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PART C. COLLECTIONS

CHAPTER 13. PROTECTION OF COLLECTIONS DURING TIMES OF ARMED CONFLICT

This chapter benefited from the extensive comments from experts within DEWHA (now the Office for the Arts in PM&C), DFAT, the Commonwealth Attorney General's Department and the Department of Defence. These comments were extraordinarily helpful but the views finally expressed are those of the author and do not necessarily reflect those of the Australian Government.

INTRODUCTION

Given that cultural property is one of the principal mechanisms by which we create, maintain and describe identity, it is unsurprising that parties to international and intra-national armed conflicts recognise the strategic value of cultural property. To threaten the cultural property of the opponent is to threaten its identity and it is this poignant link between cultural property and cultural identity that so often imperils the former in the service of the latter.

It is because of its powerful link with identity that cultural property often has a strategic function in armed conflicts. Sometimes, it may be used as a bargaining tool; at other times as a weapon, a target, or as the rightful prize of the champion. Indeed, for many centuries, cultural property was seen as one of the spoils that went to the victor and many of the great museums are filled with such prizes, self-awarded to the victorious. Not only were they a way of financing the cost of war: they also provided an eloquent symbol of power and success to the victor's public and, at the same time, a proof of military and cultural inferiority to the public of the vanquished.

It was not until the nineteenth century that debate started as to the appropriateness of such conduct.¹ Perhaps the most important catalyst for this debate was the promulgation of the Lieber Code by Abraham Lincoln in 1863, which, in part, stated:

¹ See Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth Publishing and UNESCO, 1996, p 5. For a useful

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.

However, the Code went on to 'recognise' that the conquering nation had the right to remove works of art, libraries and scientific collections belonging to the hostile nation.² This initiative was followed over the years by various treaties and declarations. The most important of these were, the Declaration of Brussels of 27 August 1874,³ the 1907 Hague Convention Respecting the Laws and Customs of War on Land⁴ and the Roerich Pact of 1935.⁵ The promulgation of such rules did little to protect cultural material from destruction and looting in the wars that followed them but to the extent that they were responsible for saving any, we can be grateful.

Coming out of the horrors of World War II and the destruction of cultural property inflicted by both sides, it was timely for the nations to recognise the losses inflicted on international cultural heritage. Even those countries that had not been directly involved in the damage and destruction of the conflict recognised that their losses, although indirect, were no less real.

summary of history of cultural material in armed conflict also see Anthi Helleni Poulos, 'The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: An Historic Analysis,' (2000) 28 *Int'l J Legal Info*, p 1.

² Articles 34–36, General Orders No 100: Instructions for the government of armies of the United States in the Field (Lieber Code) as cited in 'Chronology of Cultural Property Legislation', K Fitz Gibbon, *Who Owns The Past? Cultural Policy, Cultural Property and the Law*, Rutgers University Press, 2005, pp 3-9.

³ '... institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property. All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities': Article 8, Project of an International Declaration Concerning the Laws and Customs of War.

⁴ Hague (IV), which forbids damage to 'institutions dedicated to religion, charity and education, the arts and sciences ... historic monuments, works of art ...'.

⁵ The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, which sought to establish a status of neutrality for monuments, museums, scientific, artistic, educational, and cultural institutions, that were designated by a flag by which they could be identified, just as hospitals and medical personnel were designated by a red cross.

Acknowledging that the protections offered by the Hague Conventions of 1899⁶ and 1907⁷ had proven so inadequate, in 1954, UNESCO produced the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.⁸ The Hague Convention is supplemented by two Protocols: the First Protocol, which entered into force at the same time as the Convention itself, and the Second Protocol, which entered into force in 1999.⁹

The Preamble to this convention stated: 'Damage to the cultural property belonging to and people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.' As observed by Fitz Gibbon, 'Today there is nothing unusual about making this statement, but at the time its recognition of *all* world art as constituting an important part of human heritage was an extraordinary leap from the prejudices of the past.'¹⁰

Except for the bombing of Darwin in World War II, Australia is blessed in that it has not been attacked. Although the European settlement¹¹ of the country has endangered and destroyed much Indigenous cultural property, the absence of subsequent invasion by foreign forces has meant that for two hundred years our cultural property has not been threatened by war. Perhaps because of this, Australia has few laws specifically related to the protection of cultural material during times of armed conflict.¹² It did not ratify the 1954 Hague Convention

⁶ Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat 1803, T S No 403, 26 Martens Nouveau Recueil (ser 3), reprinted in 1 *Am Journal Int'l Law* 129 (1907) (known as Hague Convention II).

⁷ Convention Respecting the Laws and Customs of War on Land, Oct 18 1907, 36 Stat. 2277 (1907), T S No 539, 3 Martens Nouveau Recueil (ser 3), reprinted in 2 *Am Journal Int'l Law* 90 (1908)) (known as Hague Convention IV).

⁸ The text of the Convention may be found on the UNESCO site at: <<http://portal.unesco.org/la/convention.asp?KO=13637&language=E&order=alpha>>.

⁹ An instrument 'enters into force' once a specified number of states have ratified the instrument. It then binds the parties who have ratified it. The phrase 'enters into force' does not imply that the Protocols have force in Australian law as Australia has not ratified them.

¹⁰ 'Chronology of Cultural Property Legislation', K Fitz Gibbon, *Who Owns the Past? Cultural Policy, Cultural Property and the Law*, Rutgers University Press, (2005), at p 5.

¹¹ Many Indigenous people prefer the word 'invasion' to that of 'settlement'.

¹² Note that this does not mean that Australia does not have laws relating the protection of cultural property. Every State/Territory has legislation that

for another thirty years and has so far declined to sign both the First Protocol (1954)¹³ and the Second Protocol (1999)¹⁴ to that Convention. This chapter will briefly examine those aspects of the Convention as they affect Australian collections and will briefly summarise the content of the two Protocols.

THE HAGUE CONVENTION 1954

Although Australia was one of the signatory parties to the 1954 Hague Convention, it did not ratify it until 19 September 1984 and it did not come into force in Australia until 19 December 1988.¹⁵ At time of writing, there are 123 States party to the 1954 Hague Convention, 100 of which are also party to the 1954 First Protocol and 55 States are party to the Second Protocol.¹⁶

Structure

The Convention may be divided into:

- (a) The Preamble, which sets the tone and purpose of the treaty;
- (b) The forty articles in its General Provisions, which define the terms used and outline the scope of the convention; and

criminalises the destruction and pillaging of cultural property – whether or not a state of armed conflict exists.

¹³ UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention, First Protocol, 14 May 1954 (ratified 19/09/1984); See text at <http://portal.unesco.org/en/ev.php-URL_ID=15391&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

¹⁴ See text of the Second Protocol at <http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

¹⁵ For a lucid explanation as to the process by which a country becomes a party to the Convention (through ratification or accession) see P J Boylan's paper, 'Implementing the 1954 Hague Convention and its Protocols: legal and practical implications', (2006): <http://culturalpolicy.uchicago.edu/protectingculturalheritage/papers/Boylan_paper.pdf>.

¹⁶ In 2007 New Zealand issued a Consultation Paper as to whether it should ratify the Convention and its two Protocols. The United Kingdom is in the process of introducing legislation which will enable it to ratify the Convention and both the First and Second Protocols. Japan is considering ratification. The United States has expressed an intention to become a party to the 1954 Hague Convention (although arguably it is already bound by its principles: Geoffrey S Corn, "Snipers in the minaret – what is the rule?" The law of war and the protection of cultural property: A complex equation', 2005-Jul *Army Law*, 28).

- (c) The Regulations, which set out the processes for appointment of the delegates and the Commissioner General, their function, and processes for the registration of cultural property.

Purpose

The purpose of the Convention is set out in the Preamble:

The High Contracting Parties,

Recognising that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is increasing danger of destruction;

Being convinced 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;

Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;

Guided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907 and in the Washington Pact of 15 April 1935;

Being of the opinion that such protection cannot be effective unless both national and international measures have been taken to organise it in time of peace;

Being determined to take all possible steps to protect cultural property;

Have agreed upon the following provisions ...

Application

Many of the Convention's provisions only come into effect in time of armed conflict. That conflict may be international or non-international.¹⁷

This includes not only declared wars but also 'any armed conflict between two parties, even if the state of war is not recognised by one or more of them.'¹⁸ It also applies to all cases of partial or total occupation of a party even if the occupation meets with no armed resistance.¹⁹

¹⁷ Were Australia ever to suffer internal armed conflict, the Convention would apply: Article 19. See also: 'Protection of cultural property under international humanitarian law: Some emerging trends', P Ishwara Bhat, <www.worldlii.org/int/journals/ISILYBIHRL/2001/4.rtf>.

¹⁸ Article 18, para 1.

¹⁹ Article 18, para 2.

Definitions

1. CULTURAL PROPERTY

'Cultural Property', the focus of the treaty, is very broadly defined. Irrespective of origin or ownership, it covers:

- (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 art; 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);
- (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'.²⁰

Without doubt, collecting organisations and their holdings are not only covered by the Convention, they are a primary focus of it.

2. PROTECTION, SAFEGUARDING AND RESPECT

Article 2, somewhat enigmatically, states: 'For the purpose of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.' So what does 'safeguarding' and 'respect' mean in this context?

'Safeguarding' seems to be used to apply to the preventative actions necessary to protect the cultural material in one's own territory. It refers to the precautions that can and should be undertaken in peacetime to prevent the damage or destruction of the nation's cultural property that is foreseeable in times of armed conflict.²¹

²⁰ Article 1.

²¹ Article 3.

'Respect' requires the parties to:

'... prohibit, prevent and if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory (of another party) ...'²² [and] refrain from any act directed by way of reprisals against cultural property.'²³

These create obligations on each party during peacetime as well as during times of armed conflict.

Implementation in peacetime

Article 3 states:

The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.²⁴

Jan Hladik has usefully divided national implementation measures into five categories: administrative, military, penal, technical and promotional.²⁵ He lists a number of measures by which a country's compliance with Hague Convention obligations may be tested. Most of these are a matter for government rather than individual institutions – except the 'technical' measures:

Technical measures consist mainly in the preparation, in time of peace, for the safeguarding of cultural property against the foreseeable effects of an armed conflict (cf Article 3 of the Hague Convention). This provision, which is of a very general character, is complemented by Article 5 of the Second Protocol which provides an example of technical measures such as the preparation of inventories, the planning of emergency measures for protection against fire or structural

²² Para 3, Article 4.

²³ Para 4, Article 4.

²⁴ Article 3. For a detailed commentary see Jirí Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth Publishing Company/UNESCO, 1996, pp 59–66.

²⁵ 'Cultural property in the event of armed conflict: Some observations on the implementation at the national level', Jan Hladik, *Museum International* No 4, 228, Wiley-Blackwell, UNESCO, 2005, pp 71–76. See: <http://portal.unesco.org/culture/en/files/29573/11363878685228_Jan_Hladik_eng.pdf/228_Jan_Hladik_eng.pdf>.

collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property.²⁶

Although the reference to the Second Protocol may seem irrelevant to Australian institutions, these days, each State and Federal collecting institution is expected to include in its risk management plan issues such as the preparation of collection inventories and disaster preparedness. Other, smaller collections often fail to consider such issues. It is difficult to know whether complacency or modesty is a greater enemy of implementation of the Hague Convention principles. The former is the attitude that 'it will never happen here' and the latter is, 'what we have isn't important enough to be endangered'. Yet, often protective measures in small organisations can be simple, reasonably inexpensive and very effective.

The Convention gives little guidance as to how safeguarding of cultural property must be done or what preparation is appropriate but the 1995 UNESCO report on the implementation of the Hague Convention provides recommendations as to such steps and examples of safeguarding initiatives taken by some of the States. These include:

- the categorisation and subsequent preparation of inventories of cultural property;
- relevant documentation (such as microfilms, maps and photographs);
- the construction of shelters for cultural material; and
- the evacuation of military installations from city centres to suburban areas.²⁷

1. PREPARATION OF COLLECTION INVENTORIES

One of the most basic measures is the creation of a comprehensive collection inventory. Most collecting organisations do this with varying degrees of rigour. To check that your system reflects best practice you should consider whether your organisation complies with the recommendations of Object ID.²⁸ This was an enormous sectorwide project to develop an international standard for describing cultural objects. It is used to combat theft and illegal appropriation of cultural material – whether in time of peace or armed conflict.

Object ID provides a checklist for the documentation of material:

OBJECT ID CHECKLIST

²⁶ Ibid.

²⁷ 'Risk preparedness under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol', J. Hladik.
<http://icom.museum/disaster_preparedness_book/international/hladik.pdf>

²⁸ <<http://icom.museum/object-id/index.html>>.

TAKE PHOTOGRAPHS

Photographs are of vital importance in identifying and recovering stolen objects. In addition to overall views, take close-ups of inscriptions, markings, and any damage or repairs. If possible, include a scale or object of known size in the image.

ANSWER THESE QUESTIONS:

Type of Object

What kind of object is it (e.g., painting, sculpture, clock, mask)?

Materials & Techniques

What materials is the object made of (e.g., brass, wood, oil on canvas)?
How was it made (e.g., carved, cast, etched)?

Measurements

What is the size and/or weight of the object? Specify which unit of measurement is being used (e.g., cm., in.) and to which dimension the measurement refers (e.g., height, width, depth).

Inscriptions & Markings

Are there any identifying markings, numbers, or inscriptions on the object (e.g., a signature, dedication, title, maker's marks, purity marks, property marks)?

Distinguishing Features

Does the object have any physical characteristics that could help to identify it (e.g., damage, repairs, or manufacturing defects)?

Title

Does the object have a title by which it is known and might be identified (e.g., *The Scream*)?

Subject

What is pictured or represented (e.g., landscape, battle, woman holding child)?

Date or Period

When was the object made (e.g., 1893, early 17th century, Late Bronze Age)?

Maker

Do you know who made the object? This may be the name of a known individual (e.g., Thomas Tompion), a company (e.g., Tiffany), or a cultural group (e.g., Hopi).

WRITE A SHORT DESCRIPTION

This can also include any additional information which helps to identify the object (e.g., color and shape of the object, where it was made).

KEEP IT SECURE

Having documented the object, keep this information in a secure place.

[Object ID is a registered trademark of the J Paul Getty Trust. Permission must be obtained from the International Council of Museums (ICOM) prior to any reproduction of Object ID.]

If you are responsible for implementing for documenting cultural heritage you should also refer to *Documenting the Cultural Heritage*²⁹ as this will provide you with a practical guide to the internationally agreed standards.

2. DISASTER PREPAREDNESS

Disaster preparedness is a standard part of good collection management. Most collecting organisations have some disaster preparedness protocol in place as part of their risk management strategy. Some, however, are quite inadequate. This is not the place to discuss such policies but there is a lot of published material available for those who wish to develop such essential procedures.³⁰

3. DISTINCTIVE MARKING OF CULTURAL PROPERTY

One of the common difficulties in wartime is recognising cultural property. From the air, a library or museum may look much the same as a government office building or a munitions warehouse. To make identification easier, the Hague Convention 1954 provides an emblem. The use of such emblems is not new³¹ but what was new was that the Convention specified its design. It is in the form of a shield 'pointed below, persaltire blue and white (a shield consisting of a royal-blue³² square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle.'³³ Well, at least that's clear. The emblem can be used alone or may be repeated three times in a triangular formation.

²⁹ Edited by R Thornes and J Bold, Getty Information Institute, (1998).

³⁰ As a starting point refer to the Collections Australia Network: <http://www.collectionsaustralia.net/sector_info_item/2>. 'Be Prepared' (1990) published by the Heritage Collections Council, can be downloaded from that site. Also refer to the excellent site published by DISACT, *A Disaster Recovery Resource for Public Collections in the ACT*. This provides a feast of interesting and helpful links: <<http://www.anbg.gov.au/disact/web-links.html>>. See also *Disaster Management of Libraries and Archives*, G Mathews and J Feather, Ashgate, 2003.

³¹ For example, symbols were provided by the Hague Convention 1907 and the Roerich Pact 1935.

³² The Association of National Committees of the Blue Shield has adopted PMS300 as the standard for representing this 'royal blue' colour.

³³ Article 15.

The world is very familiar with the meaning of a red cross but the blue and white shield is far less well known and it is clear that there has been insufficient community education as to its recognition, meaning and importance. Even within collecting organisations, many are unaware of the shield, and even more have chosen not to implement the symbol in the belief either, that attack is unlikely or, that designating the cultural property in this way will make it a more likely target.

The Convention distinguishes between using the emblem in single form and its use in a triangulated formation. In its **triangulated** formation, the emblem can only be used to identify immovable cultural property under special protection, temporary refuges for cultural material (that comply with the Regulations) and vehicles transporting such property.³⁴

General use of the emblem in its **single** form is optional but it can only be used as a means of identification of:

- (a) cultural material not under special protection;
- (b) the persons responsible for the duties of control in accordance with the regulations for the execution of the Convention;
- (c) the personnel engaged in the protection of cultural property;
- (d) the identity cards mentioned in the regulations for the execution of the Convention.³⁵

During an armed conflict, no other use of the emblem (or any sign resembling the emblem) is permitted.³⁶

In order to apply the symbol to a building or other immovable cultural property, permission must be sought from the Federal Government and that authorisation must be signed, dated and displayed (although the form of that is not mandated).

34 Chapter V of the Convention, Articles 18 & 19.

35 Para 2, Article 17.

36 Para 3, Article 17. Note the limitation to times of armed conflict. It would make great sense if the same protection was given to the blue shield as is given to the red cross. The Red Cross organisation spends much time and money trying to ensure that its emblem is used appropriately – even in peacetime – on the basis that any devaluation of the symbol will cost lives.

When and how the emblem is displayed is a matter of discretion. For organisations that do wish to avail themselves of the symbol, it can be displayed on flags or armlets;³⁷ it may be painted on an object or represented in any other appropriate form. It can be placed on vehicles or on buildings so as to be clearly visible both from the air and from the ground. Further, it can be placed around the perimeter and at the entrance of buildings, monuments or other immovable cultural property under special protection.³⁸

The use of the emblem raises a number of important risk management questions for collecting organisations:

- Should the organisation seek to have the cultural property in its care registered as worthy of 'special protection' so that it can use the emblem in its triple formation and have the property formally recognised by all of the parties to the Convention as worthy of protection?
- If so, when should it start the application process?
- Even if it is not going to seek 'special protection' registration, should it prepare to use the single emblem?
- If so, what arrangements should be made? For example, does the organisation have armlets bearing the emblem so that they are readily available for workers in the event of armed conflict? Does the ID card presently issued to employees of the organisation comply with the requirements of the Convention? Would it not make sense if it did?³⁹
- Do the organisation's vehicles bear the cultural property emblem? If it is decided not to put it on the vehicles now, has the organisation a store of transfers or some other way of quickly attaching the emblem to the roofs and sides of the vehicles?

³⁷ Such armlets must be issued and stamped by the competent authorities and persons wearing the armband must carry an identification card bearing the emblem; stating the surname and first names; the date of birth; the title or rank and the function; photograph; signature and/or fingerprints, of the holder. Cards are to be made in duplicate, one copy being held by the issuing authority: Article 21 of the Regulations.

³⁸ Article 20 of the Regulations. Note also that Article 38 of additional Protocol 1 to the 1949 Geneva Conventions also prohibits the misuse of 'the protective emblem of cultural property'.

³⁹ If it is decided that there is too much information required on the ID card for everyday use, might a complying card be produced at the time of issuance of the everyday card so that when armed conflict arises, a complying card can be issued without delay?

The international response to the use of the protective emblem has been diverse. Some countries such as Belgium, Bosnia and Herzegovina,⁴⁰ Egypt, Austria and Germany have undertaken a program of marking important cultural property with the Shield. Other countries do not believe that it is prudent to mark such property because it may simply identify important targets for aggressors⁴¹ or unnecessarily alarm the civilian population.⁴² Still others have undertaken preparation in peacetime and when conflict threatens, the plans will be implemented.⁴³

It must be said that the use of the emblem only works to mitigate against attacks made in error. As the war in the former Yugoslavia showed, it can never protect against deliberate and tactical attack.⁴⁴

4. SPECIAL PROTECTION STATUS

One of the little used and thus largely ineffective initiatives of the Convention was to establish the *Register of Cultural Property under Special Protection*. This is maintained by the Director-General of UNESCO who, in turn, provides copies of the Register to all of the parties to the Convention.

Special protection may be given to three categories of cultural property:

1. refuges intended to shelter movable cultural property in the event of armed conflict (for example the General Refuge Oberrieder Stollen in the Federal Republic of Germany);

⁴⁰ Which marked cultural property prior to and during the 1992-1995 war.

⁴¹ As Kossiakoff observes, this rationale should be finally dismissed for, as experience in Bosnia showed, a hostile party already knows where hidden property is or at the least can easily find out: 'The art of war: The protection of cultural property during the Siege of Sarajevo (1992-1995)', Megan Kossiakoff, 14 *DePaul-LCA J Art and Entertainment Law*, (2004), p 109; cf Patrick J Boylan, *Review of the Convention for the Protection of Cultural Property for the Protection in the Event of Armed Conflict*, (The Hague Convention of 1954), Paris, UNESCO, 1993, Report ref CLT-93/WS/12.

⁴² For example Spain.

⁴³ For example Switzerland. These examples are taken from the UNESCO Report, *supra* fn 31, pp 14-16.

⁴⁴ Kossiakoff, *Id* FN 46. The cultural damage suffered in this conflict is summarised in: Lopez Henares, 'Ninth information report on war damage to the cultural heritage in Croatia and Bosnia-Herzegovina', Eur Parl Assembly Doc No 7464, sec 3 (1996):
<<http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc97/edoc7740.htm>>.

2. centres containing monuments (for example, Vatican City); and
3. other immovable cultural property of very great importance.⁴⁵

The granting of special protection is not automatic; it is essentially subject to the following conditions:

- a specific written request for granting such protection must be addressed to the Director-General of UNESCO by the State Party responsible for the territory;
- the property in question must be at an adequate distance from any military objective;⁴⁶
- it must not be used for military purposes;
- all other States Parties must agree to it.

The government submits to the Director-General any applications for entry onto the Register. It may do so in respect of cultural material in its own territory and, where it is an occupying power, for cultural property in the occupied territory. The application describes the cultural property, its location, and certifies that it complies with the provisions of Article 8 of the Convention. The Regulations require the Director-General to send a copy of that application to each of the parties to the Convention. Each party then has four months to lodge an objection.⁴⁷

One might observe that this is a task best undertaken in the comparative leisure of peacetime but it is clear that most countries that are party to the Convention have neither prepared lists of property for special protection, nor prepared refuges for the shelter of cultural material in the event of armed conflict.⁴⁸

45 Article 8, paragraph 1.

⁴⁶ There is no definition as to the meaning of 'adequate'. See criticisms of this by Patrick Boylan, 'Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)', UNESCO, (1993), at 76; UNESCO Doc. CLT-93/WS/12.

⁴⁷ The objection must be received by the Director-General within four months of the day on which he sent a copy of the application for registration. For details of the objection process see, Article 14 of the Regulations.

⁴⁸ Notable exceptions would appear to be Finland and Switzerland. See 'Report on the implementation of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Two 1954 and 1999 Protocols: (2005) UNESCO report, pp 12-14; <<http://unesdoc.unesco.org/images/0014/001407/140792e.pdf>>.

At time of writing, cultural property of three parties to the Convention (Germany, the Holy See and the Netherlands) is entered in the Register.⁴⁹ Two States (Austria and the Netherlands) have withdrawn registrations and the last entry was in 1978.⁵⁰

5. TRAINING

The Convention specifies that that each party must instruct and train its military forces in how to deal appropriately with cultural material.

Although the 'protection', 'safeguarding' and 'respect' of cultural property is required by the Convention, such admonitions are meaningless unless the military, the people who have to implement the fine sentiments on the battlefield, are provided with training. The focus of such training is to help them recognise such property and understand the Convention and the obligations that it imposes. This is equally applicable to defenders and aggressors.⁵¹ This is recognised in Article 7:

Article 7. Military measures

1. The High Contracting Parties undertake to introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.

2. The High Contracting Parties undertake 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.

Although it is a truism that 'ignorance of the Law is no defence', there is no doubt that if one really wants effective compliance with particular laws, both education and training are essential.⁵² At time of writing, more than 50 years after the Convention came into force, UNESCO is working on a submission to the United Nations and NATO aimed at ensuring

⁴⁹ A total of four refuges as well as the whole of the Vatican City State.

⁵⁰ See Jan Hladik, *Risk-Preparedness under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol*:
<http://icom.museum/disaster_preparedness_book/.../hladik.pdf>.

⁵¹ Article 7, Military measures.

⁵² Indeed it is an obligation under the convention: Article 25 which requires that the Convention be included 'in military and (if possible) civilian training, so that its principles are made known to the whole population, especially the armed forces and personnel engaged in the protection of cultural property.'

compliance with the Convention and its two Protocols by armed forces engaged in peace-keeping operations under the respective mandates of these organisations.⁵³

Some individual countries have not waited and have introduced cultural protection issues into their own military programs.⁵⁴

Respect for cultural property during time of armed conflict

Article 4 is perhaps the heart of the Convention. It is brief:

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.
3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.
4. They shall refrain from any act directed by way of reprisals against cultural property.
5. No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3.

⁵³ 'Final report of the seventh meeting of the high contracting parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict', UNESCO, 20th December 2007.

⁵⁴ Norway established a Cultural Heritage Management Section to formulate a protection plan for military establishments and buildings that were classified as cultural monuments and is incorporating this into military planning. In Spain the 'Guidelines: The law of armed conflict', prepared for the internal use of the military, emphasise the protected nature of cultural property, require that they must abstain from directing hostile acts towards such property or using it or the immediate vicinity for military operations, and restrict the application of the principle of military necessity. For further examples see 'Report on the implementation of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two 1954 and 1999 Protocols: (2005) UNESCO report, pp 10-12; <<http://unesdoc.unesco.org/images/0014/001407/140792e.pdf>>.

There are many situations in recent wars in which commanders have used monuments, museums and other cultural property for strategic purposes⁵⁵ or have carried out their military plans with wilful disregard for the endangerment or destruction of cultural property.⁵⁶ Whether or not such actions constitute a breach of Article 4 of the Convention cannot be assumed. It requires legal and factual precision.

The key lies in paragraph 2 of the Article: the 'military necessity' exception. For those charged with the protection of cultural property, this exception is the great the weakness of the Convention. One military commander may deploy an item of cultural property for strategic purposes if military necessity requires – and the opponent commander can blow it up if military necessity requires. That said, the military caveat was an important part of the diplomatic negotiations that permitted so many countries to sign up to the Convention. Without it, many would have refused.⁵⁷

The obligations of occupying forces

Given the much publicised destruction, damage and looting of Iraqi cultural institutions and cultural material since the intervention in that country by the 'forces of the willing',⁵⁸ it is important to understand that, as both Australia and Iraq are signatories to The 1954 Hague

⁵⁵ For example, the use by US snipers of the spiral minaret of the eighth-century al-Mutawakkil mosque in Samarra, Iraq, to obtain a firing position with a commanding view of the surrounding area. When questioned about the propriety of this, the US military spokesman said, 'the value of safeguarding innocent Iraqis and our security force partners, when considered in total, must take precedence.' (*The Art Newspaper*, No 156, March 2005, p 7.)

⁵⁶ For example the shelling in 1991 of the historic town of Dubrovnik, a World Heritage site. As to the experience of the First Iraq–Kuwait War see: 'The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict – Is IT WORKING? A case study: The Persian Gulf War experience', H E Oyer, (1999) 23 *Colum-VLA J L & Arts* 49.

⁵⁷ 'Military necessity' is a complex issue, both jurisprudentially and in practice.

⁵⁸ Writing on the destruction of cultural material in this conflict is prolific. *The NY Review of Books* published a review of just seven books on the subject: 'The Devastation of Iraq's Past', H Eakin, Vol 55, No 13, August 14, (2008). There are many books, but in particular see *Art And Cultural Heritage: Law, policy, and practice*, B Hoffman (ed), Cambridge University Press (2006). See 'War or Peace: It is time for the United States to ratify the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict', J V Campagna, (2005) 17 *Fla J Int'l Law* 271. The USA ratified the 1954 Convention in 2008 subsequent to the looting of the Bagdad museum: See US Committee of the Blue Shield: at <<http://www.uscbs.org/resources.htm>>.

Convention⁵⁹ Australia had (and may still have) significant obligations towards Iraqi cultural material.⁶⁰ Article 5 requires that any party:

... in occupation of the whole or part of the territory of another (party) shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property ... (Furthermore, should) it prove necessary to take measures to preserve cultural material situated in the occupied territory and damaged by military operations, and should the competent national authorities be unable to undertake such measures, the Occupying Power shall, as far as possible, and in close cooperation with such authorities, take the most necessary measures of preservation.⁶¹

Australian cultural organisations, particularly Federal ones, should be aware that, if so requested, the Federal Government of the day has a treaty obligation to provide preservation and conservation assistance to Iraq.⁶² If this arises, these skills will most likely be sourced from the Federal collecting organisations, although it is possible that external consultants would also be retained.

Transport of cultural property during armed conflict

As with refugees, there is a mechanism for conferring 'special protection' status on the transport of cultural property. Again, the application is made to the Commissioner-General for Cultural Property and it must mention the reasons for which protection is sought; the approximate number of items; their importance; present location; the anticipated new location; the means of transport; and any other relevant information.⁶³ Where the status is granted, the Commissioner-General appoints one or more inspectors who must satisfy themselves that only the property stated in the request is to be transferred and that the transport is to be by the approved method and bears the blue shield emblem. The inspectors then travel with the property to its new destination.

⁵⁹ Iraq ratified the Convention in 1967.

⁶⁰ In order to determine whether it still has such obligations would require consideration as to whether it was still an 'occupying force' or was now an invited guest of the new Iraqi government.

⁶¹ Paras. 1 & 2, Article 5. The administrative mechanism to be applied in all armed conflicts to which the Convention applies, is set out in the Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict.

⁶² Iraq is merely one example. Australian obligations under the Convention apply equally in Afghanistan and any of other zones of conflict in which Australia is a participant.

⁶³ Article 17 of the Regulations sets out the mechanism.

REPORTING TO UNESCO

The 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict stipulates in Article 26(2):

Furthermore, at least once every four years, [the High Contracting Parties] shall forward to the Director-General a report giving whatever information they think suitable concerning any measures being taken, prepared or contemplated by their respective administrations in fulfillment of the present Convention and of the Regulations for its execution.

The latest report from Australia was submitted to UNESCO in June 2010. The Department of the Environment, Water, Heritage and the Arts (DEWHA) is the lead agency in generating this report, and seeks input from all other relevant Australian Government departments including the Department of Defence, the Department of Foreign Affairs and Trade, the Attorney-General's Department and the Department of the Prime Minister and Cabinet.

THE FIRST PROTOCOL TO THE HAGUE CONVENTION

The primary focus of the First Protocol is illicit trade in objects looted during armed conflict. Contracting parties in occupation of another country undertake to prevent the export of cultural property, and also to take into custody any cultural property imported into their territory either directly or indirectly from any occupied country.⁶⁴

The First Protocol was concluded on 14 May 1954, the same date as the principal Convention. One of the characteristics of the war that had just ended (like so many of them for centuries past)⁶⁵ had been the sheer volume of cultural property that had been taken from its owners. Some of this had been straightforward looting but much had been done under the pretence of pseudo-legality. Even while the war was still ongoing, the 18 Allied powers entered the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control.⁶⁶ This reserved their rights

⁶⁴ National Interest Analysis, Hague Convention Consultation Paper, NZ Ministry for Culture and Heritage: <http://www.mch.govt.nz/projects/heritage/hague.html>.

⁶⁵ The Treaty of Versailles 1919 also contained provisions concerning the return of looted cultural property: Articles 245, 246 and 247.

⁶⁶ 5 January 1943; See too, the Final Act of the Bretton Woods Conference, July 1944, concerning restitution of looted property.

to declare invalid any transfers of, or dealings with, property rights and interests of any description whatsoever, which are, or have come under the occupation or control, direct or indirect, of the governments with which they are at war... This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently in legal form, even when they purport to be voluntarily effected.

When the war ended, the Final Act of the 1945 Paris Conference on Reparations provided some restitution mechanisms but many considered that they were flawed, or at least, did not go far enough. In particular, many considered that there needed to be positive mechanisms to prohibit the illegal trafficking of cultural material. These criticisms were taken into account by those drafting the Hague Convention and in the initial draft they included a provision that stated:

If during an occupation, a cultural property has changed hands and been exported, the restitution of that property may be required of its last holder within a period of ten years from the date on which it becomes possible to bring an action for restitution before a competent magistrate. If, however, the last holder can show proof that the property changed hands as a result of a legal transaction carried out without extortion of consent, the action for restitution shall be dismissed.⁶⁷

This draft provision was much disputed. Had it remained, several countries would have refused to sign the Convention, so it was agreed that the mechanisms relating to the international trafficking and repatriation of looted property would be split off into a separate document, the First Protocol.⁶⁸

The First Protocol is brief.⁶⁹ It is divided into three parts:

- (i) Each party undertakes:
- to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property;⁷⁰
 - to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory;⁷¹

⁶⁷ Article 5 of the draft.

⁶⁸ For a discussion of the criticisms of the draft Article 5, see Chamberlain, *War and Cultural Heritage*, Institute of Art and Law, (2004), pp 138–139.

⁶⁹ For the full text of the First Protocol, see:
<http://portal.unesco.org/en/ev.php-URL_ID=15391&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

⁷⁰ Paragraph 1. It is silent as to how this is to be achieved.

- to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.⁷²
 - If a party has an obligation to prevent the exportation of cultural property from the territory that it occupied, it must pay an indemnity to the holders in good faith of any cultural property that has to be returned in accordance with the preceding paragraph.⁷³
- (ii) Cultural property coming from the territory of a party and deposited by it in the territory of another party for the purpose of protecting it from the dangers of an armed conflict, shall be returned by the latter, at the end of hostilities, to the competent authorities of the territory from which it came.⁷⁴
- (iii) The third section is a machinery section, but, amongst other things, makes it clear that it stands independent of the principal Convention, that States can join up to the Protocol notwithstanding that they are not parties to the principal Convention, and that parties may ratify either the first part only, the second part only, or the whole of the Protocol.⁷⁵

Australia (together with others such as the United States and the United Kingdom) never did become a party to the First Protocol. Although the principles articulated by the First Protocol are reasonable and indeed, by today's ethical standards, unarguable, subsequent conflicts and looting showed that it was largely ineffective. Indeed, it should be noted that some

⁷¹ Paragraph 2. This seizure shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory.

⁷² Paragraph 3.

⁷³ Paragraph 4. This is a de facto sanction for failing to prevent the export of the material but the Protocol provides no mechanism for determining the amount to be paid. Note that the obligation to pay the indemnity does not fall upon the country into which the cultural material is imported, only on the occupier of the country from which the material was exported.

⁷⁴ Part 11, paragraph 5. Note that whereas the earlier paragraphs do not apply to internal conflicts, this paragraph applies to both internal and external conflicts. There have been several examples of the reluctance of countries to return material: See Patrick O'Keefe, 'The First Protocol to the Hague Convention fifty years on' (2004) *IX Art Antiquity and Law*, 99 at 111-112.

⁷⁵ Part 111, paragraphs 6-16. In fact, all of the parties to the Protocol have accepted the whole of it.

important functions of the First Protocol have already been achieved in Australia through the *Protection of Movable Cultural Heritage Act 1986 (Cth)*.⁷⁶

THE SECOND PROTOCOL

In the early 1990s, it was decided that the First Protocol should be reviewed and its effectiveness strengthened⁷⁷ and in 1995 UNESCO sponsored a meeting to improve the 1954 Convention (and the First Protocol). The Second Protocol has four key purposes:

- (i) It creates a new protection category of 'enhanced protection';
- (ii) It requires parties to criminalise serious violations of the Protocol (including obligations to prosecute and punish); and
- (iii) It seeks to strengthen various mechanisms of the Convention itself. For example, many States argued that the military necessity exception to the protection of cultural material should be removed.⁷⁸ Others considered that crimes against important cultural property should be war crimes.⁷⁹ Although the military necessity exception remained in the final document, the situations in which it could be invoked were more clearly defined; and
- (iv) It creates a new Intergovernmental Committee to oversee implementation.

While discussion of the Second Protocol is a fascinating window into international law and diplomacy, that is a joy that must be deferred for another place. Australia is not a party to it.

CONCLUSION

The fact that Australia is a party to neither the First Protocol nor the Second Protocol is relevant to any collecting institution that prudently seeks to use peacetime as an opportunity to protect the cultural property under its stewardship in the event of war. The 'enhanced protection' mechanisms are not available to them. They must continue to rely on the 'special protection' mechanisms provided under the 1954 *Hague Convention*.

The question of whether Australia should ratify the two protocols to the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict was addressed in the report on the review of the *Protection of Movable Cultural Heritage Act 1986 (Cth)*. The Minister for Environment Protection, Heritage and the Arts has endorsed the

⁷⁶ See Chapter 12.

⁷⁷ This took the form of the so-called Boylan Review: Patrick Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, (1995).

⁷⁸ Understandably, these were states that had recently suffered devastation in armed conflict: Croatia and Slovenia.

⁷⁹ For example Kuwait.

recommendation that in the medium term the Australian Government would undertake targeted consultation with stakeholders on the potential impacts of becoming a party to the 1954 and 1999 Protocols.

In contrast, whether an individual collection should voluntarily consider the protection of the collection in time of armed conflict is a governance issue for its board and administration.

FURTHER READING

There are many books and articles on the protection of collections. Most include the texts of the relevant source documents. It is a fascinating area. It is perhaps understandable that this topic is most vehemently discussed in countries that know the devastating short-term and long-term effects that the pillage, looting, damage and destruction of cultural material can have on the society in mourning. As a starting point, the following are recommended.

Erika Techera, 'Protection of cultural heritage in times of armed conflict: The international legal framework revisited', *MqJICEL* (2007) Vol 4, 1–20.

Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth Publishing and UNESCO, 1996 (particularly as to the Hague Convention and the First Protocol).

W Sandholtz, 'The Iraqi National Museum and international law: A duty to protect', *Columbia Journal of Transnational Law*, 2005, p 86, www.columbia.edu/cu/jtl/Vol_44_1_files/Sandholtz.pdf. Read this article as a taster – was the conduct of the US forces in breach of its international obligations? Was the head of Australian Defence Forces right when he 'rejected suggestions that Australia, as an invading and occupying force with international legal responsibilities for protecting Iraq's heritage, should share the blame for the loss of artefacts [sic]' (at p 191)

Kevin Chamberlain, *War and Cultural Heritage*, Institute of Art and Law, 2004. Read particularly as to the Second Protocol to the Hague Convention.

Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict: A comprehensive introduction*, Cambridge University Press, 2006. A more academic analysis of the laws and particularly interesting in the way that the author also looks at the relevant non-Hague conventions.

Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, Cambridge University Press, 2006.

James Nafziger, 'Protection of cultural heritage in time of war and its aftermath', International Foundation For Art Research: <<http://www.ogiek.org/indepth/protect-cult-herit.htm>>.

Report on the implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two 1954 And 1999 Protocols: Report on the activities from 1995 to 2004, UNESCO, 1995, (CLT-2005/WS/6): <<http://unesdoc.unesco.org/images/0014/001407/140792e.pdf>>. This gives a useful history of the Convention and its application in conflicts such as Afghanistan, Iraq and the former Yugoslavia, together with a useful bibliography.

You should also be familiar with the work of Blue Shield Australia – the national committee affiliated with the International Committee of the Blue Shield. See their website for further information: <<http://www.blueshieldaustralia.org.au>>.