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Military Necessity under the 1954 Hague Convention

Abstract: A system to protect cultural property in the event of an armed conflict has been in place since the 1889 and 1907 Hague Regulations. It was solidified by the conclusion of the 1954 Hague Convention, the main document for the protection of cultural property in armed conflict, and it was recently augmented by the 1999 Second Protocol to the 1954 Hague Convention. However, these instruments contain a waiver to the protection provided, linked to the concept of “military necessity”. The purpose of this paper is to examine that concept and its relation to the protection of cultural property in order to demonstrate the true extent of the international protection of cultural property during an armed conflict.

Keywords: international law, 1954 Hague Convention, cultural property, armed conflict, military necessity

Introduction

Cultural property has always been targeted in armed conflicts. However, in the last twenty years the indiscriminate destruction of objects that hold cultural and religious value has intensified. From international armed conflict to internal ones, both secular and sacred artifacts have been destroyed. In the recent conflicts, cultural

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heritage has been used as a way to fund terrorism, used as a way to fund terrorism, via the illicit traffic in cultural property,¹ and to harm the enemy by destroying their cultural landmarks.

As a means to fight terrorism, the United Nations Security Council (UNSC) initiated, in the 1990's, a campaign aimed at addressing the threats to cultural heritage.² Reaffirming the rules of the Geneva Conventions and the Hague Regulations of 1907, the UNSC called upon States to respect the cultural heritage located in areas of conflict.³

In it's the most recent resolution on threats to international peace and security caused by terrorist acts, Resolution 2199 (2015) of the UNSC addressed the current threats concerning cultural heritage in Syria.⁴ However, the resolution primarily focused on the issue of illicit traffic in cultural property, calling upon States to take measures against this practice. Although the destruction of cultural landmarks was condemned by the UNSC, further steps to prevent it were not proposed.

While the illicit trafficking in cultural artifacts is a relevant issue and must be addressed by the international community, the permanent destruction of important landmarks cannot be neglected. For instance, several significant cultural heritage sites were recently destroyed, e.g. the ancient Assyrian site of Nimrud,⁵ the old site of Hatra,⁶ and the statues at the Ninevah Museum in Mosul.⁷

There are several international instruments that protect cultural property in the event of an armed conflict, but the scope of protection is limited. In order to propose improvements to the present protection of cultural property, it is necessary understand its scope and how it can be extended. With this aim in mind, the present paper analyzes the concept of military necessity linked to the waiver of the

¹ I. Bokova, *From Baghdad to Cairo - combating trafficking in cultural property*, "Mondes, Les cahiers du Quai d'Orsay" 2011, No. 8, pp. 81-89.

² V. Negri, *Legal study on the protection of cultural heritage through the resolutions of the Security Council of the United Nations*, 25 March 2015, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Study_Negri_RES2199_01.pdf [accessed: 10.11.2015].

³ United Nations Security Council Resolution No. 1267, 15 October 1999, UN Doc. S/RES/1267 (1999), United Nations Security Council Resolution No. 1483, 22 May 2003, UN Doc. S/RES/1483 (2003).

⁴ United Nations Security Council Resolution No. 2199, 12 February 2015, UN Doc. S/RES/2199 (2015).

⁵ *ISIS video shows destruction of ancient Assyrian city in Iraq*, "The Guardian", 11 April 2015, <http://www.theguardian.com/world/2015/apr/11/isis-video-destruction-ancient-city-militants-iraq-nimrud> [accessed: 10.11.2015].

⁶ *ISIS video confirms destruction at Unesco world heritage site in Hatra*, "The Guardian", 12 April 2015, <http://www.theguardian.com/world/2015/apr/05/isis-video-confirms-destruction-at-unesco-world-heritage-site-on-hatra> [accessed: 10.11.2015].

⁷ *ISIS fighters destroy ancient artifacts at Mosul museum*, "The Guardian", 26 February 2015, <http://www.theguardian.com/world/2015/feb/26/isis-fighters-destroy-ancient-artefacts-mosul-museum-iraq> [accessed: 10.11.2015].

protection of cultural property, established by the Convention for the Protection of Cultural Property in the Event of Armed Conflict (the 1954 Hague Convention) and also contained in its Protocol.

The 1954 Hague Convention

The concern over the fate of cultural property during armed conflict dates back to the 1815 Congress of Vienna,⁸ where it was recognized that cultural heritage is important to the construction of a nation's identity and, as such, should be protected.⁹ The first legal document prohibiting the indiscriminate destruction of cultural property was the Lieber Code, a US military manual of 1863 which declared, in article 35, that "classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded".¹⁰ At the international level, the first legal instrument of this kind was the 1907 Hague Regulations on respecting the laws and customs of war on land, which protected historic monuments and works of art and science from destruction.¹¹

Following the destruction which occurred during the First World War, some draft proposals were made for specific Conventions on the protection of cultural property in the case of armed conflict. At the Seventh International Conference of American States, in 1935, the Roerich Pact was adopted with the aim of protecting artistic and scientific institutions and historic monuments in times of war and peace. However, since it was a regional instrument, it did not have broad global acceptance.¹²

Due to the atrocities committed during the Second World War, the need for an international system of protection of cultural property became evident. Thus, an intergovernmental conference called by the Netherlands to prepare an international convention took place at The Hague from 31 April to 14 May 1954, resulting in the adoption of the Convention for the Protection of Cultural

⁸ M. Sørensen, D.V. Rose, *War and Cultural Heritage. Biographies of Place*, Cambridge University Press, Cambridge 2015, p. 4.

⁹ *Ibidem*.

¹⁰ Lieber Code (or Instructions for the Government of Armies of the United States in the Field, General Order No. 100), 24 April 1863, http://avalon.law.yale.edu/19th_century/lieber.asp [accessed: 8.11.2015], Article 35.

¹¹ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, 208 Parry's CTS 77 [1907 Hague Convention], Article 27.

¹² Treaty on the Protection of Artistic Scientific Institutions and Historic Monuments, 15 April 1935, 167 LNTS 289 [the Roerich Pact].

Property in the Event of Armed Conflict (1954 Hague Convention).¹³ Signed by 126 States,¹⁴ several of its provisions have attained customary law status.¹⁵

Military Necessity and the 1954 Hague Convention

In order to protect cultural property in the event of an armed conflict, the 1954 Hague Convention established two types of protection: a general one and a special one. The scope of these types of protection was widely discussed during the Intergovernmental Conference and two points of view were exposed relating to waiver of the protection: some States called for a broader protection, while others were concerned with the effectiveness of the Convention. The content and scope of these two types of protection will be analysed separately.

General Protection

The first regime of protection established by the 1954 Convention is called the general protection. It applies to all cultural property within the scope of the Convention and obliges States to refrain from the exposure of this property to destruction or damage. A waiver to this protection was proposed in the draft of the Convention, linked to the concept of military necessity.¹⁶

The first relevant remarks on the general protection were made by the United States delegation. According to them, it was necessary to reconcile the protection of cultural property with the military realities. In this sense they argued that past experiences had shown that, when those realities were left aside, earlier projects to limit warfare had failed. Therefore they argued that the Convention should take military concerns into account during the regulation of a conflict.

Military necessity, as pointed out by the delegation, is a complex concept and its interpretation has been a matter of discussion. Three different approaches to military necessity were suggested: (1) the protection must be waived each and eve-

¹³ 14 May 1954, 249 UNTS 240.

¹⁴ For the list of States Parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E> [accessed: 29.09.2015].

¹⁵ *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, § 98; International Committee of Red Cross, *Customary IHL*, Rule 38-41, https://www.icrc.org/customary-ihl/eng/docs/v1_rul [accessed: 15.11.2015]; M. Cornu, J. Fromageau, C. Wallaert (eds.), *Dictionnaire comparé du droit du patrimoine culturel*, CNRS Éditions, Paris 2012, pp. 140-141.

¹⁶ In the transcription of the discussion during the Intergovernmental Conference, the concept analyzed was "military necessity", even though in the definitive text the term used was "imperative military necessity". Intergovernmental Conference, *Actes de la conférence convoquée par l'Organisation des Nations Unies pour l'éducation, la science et la culture tenue à la Haye du 21 avril au 14 mai 1954*, Staatsdrukkerij - een uitverrijbedrijf The Hague (1964).

ry time a military necessity arises; (2) from a legal standpoint the protection can be waived, however, there is a moral obligation to spare cultural property; and, (3) the protection can be waived only when legal instruments allow it. This last interpretation was adopted by the Nuremberg Tribunals and, according to the United States, should be applied to the Convention.¹⁷

Moreover, the US delegation stated that even though the Convention establishes a waiver, it requires that States should make their military aware of the importance of cultural property and its preservation, thereby strengthening its protection. It was also noted that any eventual application of the concept of military necessity should be restricted by the Convention; however it was acknowledged that its presence was necessary for the project's success.¹⁸

The delegation of Greece, on the other hand, remarked that "military necessity" is often used and can be used even outside of the scope of the provision that allows for it in the Convention. As for the protection of cultural property, the delegation understood that customary international law and treaty law did not allow a general waiver. For instance, the 1907 Hague Regulations did not establish a waiver on the basis of military necessity.¹⁹ Therefore, establishing it in the Convention would be a step backwards with respect to the protection given by International Law, since it reduces the protection given by previous documents.²⁰

As for the Soviet delegation, its main concern regarded the unclear character of the concept. They argued that a situation of military necessity is recognized during an ongoing battle and does not have a predetermined formula. Invoking the statement of the United States' delegation, the Soviet Union demonstrated that even scholars do not agree on the definition of military necessity. Therefore it was unclear if all armies from different continents would have the same definition. Moreover, the delegation considered that this waiver would allow the mass destruction of cultural property, since allowing the destruction of cultural property for military purposes would endanger the very *raison d'être* of the Convention. The delegation further remarked that while involuntary destruction of cultural property will always be a part of conflict, the proposed waiver would allow for deliberate destruction. The delegation concluded that "it is impossible to give to the military the right to limit the respect for cultural monuments by invoking a military necessity that they themselves will define".²¹

The delegation of the United Kingdom stated that if military necessity was included, it would create a clearer obligation and lead to refraining from the destruction of cultural property in unsuitable situations, as for example allowing it only in

¹⁷ Ibidem.

¹⁸ Ibidem.

¹⁹ See the 1907 Hague Convention, Article 27.

²⁰ Intergovernmental Conference, op. cit, p. 152.

²¹ Ibidem.

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cases of imperative necessity.²² A more concrete waiver could thus make the Convention more effective.

Accordingly, the delegation of Cuba reminded the delegates that the Geneva Conventions allowed for the use of military necessity in order to avoid compliance with some obligations,²³ and stressed the commentary to the Geneva Convention of Dr. Jean Pictet:

They realized that imposing formulae were not sufficient to control the forces let loose in war. They saw that nothing was to be gained by making rules which would, in the nature of things, remain a dead letter, and therefore asked for standards which could be observed because they were not incompatible with military necessity.²⁴

Stressing the importance of the complexity of armed conflict, Cuba argued for the inclusion of military necessity in the Convention since, according to the delegation, there could come a time when it may be necessary, in order to save thousands of lives, to destroy a cultural property, and in such cases action should be taken.²⁵

In the end, the proposal to delete the waiver in case of military necessity from the text was rejected at the Conference by 22 votes against, 8 in favor, and 8 abstentions.²⁶ Below is the final definitive text establishing the general protection:

Article 4. Respect for cultural property

1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.

2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

Special Protection

With respect to special protection, immunity was instituted for cultural property of very great importance. However, this immunity can also be waived in the case

²² Ibidem.

²³ See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31, at Article 33. It must be noted that the Geneva Convention does not have a specific provision concerning the protection of cultural property.

²⁴ J. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. 1, International Committee of the Red Cross, Geneva 1952, p. 12, http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf [accessed: 10.11.2015].

²⁵ Intergovernmental Conference, op. cit, p. 154.

²⁶ Ibidem.

of an “unavoidable military necessity, and only for such time as that necessity continues”.²⁷

During the conference, the delegation of Ecuador proposed the deletion of this passage.²⁸ In a show of support, the Spanish delegation stated that if the above-mentioned provision were present in the text of the Convention, future belligerents would believe that they were permitted to destroy such cultural property, turning an exception into a permanent rule.²⁹ It was noted that the requirements to gain this protection were many and, therefore, only a limited number of cultural items of utmost importance would qualify. Moreover, if States were given a significant discretionary power over the granting of this special protection, immunity could be undermined.³⁰ Lastly, the delegation criticized the notion of “unavoidable military necessity”, which did not have a legal definition.³¹

The position the British delegation took was that, since the concept of military necessity was included in the provision for general protection, it also needed to be present with respect to special protection.³² The distinction between the concepts of military necessity for each type of protection should be one of degree, meaning that it should be more difficult to invoke military necessity when it concerned cultural property under special protection.³³ The proposed amendment to delete “unavoidable military necessity” from paragraph 2 of Article 11 was rejected by 22 votes against, 9 in favor, and 6 abstentions.³⁴

At the same time, the definition of “military necessity” remained unclear.

The Second Protocol to the 1954 Hague Convention

Since the first Conference of the High Parties to the 1954 Convention, a need was expressed to clarify the definition of “imperative military necessity”.³⁵ The discussion of whether “imperative” and “unavoidable” military necessity should give grounds for a waiver of the protection of cultural property reappeared in the Experts Meetings to discuss the Convention.

²⁷ See Article 11(2) of the 1954 Hague Convention. Nowadays, only five places are listed under the special protection, they are: the Zentraler Bergungsort (Central Refuge) Oberrieder Stollen in Germany, Zab refuge for cultural property in Netherlands, Zod refuge for cultural property in Netherlands, St-Pietersberg refuge for cultural property in Netherlands, Statodella Città del Vaticano.

²⁸ Intergovernmental Conference, op. cit, p. 181.

²⁹ Ibidem, p. 182.

³⁰ Ibidem.

³¹ Ibidem, p. 183.

³² Ibidem, p. 213.

³³ Ibidem.

³⁴ Ibidem.

³⁵ J. Toman, *Cultural Property in War: Improvement in Protection. Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO Publishing, Paris 2009, p. 17.

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At the Lausowolt Meeting of Experts – a meeting that issued the document that later inspired the Second Protocol to the 1954 Hague Convention – concern over the term “military necessity” was evident.³⁶ As a result, an article was proposed that would clarify the meaning of Article 4 of the Convention (which establishes the general protection of cultural property), as follows:

Article 6. Respect for cultural property

With the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:

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;

b. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;

c. the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;

d. in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit.

It can be seen that there are several requirements to invoke “imperative military necessity” – an official with the capacity to recognize the presence of an imperative military necessity, the need of an effective warning issued before the attack, and the lack of an alternative measure to obtain a similar military advantage. However, the most remarkable advance was to link military necessity to the more concrete concept of military objective.³⁷

According to the First Additional Protocol to the Geneva Conventions, “military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total

³⁶ See K. Chamberlain, *Military necessity under the 1999 Second Protocol*, in: N. van Woudenberg, L. Lijnzaad (eds.), *Protecting Cultural Property in Armed Conflict - An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Brill-Nijhoff, Leiden - Boston 2010, pp. 43-50.

³⁷ See J.M. Henckaerts, *New Rules for the Protection of Cultural Property in Armed Conflict*, “International Review of the Red Cross” 1999, No. 835.

destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.³⁸

Moreover, according to the Second Protocol several precautions have to be taken by the attacking State that were not mentioned in the Convention: to verify the nature of the object towards which the attack is aimed; to use means to avoid or to reduce excessive damage to cultural property; to refrain from carrying out attacks that could cause disproportionate damage; to avoid actions that breach the above-mentioned provisions; and to place cultural property as far as possible outside of military objectives.

Furthermore, another type of protection was stipulated by the Second Protocol: enhanced protection. This type of special protection is applied only to cultural property approved by a Committee, established in the 1954 Hague Convention, to receive an immunity that meets the following requirements: being classified as cultural heritage of the greatest importance for humanity; being protected by internal law; and not being allowed to be used for military purposes or to shield military sites.³⁹

Similarly to the special protection, meeting the requirements to waive this protection is more difficult: to lose the protection the cultural property must become a military objective. Furthermore, the attacking State must take all precautionary measures as established by the Protocol.⁴⁰ It can be observed that the term “military necessity” is not used to define situations in which the protection may be waived, but rather the more concrete concept of “military objective”, defined by several international instruments, is used.

However, the advances made by the Second Protocol are only applicable to 67 States-Parties and have not yet attained customary law status.

The Practice of States: A Study of Selected States’ Military Manuals

According to article 7 of the Convention the States-Parties must, in times of peace, introduce instructions into their military regulations that ensure the observance of the Convention.⁴¹ Hence a number of military manuals provide specific instructions concerning cultural property.

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 UNTS 3.

³⁹ See Chapter 3 of Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 May 1999, 2253 UNTS 212 [Second Protocol to the 1954 Hague Convention].

⁴⁰ See Article 7 and 8 of the Second Protocol to the 1954 Hague Convention.

⁴¹ See Article 7 of the 1954 Hague Convention.

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Several Military Manuals call for respect for cultural property and for refraining from using it for military purposes.⁴² However, these protections are granted only if the cultural property is identified as such. The Military Manual of Benin, for instance, limits the protection given to cultural property “to the extent permitted by the tactical situation.”⁴³

The term “imperative military necessity” is, nevertheless, not often used. For instance, the Socialist Federal Republic of Yugoslavia’s Military Manual only requires a military need to waive the protection given to cultural property.⁴⁴

On the other hand, Croatia’s Commander Manual specifies that:

14. The immunity of a marked cultural object may be withdrawn in case of imperative military necessity. [...] 55. [In attack] the immunity of a marked cultural object shall only be withdrawn when the fulfillment of the mission absolutely so requires. Advance warning shall give time for safeguard measures and information on [the] withdrawal of immunity.⁴⁵

A similar provision is also present in Hungary’s Military Manual of 1992 and Italy’s LOAC Elementary Rules Manual.⁴⁶

As for the Soviet Military Manual, it listed as a prohibited method of warfare the destruction of cultural property that represents the cultural or spiritual heritage of a people.⁴⁷ Similar provisions can be found in the Soldier’s Manual of Guinea, which establishes that identified cultural property must remain untouched.⁴⁸

Moreover, seminars have been introduced to educate the military about the importance of protecting cultural property⁴⁹ by engaging a special division to pro-

⁴² International Committee of Red Cross, *Practice Relating to Rule 38, attacks against Cultural Property, Military Manuals*, https://www.icrc.org/customary-ihl/eng/docs/src_iimima#a [accessed: 10.11.2015]; see Argentina, *Leyes de Guerra* (1967), Australia, *Law of Armed Conflict, Commanders’ Guide* (March 1994), Burkina Faso, *Règlement de Discipline Générale dans les Forces Armées* (1994), Congo, *Décret no. 86/057* (1986), Djibouti, *Décret no. 82-028/PR/DEF* (1982), Belgium, *Doit Pénal et Disciplinaire Militaire et Droit de la Guerre* (1983), Greece, *Hellenic Territorial Army’s Internal Service Code* (1984), Mali, *Règlement du Service dans l’Armée*, (1979).

⁴³ *Ibidem*, Benin, *Le Droit de la Guerre* (1995), Indonesia, *The Basics of International Humanitarian Law in Warfare* (1990).

⁴⁴ *Ibidem*, Yugoslavia, *propisi o Primeri Pravila Medjunarodnog Ratnog Prava u Oruzanim Snagama* (1988).

⁴⁵ *Ibidem*, Croatia, *Basic Rules of the Law of Armed Conflict - Commanders’ Manual* (1992).

⁴⁶ *Ibidem*, Hungary, *A Hadjog, Jegyzet a Katonai, Főiskolák Hallgatói Részére*, 1992. Italy, *Regoleelementari di diritto di guerra* (1991).

⁴⁷ *Ibidem*, Russia Federation, *Instruction on the Application of the Rules of International Humanitarian Law by the Armed Forces of the USSR* (1990).

⁴⁸ *Ibidem*, Guinea, *Soldier’s Manual* (2010).

⁴⁹ NATO has, for instance, promoted seminars to disseminate a deeper understanding of the 1954 Hague Convention. See J.D. Kila, Ch.V. Herndon, *Military Involvement in Cultural Property Protection*, “Joint Force Quarterly” 2014, No. 74, pp. 117-118.

vide guidance during attacks on the protection of cultural property.⁵⁰ States and International Organizations are increasingly taking concrete preventive and precautionary measures to protect cultural property in the event of an armed conflict. The MINUSMA, for instance, has developed a brochure to train military, police, and civilian staff on the rules to protect such property,⁵¹ and it was also to draft a *passport* listing the cultural property that should be protected.⁵²

One can argue that even though the terms of the 1954 Hague Convention are not transposed to States' military manuals, the protection of cultural property acknowledged by them is similar to that provided by the Convention. However, as already stated the international protection of cultural property has developed the concept of "military objective" – a development first established by the 1977 Additional Protocols to the Geneva Convention. This new approach is not yet present in the majority of manuals.⁵³

The Practice of the International Criminal Tribunal for the Former Yugoslavia

The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) is apt to the analysis of the concept of military necessity, as linked to the protection of cultural property. It should be noted at the outset that the ICTY did not limit the applicable law of the protection of cultural property in the event of an armed conflict to the 1954 Hague Convention, using other instruments containing similar provisions as well.

In the Balkan conflicts, several cultural items were targeted,⁵⁴ among them the Old Town of Dubrovnik. Hence, the ICTY dealt with the responsibility of individuals for destroying this property.

In the case *Prosecutor v. Miodrag Jokić* (judgment of 18 March 2004), Miodrag Jokić pleaded guilty to the crime of destruction or willful damage done to institutions dedicated to religion, charity, education, arts and sciences, and to his-

⁵⁰ This practice was engaged by UK armed forces during the attacks in Libya in 2011, see R. O'Keefe, *Protection of Cultural Property in Armed conflict*, "Amicus Curiae" 2007, Issue 71, p. 5.

⁵¹ UNESCO determined to help Mali restore and rebuild its cultural heritage, UNESCOPRESS, 30 October 2013, http://www.unesco.org/new/en/unesco/resources/unescos-action-in-mali/?utm_source=partnerfotopedia&utm_medium=iphoneapp&utm_campaign=malicampaign&utm_term=donation&utm_content=CLT-WHC [accessed: 10.11.2015].

⁵² Ibidem, for furthering reading see Ch. Manhart, *The Intentional Destruction of Heritage: Bamiyan and Timbuktu*, in: W. Logan, M.N. Craith, U. Kockel (eds.) *A Companion to Heritage Studies*, Wiley-Blackwell, Chichester 2016, 289 ff.

⁵³ This new approach is present in a minority of manuals, e.g. the Germany's Soldiers' Manual (2006), the Military Manual (2005) of the Netherlands, and the UK LOAC Manual (2004) in: International Committee of the Red Cross, *Practice Relating to Rule 38...*

⁵⁴ K.J. Detling, *Eternal Silence: the Destruction of Cultural Property in Yugoslavia*, "Maryland Journal of International Law" 1993, Vol. 17, pp. 41-75.

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toric monuments and works of art and science by destroying the Old Town of Dubrovnik.⁵⁵ According to the Trial Chamber, “this crime represents a violation of values especially protected by the international community”.⁵⁶

The Chamber invoked the protection given by the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land (the “Hague Regulations”) and the Hague Convention Concerning Bombardment by Naval Forces in Time of War of 18 October 1907. However it recognized that the 1954 Hague Convention establishes a more specific protection and it was preferable to apply it,⁵⁷ while noting that this Convention is applicable only to cultural property of great importance to the cultural heritage of all mankind.⁵⁸ Since the Old Town of Dubrovnik was listed in the World Heritage List, it was considered that the site was of such importance that it would call for the application of the 1954 Hague Convention.⁵⁹ However, since M. Jokić pleaded guilty, the Chamber did not analyze further the obligation to refrain from attacking cultural property.

In the *Hadžihasanović & Kubura* judgment, the Trial Chamber stated that:

The Chamber considers that the seriousness of the crime of destruction of or damage to institutions dedicated to religion must be ascertained on a case-by-case basis, and take much greater account of the spiritual value of the damaged or destroyed property than the material extent of the damage or destruction.⁶⁰

Moreover, in order to constitute a crime under the Statute, the cultural property must not be used for military purposes.⁶¹

In the judgment of *Prosecutor v. Dario Kordić and Mario Čerkez*, the Appeal Chamber recognized two types of protection of cultural property: a general one, given by article 52 of the First Additional Protocol to the Geneva Conventions, concerning civilian objects,⁶² and a second one given by article 53 of the same Protocol, which applies to historic monuments, works of art, and places of worship, provided they constitute the cultural or spiritual heritage of people.⁶³

⁵⁵ *Prosecutor v. Miodrag Jokić*, ICTY Case No. IT-01-42/1, Judgment of Trial Chamber, 18 May 2004, at § 46.

⁵⁶ *Ibidem*.

⁵⁷ *Ibidem* at § 47-48.

⁵⁸ See Article 1 of the 1954 Hague Convention.

⁵⁹ *Prosecutor v. Miodrag Jokić*, *op. cit.*, at § 49-51.

⁶⁰ *Prosecutor v. Hadžihasanović & Kubura*, ICTY Case No. IT-01-47-T, Judgment of the Trial Chamber, 15 May 2006, at § 63.

⁶¹ *Ibidem* at § 64.

⁶² *Prosecutor v. Kordić and Čerkez*, ICTY Case No. IT-95-14/2-T, Judgment of the Trial Chamber, 26 February 2001, at § 89.

⁶³ *Ibidem* at § 90.

Regarding the first protection, it can be waived only when the cultural property in question has been turned into a military object and its partial or total destruction must offer a definite military advantage at the time of the attack.⁶⁴ Such waiver differed from the imperative military necessity under the 1954 Hague Convention, since it links the waiver to a more concrete definition: a military objective. However, it must be noted that the Protocol states that it was “without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954”, indicating that the Convention’s concept of military necessity was to be applied as well.

In the *Brđanin* case the ICTY understood that, in the case of a presence of military objects near cultural properties, the protection of these objects could be waived by the concept of military necessity.⁶⁵

Finally, in the *Pavle Strugar* judgment the Trial Chamber, in applying the 1954 Hague Convention, noted that the obligation to respect cultural property established in Article 4 of the Convention has two explicit limbs.⁶⁶ The first is “to refrain ‘from any use of the property and its immediate surroundings [...] for purposes which are likely to expose it to destruction or damage in the event or armed conflict’”,⁶⁷ and the second one is to “refrain from any act of hostility directed against such property”.⁶⁸

The Trial Chamber attempted to define military necessity. In order to do so, it invoked the definition given by Article 52 of the Additional Protocol I to the Geneva Conventions, i.e.: “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 neutralization, in the circumstances ruling at the time, offers a definite military advantage”.⁶⁹ However, since no military necessity was recognized in the acts of Pavle Strugar, the matter was not further discussed.⁷⁰

According to Roger O’Keefe, this jurisprudence demonstrates that the protection of cultural property can be waived only when: (1) it is invested with a military purpose; (2) its location provides a military advantage; and (3) its nature provides a military advantage. However, the destruction must be proportional to the concrete advantage acquired and it must be the only way to gain this advantage.⁷¹

⁶⁴ *Ibidem* at § 89.

⁶⁵ *Prosecutor v. Brđanin*, ICTY Case No. IT-99-36, Judgment of the Appeal Chamber, 3 April 2007, at § 337.

⁶⁶ *Prosecutor v. Pavle Strugar*, ICTY Case No. IT-01-42, Judgment of the Trial Chamber, 31 January 2005, at § 309.

⁶⁷ *Ibidem* at § 309.

⁶⁸ *Ibidem*.

⁶⁹ *Ibidem* at § 295.

⁷⁰ *Ibidem* at § 309.

⁷¹ R. O’Keefe, *Protection of cultural property under International Criminal Law*, “Melbourne Journal of International Law” 2010, Vol. 11, pp. 12-18.

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Therefore, according to jurisprudence of the ICTY, in order to waive the protection of cultural property it is not only required to demonstrate a military tactical necessity, but also to for the cultural item to meet the definition of a military object.

Conclusions

Today the concept of military necessity remains unclear, even when linked to the protection of cultural property, in the event of an armed conflict. However, no new definition of this concept has yet been drafted to solve and clarify the situations in which the protection may be waived. Instead, military necessity has been linked to a more concrete definition: military object.

This new definition not only clarifies the situations in which the waiver can be invoked, but also improves the protection by establishing new requirements to be met beforehand. Precautionary actions and advance warnings, for instance, are all steps aimed at trying to prevent an attack against cultural property.

Even though the major treaty on the protection of cultural property, the 1954 Hague Convention as well as states' military manuals do not use the concept of "military object", several new international instruments refer to it. Thus it may be said that even if this new rule has not yet attained customary status, a new practice is arising regarding the protection of cultural property in the event of an armed conflict.

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