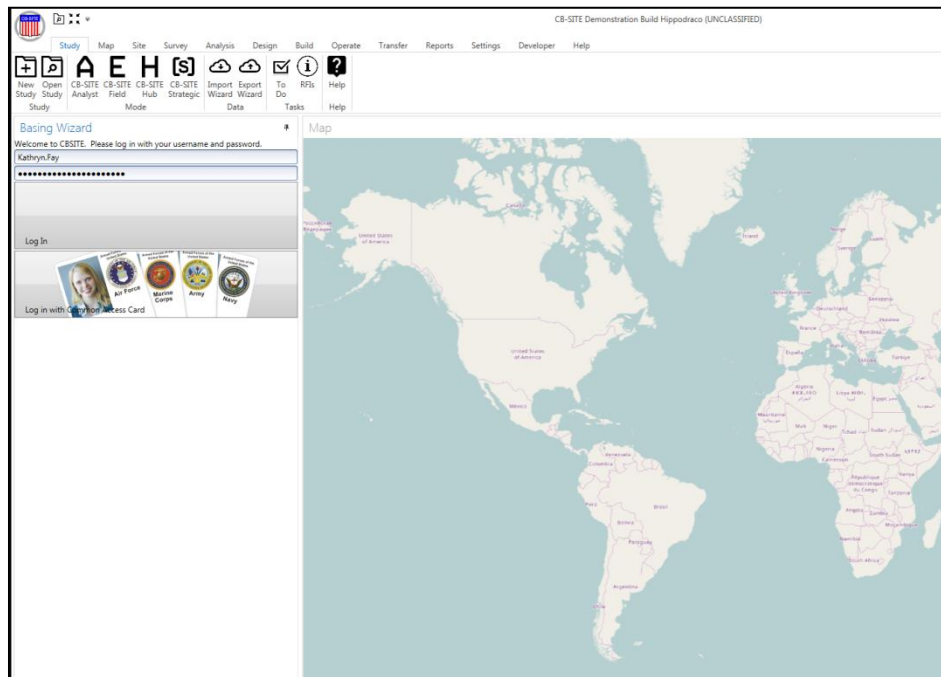


Figure 1. Screenshot of CB-SITE main dashboard. (Photo credit Noah W. Garfinkle, Civil Engineer, ERDC-CERL, USACE)

(provided by the author)

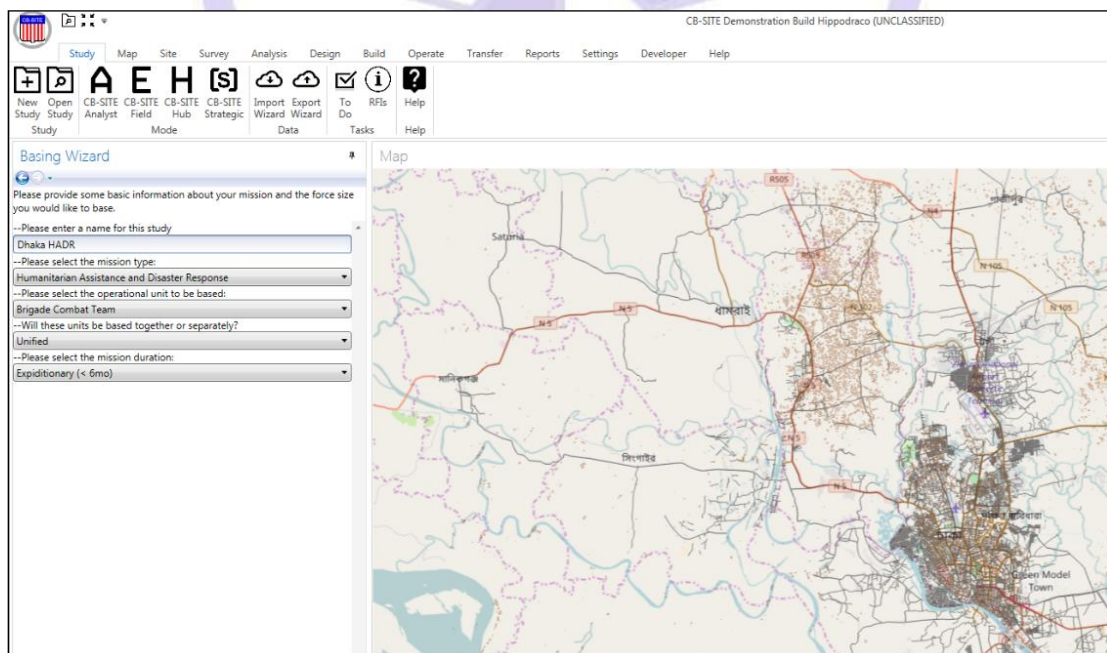


Figure 2. Screenshot of CB-SITE initial options for site selection process, using Dhaka, Bangladesh as a test area. (Photo credit Matthew D. Hiatt, Community Planner, ERDC-CERL, USACE)

(provided by the author)

The protection of cultural and natural heritage sites must also be taken into account when doing any construction in a military environment, and the addition of the heritage sites map function within the CB-SITE program fulfils this need. A search function has been created to data-mine open-source repositories for location information for cultural and natural heritage sites within the requested geographic area. This search currently uses data obtained from Open Street Map, the United Nations Environment Programme's Protected Planet database, and the United Nations Educational, Scientific and Cultural Organization's (UNESCO) World Heritage List. The use of the Protected Planet database and the World Heritage List assure that cultural or natural sites that have major international or national recognition and protection are marked as 'no-build zones' within the CB-SITE program. Open Street Map provides a more specific accounting of known heritage sites, both those of historic value and those that are still in active use today.

A list of the types of sites that would be considered heritage sites within the CB-SITE program, and thus allowed 'no-build zone' status, was created by the authors based on those sites listed in United States federal and international treaty laws as requiring protection during conflict (Figure 3). These sites include historic buildings, nature preserves, museums, places of religious worship, and places that play a large part in the cultural identity of a population, such as art galleries, libraries, archives, cemeteries, and monuments. Location data for these types of sites is pulled from the open-source databases listed above for each requested regional area. Each of these sites is then allowed a one hundred metre buffer zone around it, also included as a 'no-build' area (Figure 4). The inclusion of a buffer zone is common in domestic heritage preservation work, and provides an additional layer of protection for sites from things such as vibration damage, chemical or waste runoff, and potential weapons fire, amongst others.

Cultural Sites		Natural Sites
Museum	Auditorium/Theatre	Heritage Landscape
Library	Community Centre	Viewshed/Viewpoint
Archive	Shipwreck	Nature Preserve/Reserve
Zoo/Aquarium	Cemetery/Graveyard	Park/Playground
Ruin/Archaeological Site	Observatory/Planetarium	National/Regional Park
Public Art	Religious Building/Site	Wildlife Sanctuary
Monument	Historic: Battlefield, Site,	Botanic/Public Garden

Stadium	Neighbourhood,	Protected Area
Mausoleum/Memorial	Building	Wetland

Figure 3. Some of the types of heritage sites included in the CB-SITE program as protected, 'no-build' areas.

(provided by the author)

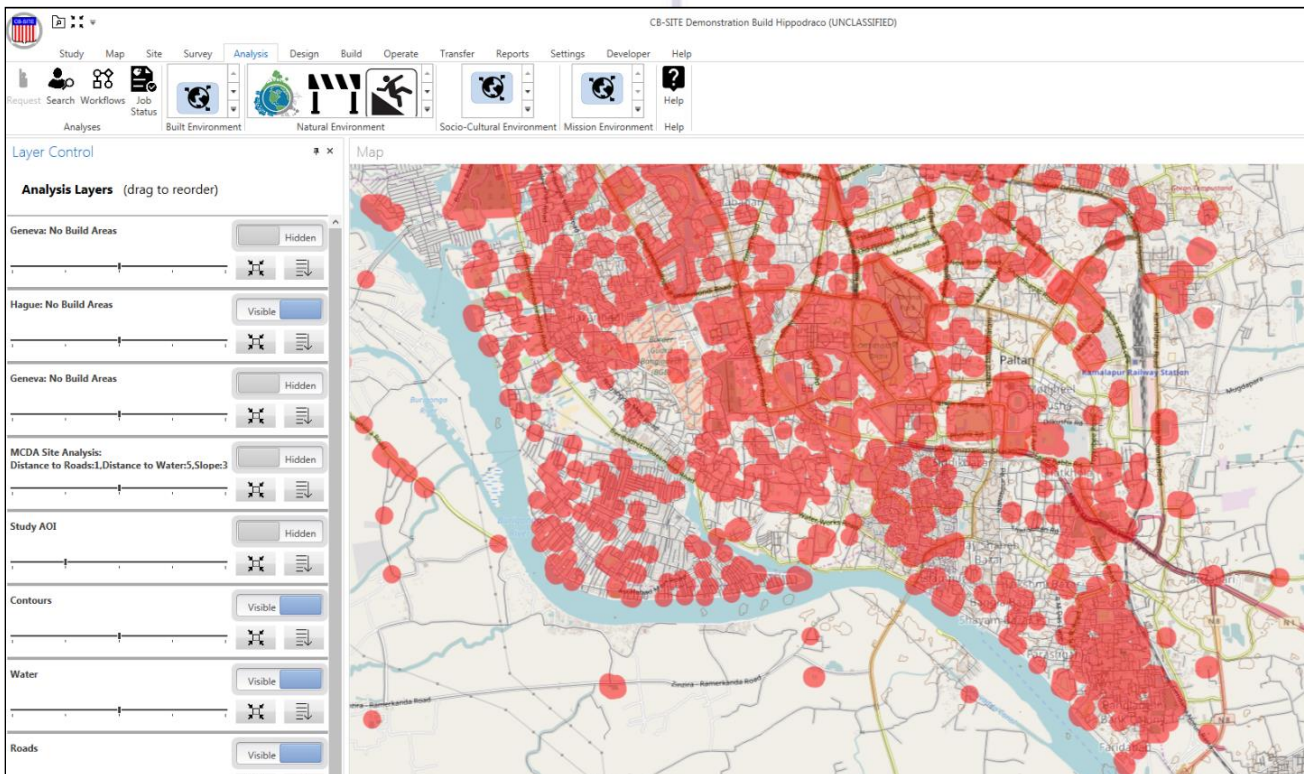


Figure 4. The metropolitan area of Dhaka, Bangladesh, used as a high population density test area for the identification and mapping of heritage sites within the CB-SITE program. Identified heritage sites and their surrounding buffer zones are highlighted in red. (Photo credit Juliana M. Wilhoit, Community Planner, ERDC-CERL, USACE)

(provided by the author)

The potential for some heritage sites to not have their locations on any of the utilised open-source databases is acknowledged, especially archaeological sites which may have little or no extant remains above ground. This deficiency in location data must be accepted until more specific information may be made available and incorporated into the search. Most countries, including the United States, do not make public the complete list of known archaeological sites out of preservation and looting concerns. If allowed access to such data in the future, it will be included within the CB-SITE program. Other U.S. government organisation's heritage site data may also be included in the future, such as the no-strike lists compiled by the Defence

Intelligence Agency and the U.S. Air Force.

The inclusion of cultural and natural heritage site data into a construction database has the potential to avoid or mitigate potential damage caused by the building of contingency bases. As stated previously, this not only keeps the U.S. Army in accordance with international treaty laws, it improves the reputation of the organisation at home and abroad, and helps to earn the trust of local populations. This project fulfils an obvious need for the U.S. military to be more aware of heritage sites abroad, and shows a desire to be more proactive about protecting such sites and the concerns, interests, and culture of the people they represent.

Future Research and Implementation

In the future, the information base for the heritage site section of CB-SITE can be expanded. The current data set is composed of known site locations, obtained from the open-source information websites Open Street Map, Protected Planet, and UNESCO. It is acknowledged that these data sets are not all-encompassing, especially when considering archaeological sites without extant surface remains. Only a small number of countries have their heritage site information currently loaded into the CB-SITE program, during the initial building and testing phase.

This initial phase is creating a framework for the program and a baseline of data, allowing for at least major and/or known sites to be immediately listed as protected, should the Army need to move into an area. With enough lead time, it would be possible for project staff or program users to run the initial search, and then engage with subject-matter experts in the geographical area, or if not possible, those within the United States. This would allow for the addition of more sites to the protected list ahead of the building phase of Army mobilisation operations. It is the hope of project staff that additional sites may be recorded by soldiers on the ground in-country, and that information can also be added to CB-SITE, narrowing the specificity and coverage even further. It is acknowledged that it is logistically unlikely to record one hundred per cent of all cultural and natural heritage sites within any geographical area, but once the CB-SITE program is implemented into full use by the Army, it will allow for the protection of a much greater number of sites than have been in the past.

In the next phase of development of the program, relevant cultural or natural heritage laws within each host nation could be applied to the

mapping software. If, for instance, a nation has a law that no building can be built within a one thousand metre radius of a nature preserve, then that law would supersede the program's already built-in one hundred metre buffer for all heritage sites. The United States is legally and ethically bound by international treaty and our own laws to respect and follow the laws relevant to heritage sites within other nations when moving through them for military purposes, whether they are combat or humanitarian aid related.

The CB-SITE program is helping to fill an obvious need within the military system, especially for the Army and its primarily ground-based mission. Cultural and natural property protection must be taken seriously and noted as a legitimate concern during military planning phases for any sort of troop movement, operation, or construction project. Many figures, military and civilian, have been calling for greater attention to be paid to this issue within military regulations and structure.⁴ Though there has been coverage for reactive measures after damage has already occurred, there is a need for better proactive measures. The building of no-strike lists for aerial campaigns has had a great measure of success in the recent conflicts, and the heritage site function of the CB-SITE program hopes to be the counterpart for ground-based operations.'

⁴ Matthew Bogdanos, 'The Casualties of War: The Truth about the Iraq Museum' [2005] *American Journal of Archaeology* 109 3; Matthew Bogdanos, *Thieves of Baghdad: One Marine's Passion for Ancient Civilizations and the Journey to Recover the World's Greatest Stolen Treasures* (Bloomsbury 2005); Matthew Bogdanos, 'See No Evil: Museums, Art Collectors, and the Black Markets They Adore' in Lawrence Rothfield (ed.) *Antiquities Under Siege: Cultural Heritage Protection After the Iraq War* (AltaMira 2008); Paul R. Green, 'Cultural Resources Data for Heritage Protection in Contingency Operations' in Laurie Rush (ed.) *Archaeology, Cultural Property, and the Military* (Boydell 2010); Richard Jackson, 'Cultural Property Protection in Stability Operations' [2008] *The Army Lawyer* October, 54; Joris D. Kila, 'Cultural Property Protection in the Context of Military Operations: The Case of Uruk, Iraq' [2011] *Conservation and Management of Archaeological Sites* 13 4, 324; Joris D. Kila, *Heritage Under Siege: Military Implementation of Cultural Property Protection Following the 1954 Hague Convention* (Koninklijke Brill 2012); Joris D. Kila, 'Military Involvement in Cultural Property Protection as Part of Preventive Conservation' in Joris D. Kila and James A. Zeidler (eds), *Cultural Heritage in the Crosshairs: Protection of Cultural Heritage During Conflict*, (Koninklijke Brill 2013); Darrell C. Pinckney, 'Time Not on My Side: Cultural Resource Management in Kirkuk, Iraq' in Laurie Rush (ed) *Archaeology, Cultural Property, and the Military* (Boydell 2010); Laurie Rush, 'Working with the military to protect archaeological sites and other forms of cultural property' [2012] *World Archaeology* 44 3; Laurie Rush 'Cultural Property Protection as a Force Multiplier in Stability Operations: World War II Monuments Officers Lessons Learned' [2012] *Military Review* March-April; Laurie Rush and Matthew Bogdanos, 'Protecting the Past to Secure the Future: The Strategic Value of Heritage Training' [2009] *Joint Forces Quarterly* 53 2nd Quarter; Corine Wegener, 'U.S. Army Civil Affairs: Protecting Cultural Property, Past and Future' in Laurie Rush (ed) *Archaeology, Cultural Property, and the Military* (Boydell 2010); Corine Wegener and Marjan Otter, 'Cultural Property at War: Protecting Heritage during Armed Conflict' [2008] *The Getty Conservation Institute Newsletter* 23 1; James Zeidler and Laurie Rush, 'In-Theatre Soldier Training through Cultural Heritage Playing Cards: A U.S. Department of Defense Example' in Laurie Rush (ed) *Archaeology, Cultural Property, and the Military* (Boydell 2010).



SOURCE: www.nato.int

Great, Greatest or Outstanding: Defining Cultural Property in NATO Operational Context

by Mr. Zarghoen Rawan¹

Introduction

One hundred years after the forced abdication of the last Emperor of Russia, it is worth remembering that it was Tsar Nicholas II who initiated the task of finding a workable definition of property protected by States during armed conflict. Beginning on 18 May, his 31st birthday, Tsar Nicolas II welcomed the 26 nations that sent delegations to the *fin de siècle* first Hague Peace Conference of 1899.² During the 10 weeks of the conference, the

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The views expressed in this article are those of the author and may not represent the views of NATO, ACO, ACT, or their affiliated institutions, or any other institution.

² Robin Sharwood, 'Princes and Peacemakers: The Story of the Hague Peace Conference of 1899' in Timothy L.H. McCormack, Michael Tilbury and Gillian D. Triggs (eds), *A Century of War and Peace. Asia-Pacific*

nations produced, among other works, the 1899 Regulations Concerning the Laws and Customs of War on Land and annexed them to the Convention with Respect to the Laws and Customs of War by Land (Hague Convention II), also adopted at the Conference. These regulations listed various types of property, including cultural property, protected during wartime.

Twentieth Century law of war treaties made protection of property with cultural value a legal concern. These treaties include: the 1907 Hague Regulations annexed to the Convention with Respect to the Laws and Customs of War by Land [Hague Convention IV]³; the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention)⁴ and its two Additional Protocols⁵; the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention)⁶; and the 1977 Additional Protocols I⁷ and II⁸ to the 1949 Geneva Conventions.

While these legal instruments contain multiple provisions on cultural property protection (CPP), what they protect varies. Although NATO is not a party to these treaties, the varying degree of protection of cultural property poses two significant challenges. First, what cultural property is NATO obligated to protect? Second, acknowledging the principle that international organisations must respect the treaty obligations accepted by their members, how do these obligations affect NATO?

To answer these questions, this article uses a three step approach. First, review the multiple legal definitions of cultural objects in times of armed

Perspectives on the Centenary of the 1899 Hague Peace Conference (Kluwer Law International 2001) 10.

³ Hague Regulations annexed Convention respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force on 26 January 1910) http://avalon.law.yale.edu/20th_century/hague04.asp.

⁴ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 (adopted 14 May 1954) <http://unesdoc.unesco.org/images/0018/001875/187580e.pdf>.

⁵ First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed conflict 1954 (adopted 14 May 1954) and Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999 (adopted 26 March 1999), <http://unesdoc.unesco.org/images/0018/001875/187580e.pdf>.

⁶ Convention concerning the Protection of the World's Cultural and Natural Heritage (adopted 16 November, entered into force 17 December 1975) <http://whc.unesco.org/en/conventiontext/>.

⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) <https://ihl-databases.icrc.org/ihl/INTRO/470>.

⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AA0C5BCBAB5C4A85C12563CD002D6D09&action=openDocument>.

conflict. Second, describe why cultural property protection requires NATO attention. Third, discuss the current NATO approach to CPP with recommendations which may enhance its effort.

Pre-1954 Protection of Cultural Objects

During the codification of the laws of war in the late nineteenth and early twentieth century, cultural property became the object of specific protective rules. These rules include stipulations regarding the need to spare cultural objects as much as possible during bombardments and the prohibition to seize, wilfully damage or destroy such cultural objects during a belligerent occupation.⁹

Although acknowledged as offering protection to cultural property, the actual phrase “cultural property” does not appear in these documents. Instead, Article 27 Hague Regulations speaks of the need to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes and historic monuments, whilst Article 56 Hague Regulations refers to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments, works of art and science. Perhaps rather unsurprisingly, but one should note that the inclusion of the phrase “as far as possible” severely undermined the practical effectiveness of the Hague Regulations.¹⁰ In its 1946 Judgement, the International Military Tribunal nonetheless qualified both rules as “recognised by all civilised nations, and (...) declaratory of the laws and customs of war [i.e. customary international law]”.¹¹

The 1935 Roerich Pact introduced a narrower definition of cultural objects protected in times of armed conflict. It declared neutral all “historic monuments, museums, scientific, artistic, educational and cultural institutions.” Because of their neutrality, objects falling under this category were to be respected and protected by the parties to an armed conflict.¹²

⁹ See Articles 27 and 56 Hague Regulations annexed to Hague Convention (IV), Article 5 Hague Convention concerning Bombardment by Naval Forces in Time of War (IX) and Article 25 HRAW 1923.

¹⁰ Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, (Cardozo Public Law Policy and Ethics Journal, Vol. 7:677), 682.

¹¹ Frits Kalshoven, *The Protection of Cultural Property in the Event of Armed Conflict within the Framework of International Humanitarian Law*, (Museum International, Vol. 57, No. 4, 2005) 62.

¹² Rino Büchel and Peter Hostettler, ‘Protection of Cultural Property: Reflections from a Civilian and a Military Point of View. What is Cultural property, and How is it Protected under International Humanitarian Law?’ in Edwin R. Micewski and Gerhard Sladek (eds), *Protection of Cultural property in the Event of Armed Conflict. A*

Efforts to establish a more specified international instrument to protect cultural objects during armed conflict were made impossible by the outbreak of WWII. The post-WWII revelations regarding Nazi Germany's assault on Europe's cultural objects were instrumental in shedding light on the weakness of the Hague Regulations.¹³ Simply put, the Hague Regulations' use of over-ambitious definitions to protect every building dedicated to religion, art, science or charity was overbroad. To address the shortcomings of the Hague Regulations, the international community undertook a more selective approach to CPP by introducing the term "cultural property" in the 1954 Hague Convention and its two Additional Protocols.¹⁴

1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict: Cultural Property of "Great Importance"

The preamble of the 1954 Hague Convention declares "that 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". The 1954 Hague Convention then provides a pragmatic and selective definition of cultural property in Article 1:

"For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:

(a) movable 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 art¹⁵; manuscripts, books 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);

Challenge in Peace Support Operations (Austrian Armed Forces Printing Office 2002) 30.

¹³ Roger O'Keefe, 'Protection of Cultural Property', in Dieter Fleck (eds), *The Handbook of International Humanitarian Law* (Oxford University Press 2013) 425-426; See also Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press 2015)180.

¹⁴ Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press 2006) 101-102.

¹⁵ This includes paintings, drawings, sculptures, etc.

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

The definition appears broad, as it refers to both movable and immovable cultural property.¹⁶ Nonetheless, the Hague Convention's approach to cultural property is considerably more limited in the sense that it does not encompass all places of worship (unless they are religious monuments). Further, it only covers cultural property "of great importance to the cultural heritage of every people [read: of each respective party]".¹⁷ Also, note that Article 1 Hague Convention applies with no regard for the cultural origin of the property in question, its ownership, and its state of repair and applies to both religious and secular objects.¹⁸

Furthermore, this definition is not cross-referable to the definitions in other international instruments regarding CPP.¹⁹ Although cultural objects protected by other instruments – such as Articles 27 and 56 of the Hague Regulations annexed to Hague Convention (IV) and Article 5 of the Hague Convention concerning Bombardment by Naval Forces in Time of War (IX) – could be called "cultural property" in a lay sense²⁰, it is important to note that the objects they protect may not meet the threshold of "cultural property" as defined in Article 1 of the 1954 Hague Convention.²¹

The drafters of the 1954 Hague Convention sought a definition flexible enough to accommodate as many States as possible. Aware of the plethora of national regulations regarding this topic, they granted the States Parties freedom in determining which objects on their territory meet the threshold of cultural property.²² Each individual State Party decides whether the property

¹⁶ Note that the distinction between movable and immovable cultural objects was not envisioned in earlier texts.

¹⁷ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2016) 207.

¹⁸ 2016 UNESCO Protection of Cultural Property Military Manual, 13

<http://unesdoc.unesco.org/images/0024/002466/246633e.pdf>, accessed 7 February 2017; Further note that States may theoretically argue that both an immaculately preserved classical temple and a badly damaged statue from the Cold War both constitute "cultural property" in the sense of Article 1 Hague Convention.

¹⁹ In fact, the Hague Convention and its two APs are the only CPP mechanisms that contain this term.

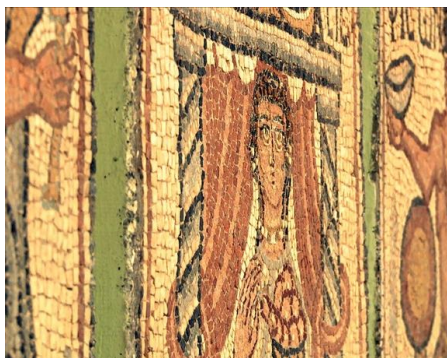
²⁰ According to the Shorter Oxford English Dictionary, an everyday meaning of the term cultural property would cover all property that pertains "to culture in a society or civilisation". For apparent reasons, this definition covers an extremely numerous number of objects.

²¹ Yutaka Arai-Takahashi, 'Protection of Private Property' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions* (Oxford University Press 2015) 1528.

²² Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press 2006) 105.

on its territory is of great importance to cultural heritage within the bounds of the rules of interpretation of treaties and the principle of good faith.²³

Cultural Property under the Additional Protocols to the Geneva Conventions



SOURCE: www.nato.int

Like the 1954 Hague Convention, the Additional Protocols I (1977) and II (1977) to the 1949 Geneva Conventions aim to protect objects of cultural value in times of armed conflict. However, the Additional Protocols pursue this aim without adopting or using the term “cultural property” found in the 1954 Hague Convention. Instead, Article 53 AP I and Article 16 AP II protect three categories of objects: historic monuments, works of art²⁴, and places of worship. These objects receive protection if they “constitute the cultural or spiritual heritage of peoples.”²⁵

This creates a definition difference, as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict protects objects that are “of great importance to the cultural heritage of every people.” The ICRC commentary on the Additional Protocols I and II to the Geneva Conventions, however, reassures us that despite this difference in terminology, the basic idea behind both sets of instruments is the same.²⁶ The

²³ Article 26 and Article 31 Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969 www.treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf, accessed on 7 February 2017.

²⁴ Historic monuments and works of art are used here as “generic terms”. In case of doubt, the ICRC advises States Parties to fall back on the detailed definition of the Hague Convention. *ICRC Commentary on the Additional Protocols I and II to the Geneva Conventions*, 2068, 4838.

²⁵ Also note that the Additional Protocols I and II to the 1949 Geneva Conventions are phrased “without prejudice” to the provisions of the 1954 Hague Convention and of other relevant international instruments. Therefore, if the conduct of Party’s conduct is covered by both the APs to the GCs and the 1954 Hague Convention and its APs, the latter series of instruments prevail; Frits Kalshoven, *The Protection of Cultural Property in the Event of Armed Conflict within the Framework of International Humanitarian Law*, (Museum International, Vol. 57, No. 4, 2005) 63.

²⁶ ICRC Commentary on the Additional Protocols I and II to the Geneva Conventions, 2064, 4844; Note however that there are practitioners who hold a different view in this regard and argue that the definition contained in Article 1 of the Hague Convention encompasses a scope of property ‘slightly broader’ than that of Additional Protocol I to the Geneva Conventions, see: Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press 2015) 180; See also: Thomas Desch, ‘Problems in the Implementation of the Convention from the Perspectives of International Law’ in Edwin R. Micewski and Gerhard Sladek (eds), *Protection of Cultural property in the Event of Armed Conflict. A Challenge in Peace Support Operations* (Austrian Armed Forces Printing Office 2002) 17.

additional reference to places of worship and spirituality merely serves the purpose of clarification of possible protected objects, as cultural or spiritual heritage “covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people”.²⁷

Under the Additional Protocols I and II to the Geneva Conventions, regardless of their condition, restored or dilapidated, make up the cultural or spiritual heritage of peoples enjoy protection.²⁸ Note, however, that this category of objects does not encompass all places of worship. Article 53 AP I or Article 16 AP II²⁹ only protect places of worship that possess “a quality of sanctity independently of their cultural value and express the conscience of the people”.³⁰

The 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: Cultural Property of the “Greatest Importance”

Building forth on the existing definition contained in the 1954 Hague Convention, the States Parties to the Second Protocol to the 1954 Hague Convention created an instrument that provided the new category of “enhanced protection” for cultural property.

Like the regime of special protection³¹, Article 10(a) of the Second Protocol to the 1954 Hague Convention provides the possibility of placing cultural property under enhanced protection, subject to three conditions, of which one is that the property is considered “cultural heritage of the greatest importance for humanity”. Although heritage is not defined in the 1954 Hague Convention or its Second Protocol, this qualifier created an enhanced

²⁷ ICRC Commentary on the Additional Protocols I and II to the Geneva Conventions, 2065, 4840-4842.

²⁸ Note in this regard that protected objects can have both spiritual and cultural value. See ICRC Commentary on the Additional Protocols I and II to the Geneva Conventions, 2065, 4843.

²⁹ Naturally, places of worship that fail to meet this requirement still enjoy protection as civilian property, for example under Article 52 AP I to the Geneva Conventions.

³⁰ ICRC, ‘Commentary on the Additional Protocols I and II to the Geneva Conventions’, 2067, 4839.

³¹ The Hague Convention provides the option of placing under the regime of special protection a limited number of wartime shelters for movable cultural property, centres containing monuments and other immovable cultural property ‘of very great importance’. Whilst this regime provides a higher standard of protection to a narrower range of property, this degree of protection turned out to be ineffective in practice. (See Foliant 2015, p. 32). Therefore, this article will not elaborate on the definition of cultural property under the system of special protection.

degree of protection that is narrower than the general protection of the 1954 Hague Convention.

Following a case-by-case evaluation, The Committee for the Protection of Cultural Property in the Event of Armed Conflict evaluates a property's exceptional cultural significance and uniqueness. It examines whether its destruction would amount to an irretrievable loss for humanity.³² If it determines the property is of "the greatest importance for humanity", the property becomes eligible³³ for inclusion in the International List of Cultural Property under Enhanced Protection.³⁴

Cultural Heritage of 'Universal Outstanding Value'

The 1972 World Heritage Convention, a treaty dedicated to protecting the world's cultural and natural heritage, grants the acme of cultural property the status of "cultural heritage".³⁵ One could perceive this convention as a logical continuation of the 1954 Hague Convention.³⁶ Article 1 of the World Heritage Convention differentiates between three distinct categories of "cultural heritage" that are all of "outstanding universal value".³⁷

³² UNESCO, 'Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict', 2016, 32

<http://unesdoc.unesco.org/images/0018/001867/186742E.pdf>, accessed on 9 February 2017. See these Guidelines for an elaborate summary indicative criteria on the basis of which the Committee can determine whether a property possesses characteristics such as 'exceptional cultural significance', 'uniqueness' and 'irretrievable loss for humanity in case of destruction': 33-37.

³³ Note that Article 10 of the 1999 Second Protocol to the 1954 Hague Convention also requires that the property in question "is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection" (para. b) and that the property "is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used" (para. c).

³⁴ See Articles 10, 11, 25 and 27 of the Second Protocol to the Hague Convention.

³⁵ Note that this convention relates to tangible cultural heritage, as well as natural heritage. Although often described as a peacetime treaty, interpreting the World Heritage Convention through the lens of Article 31(1) Vienna Convention on the Law of Treaties provides ground to believe that this instrument also applies in times of armed conflict. See Marina Lostal, *Syria's world cultural heritage and individual criminal responsibility*, (International Review of Law 2015, Issue 1) 17; Note however that not all scholars accept this view. See for example, Erika J. Techera, *Protection of Cultural Heritage in Times of Armed Conflict: The International Legal Framework Revisited*, (Macquarie Journal of International and Comparative Environmental Law 2007, Vol. 4) 7.

³⁶ Gerhard Sladek, 'The Role of a Non-Governmental Organization in the Field of the Protection of Cultural Property' in Edwin R. Micewski and Gerhard Sladek (eds), *Protection of Cultural property in the Event of Armed Conflict. A Challenge in Peace Support Operations* (Austrian Armed Forces Printing Office 2002) 63.

³⁷ [1]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; [2]Groups of Buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape,

Reminiscent of the 1999 Second Protocol to the 1954 Hague Convention, the World Heritage Convention established the Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value. This Committee oversees the cultural heritage on the World Heritage List³⁸ and the List³⁹ of World Heritage in Danger.⁴⁰

UNESCO's Operational Guidelines for the Implementation of the World Heritage Convention offer help in assessing whether a property is of outstanding universal value. When applied to cultural heritage, as opposed to natural heritage, the definition aims to encompass property with significance "so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity (...) the permanent protection of this heritage is of the highest importance to the international community as a whole".⁴¹

NATO and Cultural Property: Legal Obligation

International organisations such as NATO, in principle, only possess the rights and obligations conferred on them by their constituent documents.⁴² Scholars however agree that subjects of international law need not be States or enjoy the rights and obligations of States per se. Consequently, international organisations that possess international legal personality are viewed as subjects of international law. Such organisations thus bear

are of outstanding universal value from the point of view of history, art or science; and [3] 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.

³⁸ UNESCO, 'World Heritage List' 2016 <http://whc.unesco.org/en/list/>, accessed on 9 February 2017.

³⁹ UNESCO, 'List of World Heritage in Danger' 2017 <http://whc.unesco.org/en/danger/>, accessed 3 March 2017.

⁴⁰ See Articles 8(1) and 11(2)(4) of the World Heritage Convention. Interestingly, Article 12 of the World Heritage Convention decides that the fact that a property is not included on either list does not indicate that it does not possess 'outstanding universal value'.

⁴¹ UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention* (UNESCO 2016) <http://whc.unesco.org/en/guidelines/>, accessed on 9 February 2017, 49.

See these Guidelines for an elaborate summary of indicative criteria on the basis of which the Committee can determine whether a property possesses 'outstanding universal value': (the list includes characteristics such as represent human creative genius, exhibit important interchange of human values, bear a unique testimony to a cultural tradition or civilisation, illustrate significant stage in human history, be an outstanding example of culture or human interaction with the environment. Additionally property must also meet the conditions of integrity and/or authenticity, see: 77-95).

⁴² Ian Brownlie, *The Rule of Law in International Affairs. International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publishers 1998) 49.

obligations under international law, their constituting documents and any international agreements they are a party to.⁴³

NATO as an international organisation with international legal personality⁴⁴ is a subject of international law and is bound by customary international law.⁴⁵ Accepting that CPP-related treaty law such as the Hague Regulations, certain parts of the 1954 Hague Convention⁴⁶, and certain parts of the Additional Protocols I and II to the Geneva Conventions have gained customary status⁴⁷, NATO bears an obligation to protect cultural property in times of armed conflict.⁴⁸

In contrast to the clarity of NATO's obligation under customary international law, NATO is not party to any of the agreements that create CPP obligations. Yet as an international organisation created to safeguard "the freedom, common heritage (...) and the rule of law", NATO can build upon the current ratification of 1954 Hague Convention by 27 NATO nations⁴⁹ and the United Kingdom's imminent ratification.⁵⁰ When this occurs all NATO nations with armed forces⁵¹ will be parties to the Hague Convention. In

⁴³ Robert Jennings and Arthur Watts, *Oppenheim's International Law* (Longman 1996) 18-19.

⁴⁴ International legal personality has been bestowed upon NATO in two ways. First, the North Atlantic Council and all of its subsidiary bodies are granted international legal personality under Article 4 of the Agreement on the status of the North Atlantic Treaty Organisation, National Representatives and International Staff (Ottawa Agreement, 20 September 1951). In a similar fashion, the two Supreme Headquarters (HQ SACT and SHAPE) are equipped with international legal personality by Article 10 of the Protocol on the Status of International Military Headquarters Set up pursuant to the North Atlantic Treaty (Paris Protocol, 28 August 1952).

⁴⁵ Niels Blokker, Henry Schermers, *International Institutional Law* (Martinus Nijhoff Publishers 2011) 835, 1579; C.F. Amerasinghe, *Principles of the Institutional Law of International Organisations* (Cambridge University Press 2005) 400.

⁴⁶ Patty Gerstenblith, *Archaeology in the Context of War: Legal Frameworks for Protecting Cultural Heritage during Armed Conflict*, (Archaeologies: Journal of the World Archaeological Congress 2009, Vol. 5, No. 1) 24.

⁴⁷ Jean-Marie Henckaerts, *Customary International Humanitarian Law*, (Cambridge University Press 2009) Rules 38-41.

⁴⁸ NATO as an international organisation is not the only actor with the responsibility to abide by international norms regarding Cultural Property Protection. Troops in NATO operations always remain under full command of the Troop Contributing Nations (TCNs), and these Nations also bear the responsibility to fulfil national and international CPP obligations.

⁴⁹ List of States Parties to the Hague Convention

www.unesco.org/eri/la/convention.asp?KO=13637&language=E&order=alpha, last accessed on 8 January 2017.

⁵⁰ The United Kingdom, one of the two NATO Nations that is not yet a party to the 1954 Hague Convention, has expressed its intention to ratify the Convention. The bill to ratify the Hague Convention is currently being debated by Parliament. See, Peter Stone, *Why ratifying the Hague Convention matters* (THE ART NEWSPAPER 2016) www.theartnewspaper.com/comment/why-ratifying-the-hague-convention-matters/, accessed 15 February 2017.

⁵¹ The only NATO Nation that has not expressed any desire to ratify the Hague Convention is the Alliance's sole member without standing armed forces: Iceland. See Icelandic Ministry of Foreign Affairs, *Iceland and NATO*

practical terms, this means that NATO's actions complement the obligations of its member nations. Even though Article 34 of the Vienna Convention on the law of treaties explicitly states that a treaty does not create obligations or rights for a third State without its consent, the rules on State succession offer ground for a different reasoning. After all, if a new State is considered bound by the obligations of its predecessor, then by analogy, an organisation that was formed by States should be considered bound by the obligations to which the organisation's members committed themselves to.⁵² Therefore, one could argue that due to the widespread adherence amongst NATO nations to the Hague Convention and to the Additional Protocols I and II to the Geneva Conventions, the organisation is obliged to respect its members' treaty-based obligations even though NATO itself is not a signatory to these instruments.⁵³

Lastly, it is worth noting that out of all of NATO's constituent documents⁵⁴, only the Washington Treaty may contain a reference relating to cultural property. The preamble of the Washington Treaty –the document that establishes the Alliance– emphasises the Alliance's faith in the purpose and principles of the Charter of the United Nations and reaffirms its determination “to safeguard the freedom, common heritage and civilization of their peoples (...) and the rule of law”. A sympathetic reading of this preamble could permit the deduction that NATO committed itself to, when circumstances allow it, protect and safeguard cultural property.⁵⁵ The Alliance's determination to safeguard the common heritage and civilisation of their peoples may be perceived as a collective value of the Alliance and one of the objectives of the Washington Treaty.⁵⁶

www.mfa.is/foreign-policy/security/iceland-nato/, accessed 15 February 2017.

⁵² Niels Blokker, Henry Schermers, *International Institutional Law* (Martinus Nijhoff Publishers 2011) 1574.

⁵³ Joris D. Kila, *Heritage under siege: military implementation of the 1954 Convention for the Protection of Cultural Property* (Brill 2012) 69: “International treaties such as the 1954 Hague Convention and its protocols require that NATO and the EU bring in expertise concerning cultural heritage protection in times of armed conflict in their organizations”; David Nauta, *The International Responsibility of NATO and its Personnel during Military Operations* (Nauta 2016) 195.

⁵⁴ North Atlantic Treaty Treaty (adopted 4 April 1949) (the Washington Treaty); Agreement on the status of the North Atlantic Treaty Organisation, National Representatives and International Staff (20 September 1951) (Ottawa Agreement); Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces (adopted 19 June 1951) (NATO SOFA); Protocol on the Status of International Military Headquarters Set up pursuant to the North Atlantic Treaty (adopted 28 August 1952) (Paris Protocol).

⁵⁵ Yvette Foliant, *Cultural Property Protection Makes Sense. A Way to Improve your Mission* (Civil-Military Cooperation Centre of Excellence 2015) 46.

⁵⁶ Article 31(2) of the Vienna Convention on the Law of Treaties.

NATO and Cultural Property: the 21st Century Approach

NATO is no stranger to protecting cultural objects in times of armed conflict. One might argue that it was the Bosnian War that spurred NATO's and NATO nations' awareness of the importance of CPP in conflict and post-conflict scenarios. Not long after the deployment of the Implementation Force (IFOR), NATO held a conference on "Cultural Heritage Protection in Wartime and State of Emergency" in Krakow in 1996. During the conference, which was held as part of NATO's Partnership for Peace (PfP) Programme, the participants expressed their support for the "Appeal for International Aid for Croatian and Bosnia-Herzegovina Monuments Destroyed During the War", which was issued by the European Conference of Ministers on 31 May 1996, in Helsinki.⁵⁷ Likewise, important efforts were made in the NATO-led peace enforcement operation in Kosovo: Kosovo Force (KFOR). Deriving its mandate from UNSCR 1244⁵⁸ and the Military-Technical Agreement between NATO and the Federal Republic of Yugoslavia and Serbia and operating under Chapter VII of the UN Charter⁵⁹, NATO has been widely credited for its efficiency in protecting Serbian Orthodox cultural heritage in Kosovo from attacks.⁶⁰ Cultural property was also taken into account during the deployment of the International Security Assistance Force (ISAF) in Afghanistan and during the construction of the framework for NATO's current Resolute Support (RS) mission.⁶¹ In the context of the latter mission, NATO has committed itself to respect cultural heritage in two ways. First, NATO activities shall be conducted with full respect for Afghan laws and regulations on the protection of sites or artefacts of historic and cultural heritage.⁶² Second, NATO has committed itself to taking appropriate steps in ensuring that no items or material of cultural or historic significance to Afghanistan are exported from the

⁵⁷ Helen Walase, *Bosnia and the Destruction of Cultural Heritage* (Routledge 2015), 16.

⁵⁸ UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244; Interestingly, Annex 2 paragraph 6 explicitly mentions the need to allow a number of Yugoslav and Serb personnel maintain a presence at Serb patrimonial sites after the withdrawal by the Federal Republic of Yugoslavia from Kosovo. The UNSC clearly did not forget about the need to protect Serb heritage sites.

⁵⁹ NATO, 'NATO's role in Kosovo', (NATO website, 6 September 2016)

http://www.nato.int/cps/en/natolive/topics_48818.htm, accessed 20 February 2017.

⁶⁰ Enver Hoxhaj, 'The Protection of Cultural Property: "The Rights of Stones and Monuments"' in Edwin R. Micewski and Gerhard Sladek (eds), *Protection of Cultural property in the Event of Armed Conflict. A Challenge in Peace Support Operations* (Austrian Armed Forces Printing Office 2002) 79.

⁶¹ NATO's Resolute Support Mission aims to train, advice and assist the Afghan National Defence and Security Forces. The mission derives its legal basis from the Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan (30 September 2014). The agreement was subsequently welcomed by the UN, see UNSC Res 2189 (12 December 2014) UN DOC S/RES/2189.

⁶² Article 5(7) of the NATO-Afghan SOFA.

country.⁶³

The most prominent example of NATO's experience with CPP however comes from Operation Unified Protector (OUP) in Libya. As a result of NATO's precision airstrikes during OUP, the Alliance was widely lauded in the press for its efforts to protect Libya's invaluable cultural property.⁶⁴ Following an evaluation of the mission by the NATO Joint Analysis and Lessons Learned Centre (JALLC), three functional areas were identified that handle information about cultural property in general and CPP in particular: Targeting, Military Engineering (MILENG) and Civil-Military Cooperation (CIMIC).⁶⁵ Consequently, a cross-cutting subject like cultural property brings together a variety of actors, including Environmental Protection (as a specialist area of MILENG), CIMIC's J9 Division and CPP focal point, intelligence gathering and analysis, geospatial imaging, combat support (targeting and fire support) and combat support services and the Committee for Military Planning and Strategy⁶⁶, but also the Legal Advisors, the Cultural Advisors and the Political Advisors. Stepping outside of the NATO structure, possible actors may include the formal and informal authorities of the indigenous population, media, diplomats, International Organisations, Non-Governmental Organisations, private military companies, private security companies and multinational companies.⁶⁷

The involvement of such a diverse group of actors makes the absence of a readily available and standardized definition of cultural property all the more striking. Neither the NATO Dictionary of Terms and Definitions (AAP-06)⁶⁸ nor the Glossary of Abbreviations used in NATO Documents and Publication (AAP-15)⁶⁹ contain accepted definitions of cultural property or CPP. The same is true for at least 15 NATO publications on operational standards.⁷⁰ The one

⁶³ Article 14(3) of the NATO-Afghan SOFA.

⁶⁴ Joris D. Kila and Christopher V. Herndon, *Military Involvement in Cultural Property Protection An Overview*, (JFQ 74, 3rd Quarter 2014) 118.

⁶⁵ The reason why CPP came to prominent attention during and after OUP is likely the result of the involvement of two actors: Allied Air Command and NGOs such as the International Committee of the Blue Shield.

⁶⁶ AJEPP-2, *Environmental Protection Best Practices and Standards for Military Camps in NATO Operations*, (Ed. A. Ver. 1, 2016) Annex I.

⁶⁷ AJP-3.4.9, *Allied Joint Doctrine for Civil-Military Cooperation*, (Ed. A. Ver. 1, 2013), 1-4 NATO.

⁶⁸ AAP-06, *NATO Glossary of Terms and Definitions*, (Ed. 2016, Version 1).

⁶⁹ AAP-15, *NATO Glossary of Abbreviations used in NATO Documents and Publications*, (Ed. 2016).

⁷⁰ Note that although CPP is not integrated in NATO, references to culture-related matters can be found throughout various NATO documents. This list includes NATO Doctrine related, but not limited to: Special Operations (AJP-3.5, Ed. A, Ver. 1); Land Operations (AJP-3.2, Ed. A, Ver. 1); Military Contribution to Stabilization and Reconstruction (AJP-3.4.5, Ed. A, Ver. 1); Countering Improvised Explosive Devices [C-IED] (AJP-3.15, Ed. B, Ver. 1); Storage, Maintenance and Transport of Ammunition on Deployed Missions or

exception to this doctrinal vagueness is Annex I of NATO's AJEPP-2, which states that for the purposes of environmental protection and military engineering the identification of cultural property during operations should be conducted on the basis of the definition of cultural property in the 1954 Hague Convention. Between the over-inclusive definition of cultural property in customary international law⁷¹ and the under-inclusive definitions of the 1999 Second Protocol to the 1954 Hague Convention and the World Heritage Convention, AJEPP-2 has thus pragmatically aimed for a practical medium by accepting the 1954 Hague Convention definition.

NATO and Cultural Property: Way Forward

A basic CPP challenge for NATO is a common definition of cultural property. If a definition of cultural property is accepted it can be published in NATO doctrine, used in operational planning, and taught in NATO and national training and education activities. The practical implications of CPP obligations are complex and oftentimes lead to a lack of concern for CPP because of the wide perception of CPP as a low status activity and a frequent inclination towards high-visibility and quick-fix projects in zones of conflict (like rebuilding schools).⁷² Moreover, the comprehensive approach that NATO uses when planning Alliance military action relies upon cross functional coordination of numerous staff functions such as: CIMIC, Logistics, Operations, intelligence, legal advisors, political advisors, gender advisors, and strategic communications. Taking into account both the complexity of the practical consequences of CPP as well as NATO's comprehensive approach, for these subject-matter experts to provide accurate advice and support to commanders and their staffs, an accepted NATO definition of cultural property is needed. Eliminating the current existing definitional lacuna would ease planning process and add clarity to NATO actions to protect cultural property.

Operations (AASTP-05, Ed. 1, Ver. 1); Civil-Military Cooperation (AJP-3.4.9, Ed. A, Ver. 1); Non-Combatant Evacuation Operations (AJP-3.4.2, Ed. A, Ver. 1); Multinational Maritime Tactical Instructions and Procedures (MTP-01 I, Ed. G, Ver. 1); Conduct of Operations (AJP-3, Ed. B); Linguistic Support for Operations (ALingP-1); Civil-Military Medical Interface Doctrine (AJMEDP-6, Ed. A, Ver. 1); Multinational Medical Unit (AMedP-1.3, Ed. A, Ver. 1); Medical Support (AJP-4.10, Ed. B, Ver. 1); Minimum Requirements for Medical Care of Women in Joint/Combined Operations (AMedP-8.9, Ed. A, Ver. 1); Training in the Law of Armed Conflict (ATrainP-2 ed. A, Ver. 1).

⁷¹ Articles 27 and 56 of the 1907 Hague Regulations annexed to the Convention with Respect to the Laws and Customs of War by Land ('Hague Convention IV').

⁷² Helen Walase, *Bosnia and the Destruction of Cultural Heritage* (Routledge 2015), 16.

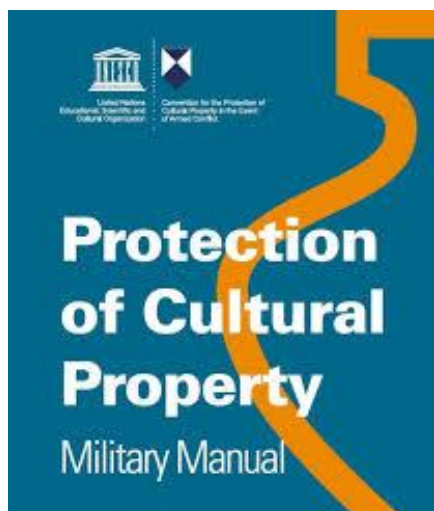
The NATO nations have accepted the definition of cultural property found in the 1954 Hague Convention as an applicable standard in the NATO publication Environmental Protection Best Practices and Standards for Military Camps in NATO Operations (AJEPP-2). Harvesting this consensus on the definition of cultural property will lead to quick-wins. The next step is thus including the agreed upon definition in the NATO Dictionary of Terms and Definitions (AAP-06) and adding CPP -the acronym for cultural property protection- the Glossary of Abbreviations used in NATO Documents and Publication (to AAP-15).

Conclusion

The 1954 Hague Convention definition offers solid ground on which NATO can develop its operational CPP efforts. As the forgoing review displays, while cultural property definitions may differ, NATO and its member nations must protect cultural property. If the consensus is reached within NATO to apply the 1954 Hague Convention definition of cultural property to NATO functional areas beyond Environmental Protection, this will establish a baseline for what actions NATO may take. Institutional efforts to publicise this acceptance through training, policy documents and doctrinal publications will follow. When this occurs, the outlook for NATO to better integrate cultural property protection through a coordinated and institutional approach into all aspects of its military planning and operations is bright.

Review: Protection of Cultural Property – Military Manual (2016), UNESCO

by Ms. Mette Prassé Hartov¹



In December 2016, a new publication was added to the prominent line of military manuals and handbooks published by the International Institute of Humanitarian Law (Sanremo), when the Institute and UNESCO jointly published “Protection of Cultural Property – Military Manual”. The Manual has been developed under the auspices of the publishers, but is the academic work of the authors, Roger O’Keefe (University College London, United Kingdom), Camille Péron (Ministry of Defence, France), Tofiq Musayev (Ministry of Foreign Affairs, Azerbaijan), and Gianluca Ferrari (Carabinieri TPC Operations Section, Italy). The purpose of the Manual is “to serve as a practical guide to the implementation by military forces of the rules of international law for the protection of cultural property in armed conflict”, and as such is focused at the Law of Armed Conflict (LOAC), and thus in particular the 1954 Hague Convention for the Protection of Cultural Property and its two protocols. The Manual follows the same approach as other Sanremo manuals by articulating rules accompanied by detailed legal context by offering an overview of LOAC sources on the topic and of international as well as national court cases. Consistent with its purpose, the Manual provides both detailed accounts of the pertinent rules, best practice, and an account of jurisprudence from Nuremburg to the most recent case from Mali tried at the International Criminal Court. The Manual also includes a list of international registers and lists of cultural property enjoying special protection, designated as having enhanced protection, or adopted on the World Heritage List.

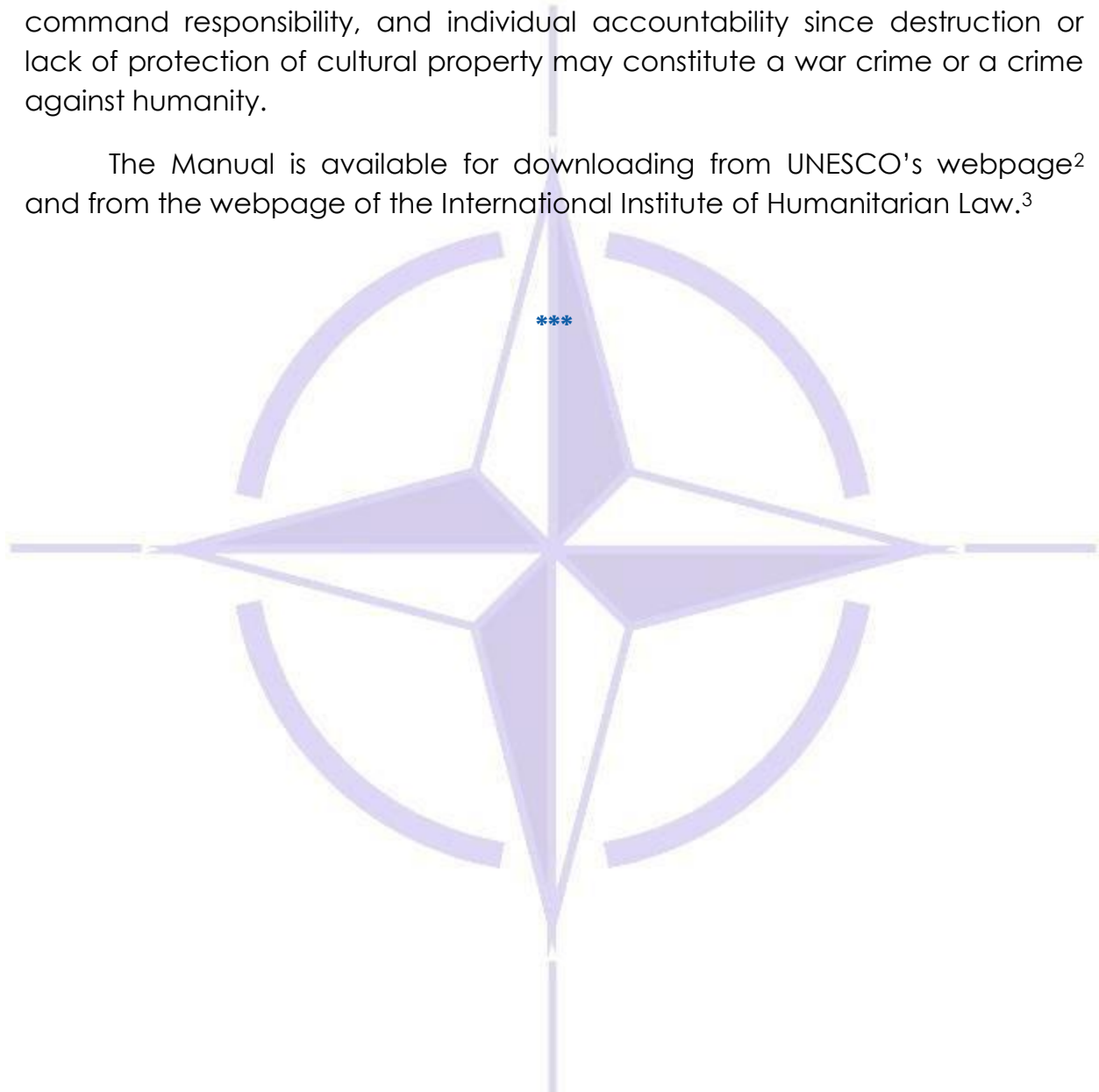
The direct and instructive approach of the authors makes the Manual very easy to use and with its executive summary it would be considered a

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The views expressed in this article are solely those of the author and may not represent the views of NATO, ACO, or ACT, or their affiliated institutions, or any other institution.

valuable tool for both lawyers practicing cultural property protection in (preparation of) military operations and other advisors to military commanders. Particularly, the executive summary is considered useful for military lawyers and commanding officers at all levels, as the Manual in its introduction reminds the reader that international law on cultural property protection evoke responsibilities both as a matter of State responsibility, command responsibility, and individual accountability since destruction or lack of protection of cultural property may constitute a war crime or a crime against humanity.

The Manual is available for downloading from UNESCO's webpage² and from the webpage of the International Institute of Humanitarian Law.³



² Protection of cultural property: military manual at http://unesdoc.unesco.org/ulis/cgi-bin/ulis.pl?catno=246633&set=0059480A9A_0_37&gp=1&lin=1&ll=1 .

³ Military Manual-Protection of Cultural Property (2016) at <http://www.iihl.org/wp-content/uploads/2017/01/Military-Manual-Protection-of-Cultural-Property.pdf> .



Binenhof, The Hague, Netherlands, SOURCE: <http://uscbs.org/>

Cultural Property Protection during Armed Conflict under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol: A Comprehensive Guide

by Mr. Zarghoen Rawan¹

Introduction

After the defeat of the Axis Powers and the conclusion of World War II, humanity was confronted with the most extensive destruction of cultural objects that the world has ever witnessed. Determined to prevent create a better world, the international community established the United Nations and created international conventions such as the Universal Declaration of Human Rights and the four Geneva Conventions. Soon after, in 1954 to be precise, the international came together and adopted the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 Hague Convention.² Simultaneously with the 1954 Hague Conventions, the First Protocol to the 1954 Hague Convention was adopted

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The views expressed in this article are those of the author and may not represent the views of NATO, ACO, ACT, or their affiliated institutions, or any other institution.

² Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 (adopted 14 May 1954)
<http://unesdoc.unesco.org/images/0018/001875/187580e.pdf>.

and, in 1999, the Second Protocol to the 1954 Hague Convention was adopted.³

The purpose of this article is to familiarise the reader with the content of the Hague Convention and its Second Protocol and provide a comprehensive overview of the various degrees of protection that are offered by these instruments. In this context it is important to note that cultural objects that enjoy protection under either the Hague Convention or its Second Protocol, may also enjoy protection under the 1907 Hague Regulations annexed to the Convention with Respect to the Laws and Customs of War by Land [Hague Convention IV]⁴, the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention)⁵ or the 1977 Additional Protocols I⁶ and II⁷ to the 1949 Geneva Conventions.⁸ One should therefore note that this article will limit the discussion to the protection offered under the system of the 1954 Hague Convention and its Second Protocol. Furthermore, this article will only shed light on the obligations regarding the protection of cultural objects during armed conflict, and will thus not reflect on the obligations regarding the protection of cultural property during peacetime or during occupation.

The 1954 Hague Convention: General Protection

Article 2 of the Hague Convention defines the protection of cultural property as comprising of two components: “safeguarding of and respect for such property [i.e. cultural property]”. States Parties are obliged to respect cultural property that is situated both within their own territory, as well as within the territory of other Member States. Whilst “safeguarding” refers to

³ First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed conflict 1954 (adopted 14 May 1954) and Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999 (adopted 26 March 1999), <http://unesdoc.unesco.org/images/0018/001875/187580e.pdf>.

⁴ Hague Regulations annexed Convention respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force on 26 January 1910) http://avalon.law.yale.edu/20th_century/hague04.asp.

⁵ Convention concerning the Protection of the World’s Cultural and Natural Heritage (adopted 16 November, entered into force 17 December 1975) <http://whc.unesco.org/en/conventiontext/>.

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) <https://ihl-databases.icrc.org/ihl/INTRO/470>.

⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AA0C5BCBAB5C4A85C12563CD002D6D09&action=openDocument>.

⁸ Patty Gerstenblith, *Archaeology in the Context of War: Legal Frameworks for Protecting Cultural Heritage during Armed Conflict*, (Archaeologies: Journal of the World Archaeological Congress 2009, Vol. 5, No. 1) 24.

peacetime obligations and is codified in Article 3 of the Hague Convention, “respect” relates to a nation’s obligation to protect cultural property during hostilities and occupation, and is codified in Articles 4 and 5 of the Hague Convention, respectively.⁹

“Respect” in the sense of Article 4 of the Hague Convention implies three obligations. Firstly, a State must refrain from using cultural property¹⁰ for purposes which are likely to expose it to destruction or damage in the event of armed conflict – Article 4(1) limb 1, Hague Convention. Secondly, States are obliged to refrain from any act of hostility directed against cultural property – Article 4(1) limb 2, Hague Convention. Lastly, States bear the obligation to prohibit, prevent and, if required, stop any form of theft, pillage or misappropriation of or vandalism against cultural property – Article 4(3), Hague Convention.

Note that if a State has acted in violation of the first limb of Article 4(1) that in itself does not relieve one’s adversary from his obligation under the second limb of Article 4(1). Furthermore, Article 4(1) prohibits “any use” that is likely to expose the property to danger during armed conflict, which includes a passive use of the property in a manner that makes it a likely target. Moreover, the use of the phrase “any act of hostility” in the second limb results in a prohibition of not merely attacking cultural property, but also demolishing it, regardless of the motivation to do so (to slow down the advancing adversary, to clear a line of fire, etc.).¹¹

Article 4(2) of the Hague Convention softens the three obligations by waiving them “where military necessity imperatively requires such a waiver”. Although the Convention provides no textual elaboration on when exactly military necessity could warrant a waiver, it is clear that the military necessity “*should not be confused with convenience or be used to cloak slackness or indifference to the preservation of cultural property.*”¹²

Article 6 of the Hague Convention provides the possibility to mark cultural property with a distinctive emblem that facilitates its recognition.

⁹ Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, (Cardozo Public Law Policy and Ethics Journal, Vol. 7:677), 686.

¹⁰ This prohibition includes using immediate surroundings of cultural property or the appliances in use for its protection for purposes that are likely to expose the property to destruction or damage in the event of an armed conflict.

¹¹ Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict*, (Cambridge University Press 2006) 126.

¹² USA DoD, *Law of War Manual*, (DoD 2015) 276 5.18.5.1

Such property can be recognised by the emblem specified in Article 16 of the Hague Convention (see Figure 1). Note, however, that the use of the protective emblem is optional and its non-use does not indicate a lack of protection.¹³ It is especially important to be aware of this, as no State attaches the emblem to all the cultural property on its territory and most States do not use the emblem at all.¹⁴



Figure 1

The Hague Convention 1954: Special Protection

Article 8(1) of the Hague Convention 1954 provides the option of placing cultural property under –“special protection”- a limited number of refuges for movable cultural property and centres that contain monuments and other immovable cultural property¹⁵ of “very great importance”. Apart from the general obligations of Article 4 of the Hague Convention, all other general protection obligations from Chapter I of the Hague Convention apply simultaneously with special protection.

Special protection is only afforded when these refuges and centres fulfil the strict criteria of Article 8(1) of the Hague Convention:

“(a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;

(b) are not used for military purposes.”

Article 9 of the Hague Convention obliges the warring parties to refrain from any act of hostility against the property, except in cases of “exceptional cases of unavoidable military necessity”. Whether or not such necessity exists may only be determined by a commander of a force the equivalent of a division or larger.¹⁶

Note, however, that despite the aim of creating a higher degree of protection for objects of “very great importance”, the practical significance

¹³ 2016 UNESCO Protection of Cultural Property Military Manual, 65 <http://unesdoc.unesco.org/images/0024/002466/246633e.pdf>, accessed 7 March 2017.

¹⁴ *Ibid*, 23.

¹⁵ Note that this special protection is not accessible for movable cultural property.

¹⁶ Joris Kila, *Heritage under siege: military implementation of the 1954 Convention for the Protection of Cultural Property*, (University of Amsterdam 2012) 234.

of the regime of special protection has proven to be insignificant.¹⁷ In fact, if a property under special protection enjoys greater protection than property under general protection, that protection mainly derives from the criteria of establishing a cordon sanitaire around the concerned property.¹⁸

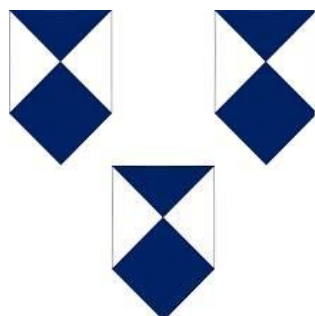


Figure 2

Cultural property under special protection can be recognised by the protective emblem of the Hague Convention repeated three times in a triangular formation – Article 17(1)(a) of the Hague Convention (see Figure 2). Article 10 of the Hague Convention stipulates that during an armed conflict, the use of the protective emblem is mandatory in case of property under special protection.¹⁹

Second Protocol to the Hague Convention: General Provisions

The Second Protocol was born from the ashes of destroyed cultural property during the Balkan Wars of 1991. In fact, some of the Second Protocol's key provisions –most notably its application to NIACs- were the direct result of the world wide outcry about the Hague Convention's apparently inadequate nature to successfully protect the world's cultural property.²⁰

Recalling the absence of textual elaboration on when military necessity could warrant a waiving of the obligations contained in Article 4(1) of the Hague Convention, Article 6 of the Second Protocol provides that Article 4(2) of the Hague Convention may only be invoked when and for so long as the property in question has, as a result of its function, been made into a military objective (i) and no feasible alternative exists to obtain a military advantage similar to the one that is offered by directing an act of hostility against said property (ii).

Unlike Article 6 of the Second Protocol, Article 7 of the Second Protocol does not constitute a refinement of any provision in the Hague Convention,

¹⁷ Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict*, (Cambridge University Press 2006) 141.

¹⁸ Roger O'Keefe, 'Protection of Cultural Property', in Dieter Fleck, *The Handbook of International Humanitarian Law*, (Oxford University Press 2013) 444.

¹⁹ 2016 UNESCO Protection of Cultural Property Military Manual, 66

<http://unesdoc.unesco.org/images/0024/002466/246633e.pdf>, accessed 7 March 2017.

²⁰ Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, (Cardozo Public Law Policy and Ethics Journal, Vol. 7:677), 689.

but adds to it.²¹ Article 7 of the Second Protocol imposes three obligations on a Party to the conflict. Firstly, each Party is required to do everything feasible to verify that its object of attack does not enjoy protection under Article 4 of the Hague Convention - Article 7(a), Second Protocol. Secondly, each Party must take precautionary measures in its mode of attack with the aim to avoid, or at the very least minimise, incidental damage - Article 7(b), Second Protocol. Lastly, if an attack is expected to cause incidental damage that is excessive to the concrete and direct anticipated military advantage, parties must refrain from conducting such an attack - Article 7(c), Second Protocol.

Second Protocol to the Hague Convention: Enhanced Protection

Apart from fine-tuning the Hague Convention, the Second Protocol introduced the option of placing under “enhanced protection” cultural property that meets the cumulative criteria that are set out in Article 10 of the Second Protocol:

- “a. it is cultural heritage of the greatest importance for humanity;
- b. it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;
- c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.”

Article 4(a) of the Second Protocol provides that the placement of an object under enhanced protection in no way suspends the benefits that cultural property enjoys under the general provisions of the Hague Convention and the Second Protocol, except to the degree that the enhanced protection rules constitute a *lex specialis*.²² If an object is placed simultaneously under special protection and under enhanced protection, then - Article 4(b), Second Protocol explains only the rules of enhanced protection apply.²³

Article 11 of the Second Protocol tasks the Committee for the Protection of Cultural Property in the Event of Armed Conflict with the job of assessing whether the criteria for enhanced protection are met. If such protection is

²¹ Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict*, (Cambridge University Press 2006) 257.

²² Roger O’Keefe, ‘Protection of Cultural Property’, in Dieter Fleck, *The Handbook of International Humanitarian Law*, (Oxford University Press 2013) 447.

²³ *Ibid*, 446.

allocated, the object is put on the International List of Cultural Property under Enhanced Protection.

Article 12 of the Second Protocol requires each Party to ensure the immunity of cultural property under enhanced protection by refraining from using the property or its immediate surroundings in support of military action or making that property the object of attack.

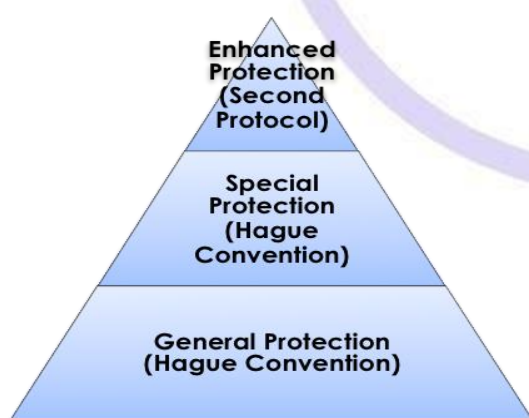
Cultural property under enhanced protection loses its immunity if the protection is suspended or cancelled by the Committee or, if and for so long as, the property has, as a result of its use, transformed into a military objective - Article 13(1) of the Second Protocol.

Cultural Property under enhanced protection can be recognised by a protective emblem that was created by the State Parties in 2015. Note that the Second Protocol does not contain a provision in which this emblem is specified. The protective emblem comprises the emblem of the Hague Convention, surrounded by a white frame, surrounded by a red frame (See Figure 3).²⁴



Figure 3

Conclusion



The purpose of this article was to, firstly, familiarise the reader with the various degrees of protection that are offered by the Hague Convention and its Second Protocol. Secondly, this article aimed to present to the reader the emblems that have been put in place by the international community to facilitate the recognition of cultural objects under the various forms of protection that are offered by the Hague Convention and its Second Protocol.

²⁴ 2016 UNESCO Protection of Cultural Property Military Manual, 67, Appendix III <http://unesdoc.unesco.org/images/0024/002466/246633e.pdf>, accessed 7 March 2017 .

Recalling all the above, it becomes clear that the Hague Convention and its Second Protocol together form a system that is capable of equipping cultural property with three forms of protection during hostilities: general protection (i); special protection (ii); and enhanced protection (iii). Each of these forms of protection can be recognised by an emblem that was specifically designed for that purpose. Within the system of the Hague Convention and its Second Protocol, general protection is most accessible and offers the least protection. Special protection, albeit only theoretically, offers protection greater than that of general protection, but is practically insignificant and least accessible. Offering the most extensive degree of protection, both to movable and immovable cultural property, is the Second Protocol's regime of enhanced protection.



Call for Papers

‘The North Atlantic Treaty at 70 - Selected Legal Perspectives’

Introduction

Founded on 4 April 1949 by the signing of the North Atlantic Treaty, the North Atlantic Treaty Organization (NATO) is a political and military alliance of European and North American nations. Consistent with the Charter of the United Nations, NATO's essential and ensuring purpose is to safeguard the freedom and security of its members by political and military means. Collective decision making by the North Atlantic Council is at the heart of the Alliance, and creates a spirit of solidarity and cohesion among its members.

NATO strives to secure lasting peace and security in the North Atlantic Area, based on common values of liberty, democracy, and the rule of law. It also contributes to international peace and security across the globe through crisis management operations and partnerships.

NATO's primary purpose and values are set out in the North Atlantic Treaty, first signed on 4 April 1949 in Washington D.C. by its twelve founding members. The intervening decades have seen the accession of a further members, and a series of rapid and profound changes to the global security environment, the political context, and the technological means of warfare, to name only a few. Yet, the North Atlantic Treaty with its 14 brief articles remains the bedrock document of the Alliance.

Call for Papers - Theme and Possible Topics

To commemorate the upcoming 70th anniversary of NATO – and the Treaty after which it is named – the Legal Advisers at NATO Headquarters, Allied Command Operations, and Allied Command Transformation are pleased to issue a call for papers on the theme ‘The North Atlantic Treaty at 70 – Selected Legal Perspectives’.

Submissions are invited from legal academics, practitioners, young professionals and students. The primary focus of the publication will be to examine the Treaty through the lens of international law, contributions related to relevant domestic law or legal systems are welcomed.

Particular topics of interest could include the legal aspects of the following themes:

- *The Washington Treaty and Peaceful Settlement of Disputes* – How has the commitment to the peaceful settlement of disputes set out in Article 1 been given effect in practice? From a legal perspective, what is the substance and content of this obligation?
- *The Washington Treaty and Rule of Law, Free Institutions and Economic Collaboration* – How have the commitments of Member nations to these principles, as set out in Article 2, been fulfilled? From a legal perspective, is the provision merely exhortatory or aspirational, or has it been given effect?
- *The Washington Treaty and its Relationship to the ‘Other’ Treaties* – While the primary focus of this exercise is to produce a volume relating to the North Atlantic Treaty, submissions discussing the relationship of the North Atlantic Treaty to other treaties: What was the rationale of Article 8 and what is the practical impact today? What is the relationship to the Ottawa Agreement, NATO SOFA, and/or Paris Protocol as they serve to implement the functions of the North Atlantic Treaty?

The articles that will be selected for publication will be included in a special edition of the NATO Legal Gazette, dedicated to the North Atlantic Treaty's 70th Anniversary.

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Please submit an abstract of no more than 2 pp. length with a body text in Century Gothic, 12:

To: Ms. Galatea GIALITAKI, Galatea.Gialitaki@shape.nato.int

Cc: Mr. Sherrod 'Lewis' BUMGARDNER, Sherrod.Bumgardner@shape.nato.int

The submission deadline of the abstracts is **01 February 2018**

The abstract should set out a proposal for an original paper, setting out the topic and the main aspects of the study, including the following:

- Title
- Author's complete name, position, and institution/affiliation, as well as educational credentials (and same for any proposed co-authors)
- Author's c.v.
- Main lines of argument and conclusion

- Language of publication (submissions are accepted only in English language)

Selection and Publication Details

The organizers will notify proponents of their decision by 01 April 2018. Successful proponents will at that time be invited to complete a consent for publication.

The first draft of the selected papers is to be submitted by 1 June 2018.

The selected papers will be published in a special edition of the NATO Legal Gazette and will not be construed as representing the views of NATO or its Allies. To ensure consistency between papers, authors are asked to follow the 'Instructions for Contributors' for the NATO Legal Gazette, which can be available upon request to Ms. Galateia GIALITAKI, Galateia.Gialitaki@shape.nato.int.

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