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# Protection of Cultural Property in Armed Conflict and Military Necessity

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## *The general obligation not to direct acts of hostility against cultural property*

The protection of cultural property in armed conflict has been a matter for special consideration by customary and conventional international humanitarian law since its first expressions. The Hague Conventions of 1899 and 1907 already enunciated a principle of protection in this matter, as shown in particular by the Regulations concerning the laws and customs of war on land annexed to the fourth convention, which provided that in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.[1] Additionally, any intentional appropriation, destruction or deterioration of similar institutions, historic monuments and works of art and science were prohibited and had to be criminally repressed.[2] It should be noted, however, that the obligation to respect the buildings forming part of the cultural heritage was limited to the situation in which the mentioned buildings were not used for military purposes at the time of an attack. In practice, therefore, the protection afforded by the conventional rules to cultural objects was not special as compared with the general protection to which any civilian object was entitled.

More recently, noting the serious damage suffered by cultural property during previous conflicts, especially in World War II, the

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[1] Article 27, Regulations concerning the Laws and Customs of War on Land annexed to the IV Hague Convention of 18 October 1907.

[2] *Id*., Article 56.

absence of any appropriate rule protecting cultural property in the Geneva Conventions of 1949, and the threat of destruction represented by the development of warfare techniques, a new specific convention aimed at the protection of cultural property in the event of armed conflict was adopted within the framework of UNESCO in 1954 ("1954 Hague Convention"), which contains a more detailed regulation of the international obligations concerning an enhanced protection and respect for cultural property.[3] In relation to the conduct of hostilities, Article 4 (1) of the Convention requires States parties to respect cultural property situated within their own territory as well as within the territory of other 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.

These principles are reiterated in the Protocols of 8 June 1977 on the protection of victims of armed conflicts, additional to the Geneva Conventions of 12 April 1949. Article 53 of the first Protocol relating to international armed conflicts ("Protocol I of 1977") provides that,

> 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, and of other relevant international instruments, it is prohibited: *a*) to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; *b*) to use such objects in support

[3] Convention for the Protection of Cultural Property in the event of Armed Conflict, adopted at The Hague on 14 May 1954, and annexed Regulations for the Execution of the Convention. The Convention is accompanied by a protocol with the same title and date. A second Protocol was subsequently adopted 26 March 1999 (*see infra*, note 25).

> of the military effort; *c*) to make such objects the object of reprisals.

In turn, Article 16 of the second Protocol relating to non-international armed conflicts ("Protocol II of 1977") provides in the same sense, except for the reference to reprisals.

It follows from these provisions that there is in international law a basic principle that cultural property is not a legitimate objective in military operations in both international and non-international armed conflicts. On one hand, the principle affirmed in the mentioned conventions is well rooted in customary law and its applicability has not been contested even by the States that have not ratified the additional protocols. On the other hand, it is also confirmed in the statute of the International Criminal Court ("ICC"), which includes among the war crimes over which the Court has jurisdiction the conduct of intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, and against historic monuments, both in international and non-international conflicts, provided they are no military objectives.[4]

[4] Article 8 (2) (b) (ix) and (e) (iv) of the ICC Statute. The text of the Rome Statute, as well as the corresponding text of the Elements of Crimes, echoes the provision of Article 27 of the Regulations annexed to the IV Hague Convention, *supra* note 1, and does not appear to take account of the developments contained in the 1954 Hague Convention (*supra* note 3), which restricts the possibility of directing an attack against cultural objects even when they have become military objectives as later discussed in this paper (*infra*, para 2). *See also* Micaela Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT'L L. 203 (2011). Whether the criteria adopted in the 1954 Hague Convention may be applied by way of interpretation of the Rome Statute of the ICC is a delicate matter in relation to criminal provisions: the ICC Statute was adopted in 1998, after the 1954 Hague Convention that it omits to consider, and the restrictive criteria that it adopts with respect to military necessity may operate against an accused, thus conflicting with the principle of legality. This question has not been yet considered by the ICC and will not be discussed here. For an application of Article 8 (2) (b) (iv) see *Prosecutor* v. *Al Mahdi*, ICC Case No ICC-01/12-01/15, Trial Judgment and Sentence, 27 September 2016, where however the reasoning is quite succinct since the accused entered a plea of guilty.

### *2. The conditions for waiving the obligation to abstain from attacking cultural property*

The above-mentioned principle, however, does not have an absolute nature. It should be recalled in this regard that the principle according to which cultural property is not a legitimate objective in military operations must be considered together with the obligation of the States Parties – which is also set forth in Article 4 (1) of the 1954 Hague Convention and taken up in the reference to it made by the Additional Protocols of 1977 – to respect cultural property by abstaining from the use of such property, of their protective devices and of their immediate vicinity, for purposes which could expose them to destruction or deterioration in the event of armed conflict. According to Article 4 (2) of the Convention, this obligation may be waived "only in cases where military necessity imperatively requires such a waiver."

In the case of such a waiver, the cultural property concerned may be used for military purposes. This step is not however without consequences. The other belligerent may be allowed to waive in turn its obligation, also set forth in Article 4 (2) of the Convention, of abstaining from any act of hostility directed against that property, provided that an imperative military necessity so requires. As an exception from the general principle that a civilian object used for military purposes becomes a military objective and can be targeted in a military operation, cultural property benefits under the 1954 Hague Convention from a strengthened protection, that was not foreseen as such by Article 27 of the 1907 Regulations which requested the protection of cultural objects "provided that they are not used at the same time for military purposes." In other terms, even if cultural property is used for military purposes an attack can be directed against it only if there is an imperative military necessity for such an attack.

The possibility of a waiver in this case is also confirmed by the Additional Protocols of 1977, which affirm the principle of the protection of cultural property without prejudice to the provisions of the 1954 Hague Convention. By means of this reference they permit a waiver in the same terms in which it is permitted by the Convention, that is only in cases where military necessity imperatively requires it. But how should this conventional clause be interpreted? When does a

situation arise in which military necessity "imperatively" requires a waiver of the rule according to which cultural property is not a legitimate objective in an armed attack, thus legitimizing such an attack?

The question therefore arises whether by imposing these two parallel obligations on the parties to the conflict, the Convention intended to establish a close connection between them, in the sense that the respect for the first, that of not using cultural property for purposes that could expose it to destruction or deterioration, is a prerequisite for respecting the second, that of not carrying out any act of hostility against such property.[5] In other words, if in a given situation the conditions for waiving the prohibition of using cultural objects for military purposes do not exist, and nevertheless they are used for this purpose, would a waiver of the prohibition to commit acts of hostility against such objects also be automatically justified?

The answer to this question, if proposed with respect to civilian objects in general, would seem affirmative. It is indeed commonly maintained that when a civilian object is used for military purposes, it becomes a military object and as such can be a target in the event of an armed attack or reprisal.[6] This is also confirmed by Article 52 (2) of Protocol I of 1977, which however specifies that "in so far as objects are concerned, military objectives are limited to those objects which by their nature, location, destination or use make an

[5] The same question could also be asked with reference to the mentioned Articles 53 of Protocol I and 16 of Protocol II of 1977, which reaffirm the two obligations provided for in the Article 4 of the 1954 Hague Convention; it is not necessary, however, to examine it separately since these articles apply without prejudice to the provisions of the Convention.

[6] *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 97 (2nd ed. 2010). This principle has often been affirmed in a general way also by international jurisprudence. *See, e.g.*, *Prosecutor* v. *Strugar*, ICTY Case No IT-01-42-T, Trial Judgement, 31 January 2005, para. 310, which however distinguishes the case in which an attack is directed specifically against a cultural property from that in which military activities are carried out against military installations located in the immediate vicinity of the cultural property, in which case the special protection granted to the cultural property cannot be considered lost, although in practice it may be difficult to assess whether the acts that caused the destruction or damage of the cultural property were "directed against" that cultural property rather than the military objective located in the immediate vicinity.

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." Article 52 (3) further establishes a presumption that in case of doubt, an object which is normally dedicated to civilian purposes should be regarded as not used to contribute effectively to military action.[7] Protocol II of 1977 does not contain a similar provision, but it seems natural that these clarifications set forth for international conflicts must also apply, under customary law, as regards non-international conflicts, since they implicitly refer, with respect to civilian objectives, in addition to the principle of distinction, to other fundamental principles of the law of armed conflicts such as the principles of precaution and of proportionality, which must always be kept in mind to establish where necessity for a specific military action exists.[8]

### *3. The requirement of imperative military necessity for a waiver of the abstention from acts of hostility against cultural property*

Now, are these principles, which generally express the natural tension between military necessity and the protection of civilians and civilian property in armed conflicts and which characterize and limit the notion of necessity of a military action, sufficient to establish when military necessity exists even when a civil object can be classified as a cultural object? The question must be addressed in the light of the already mentioned special provision of the Article 4 (2) of the 1954 Hague Convention, according to which the principle of protection of cultural property can be waived only when military necessity "imperatively" requires such a derogation. This provision introduces an additional characterization of military necessity for the purposes of an act of hostility towards cultural property, requiring it

[7] Whether this presumption reflects customary international law is not unanimously accepted: *see* DINSTEIN, *supra* note 6, at 99; Fausto Pocar, *Protocol I Additional to the 1949 Geneva Conventions and Customary International Law, in* THE PROGRESSION OF INTERNATIONAL LAW. FOUR DECADES OF THE ISRAEL YEARBOOK ON HUMAN RIGHTS 209 (Yoram Dinstein & Fania Domb eds., 2011).

[8] Irrespective of the circumstance that these principles are not mentioned in Protocol II of 1977. *See* YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 283-284 (2nd ed. 2021), referring to *Prosecutor* v. *Galić,* ICTY Case No IT-98-29-T, Trial Judgment, para. 58.

to be an imperative military necessity. This characterization represents a condition for justifying military action directed against cultural objects and is additional to the respect for the other principles that must be applied to ensure the protection of civilian objects in the case of an armed attack.

It could of course be debatable whether from a strictly semantic point of view the adverb "imperatively" adds a particular meaning to the term "necessity," which is of itself imperative. However, the consideration that the law uses it highlights the intention to further limit and make more rigorous the appreciation of military necessity when an act of hostility is directed against a cultural object. Moreover, the conclusion that the concept of necessity should be interpreted restrictively derives from the general principles of the law of armed conflicts which define and limit it and is well confirmed in international practice, since the famous case of the steamer *Caroline*,[9] dating back to 1837, where the notion of necessity was developed for the purposes of its qualification as a justification of legitimate self-defense. Without going into a detailed examination of this case, in which this necessity was defined as "instant, overwhelming, leaving no choice on means and no moment for deliberation," it could be argued that since only such a necessity can justify military action for self-defense, *a fortiori* necessity must have these characteristics when the law expressly qualifies it as "imperative," with a term that denotes urgency, obligatory nature without choice of means and time to act, as it is the case of an attack on cultural property, which enjoys a strengthened protection in international humanitarian law. It therefore seems correct to conclude that under customary international law it is legitimate to commit an act of hostility directed against cultural objects which are used for military purposes, only when there is no alternative option to obtain an equivalent military advantage.

[9] On this incident, *cf.* J.B. MOORE, A DIGEST OF INTERNATIONAL LAW, I, 409 (Washington 1906); C.C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, I, 239 (2nd ed. 1947); R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938); PIERLUIGI LAMBERTI ZANARDI, LA LEGITTIMA DIFESA NEL DIRITTO INTERNAZIONALE 43 (Milan 1972); FAUSTO POCAR, L'ESERCIZIO NON AUTORIZZATO DEL POTERE STATALE IN TERRITORIO STRANIERO 88 (Padua 1974).

### *4. The Old Bridge of Mostar Case*

In the light of the foregoing considerations, one of the last cases adjudicated by the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the *Prlić et al.* case, where diverging positions were expressed by the Trial Chamber and the Appeals Chamber,[10] deserves special attention. The case was about the legitimacy of the attacks of the Croatian Defense Council (HVO) that led to the destruction, on 8 and 9 November 1993, of the Old Bridge (*Stari Most*) from which the city of Mostar takes its name, which crosses the Neretva river connecting the eastern and western parts of the town, and is unanimously considered, as also recognized by the first instance judgment, of "immense cultural, historical and symbolic value."[11] In particular, it symbolizes the bond between the communities that inhabit the city despite the difference in religion that distinguishes them.

In pronouncing on the responsibility of the accused, the Trial Chamber considered that the Old Bridge was used by both the Bosnian and Herzegovinian army and the inhabitants of the right and left banks of the Neretva as a means of communication and supply and that it was essential for combat activities of the Bosnian units, for sending of troops, food and materials, and that it was utilized to this end. Consequently, at the time of the attack, it was a military target.[12] The Trial Chamber considered, however, that the destruction of the bridge put the residents of the Muslim enclave on the right bank of the river in total isolation, making impossible for them to get food and medical supplies resulting in a serious deterioration of their humanitarian situation. The Trial Chamber also determined that the destruction of the Old Bridge had a very significant psychological impact on the Muslim population of Mostar.[13] The Chamber also held that, although the destruction of the bridge may have been justified by military necessity, the damage on the civilian population was

[10] *Prosecutor* v. *Prlić et al.,* ICTY Case No IT-04-74-T, Trial Judgment, 29 May 2013, para. 1581; *Prosecutor* v. *Prlić et al.,* ICTY Case No IT-04-74-A, Appeal Judgment, 29 November 2017, para. 393.
[11] *Prosecutor* v. *Prlić et al., supra* note 10, Trial Judgment, para. 1585.
[12] *Id.*, para. 1582.
[13] *Id.*, para. 1583.

indisputable and substantial, such that it could not resist the test of proportionality applicable in a military attack under the law of armed conflicts. According to the Trial Chamber, "the impact on the Muslim civilian population of Mostar was disproportionate to the concrete ad direct military advantage expected by the destruction of the Old Bridge."[14] It concluded that by destroying the Old Bridge the armed forces of the HVO committed the crime of wanton destruction of cities, towns of villages, or devastation not justified by military necessity.[15] The Trial Chamber also considered that the deliberate isolation of a population in an enclave as small and overcrowded as East Mostar for several months and the exacerbation of their distress and difficult living conditions demonstrated the specific intention to spread terror on the population, and found the accused responsible also for this crime.[16]

The trial judgment was appealed, and the Appeals Chamber followed a partly different approach coming to different conclusions. After summarily describing the findings of the trial judgment and the submissions of the parties,[17] it took notice of the findings that the Old Bridge was a military target at the time of the attack and that its destruction offered a definite military advantage and, on that basis only, concluded that "it could not be considered, in and of itself, as wanton destruction not justified by military necessity."[18] Additionally, the Chamber noted that

> when outlining the damage caused to the civilian population in its determination of whether the crime of wanton destruction had been committed, the Trial Chamber did not make any finding about other property being collaterally destroyed as a result of the attack on the Old Bridge. Rather, in reaching its

[14] *Id.*, para. 1584.
[15] *Id.*, para. 1587.
[16] *Id.*, paras. 1690-1692.
[17] It is worth mentioning that the Prosecutor argued that the destruction of the Old Bridge was unlawful, although it was a military target, because it was not targeted for that reason but as part of the HVO's campaign of terror directed against the Muslim population of Mostar: see *Prosecutor* v. *Prlić et al., supra* note 10, Appeal Judgment, para. 410, note 1248.
[18] *Id.*, paras 405-410.

> conclusion that the attack on the Old Bridge was disproportionate, the Trial Chamber found that the attack isolated the Muslim population in Mostar and caused a very significant psychological impact. Thus, in the absence of any destruction of property *not justified by military necessity* in the Trial Chamber's legal findings..., the Appeals Chamber … concludes that a requisite element of the crime was not satisfied.[19]

Consequently, the appeal judgment found that the Trial Chamber erred in finding that the destruction of the Old Bridge of Mostar constituted the crime of wanton destruction not justified by military necessity as a violation of the laws or customs of war.[20] As an additional consequence, the Appeals Chamber also concluded that the destruction of the Old Bridge did not constitute persecution as a crime against humanity and the unlawful infliction of terror on civilians as a violation of the laws or customs of war.[21]

In reaching these conclusions, however, the Appeals Chamber erroneously considered that the Old Bridge being a military objective was *per se* determinative that its destruction was justified by military necessity, thus erroneously combining and conflating the notion of military objective with that of military necessity, while the notion of justification by military necessity is distinct and more stringent from that of military objective. It is worth recalling that the Appeals Chamber itself had previously defined military necessity as "the necessity of those measures which are indispensable for securing the

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[19] *Id.*, para. 411.

[20] The Appeals Chamber, however, declined to enter convictions of appeal for the crime considering "the interests of fairness to the appellants balanced with considerations of the interests of justice, and taking into account the nature of the offences and the circumstances of this case." *Id.*, para. 413. Although this conclusion is a correct one, the reasoning thereon is flawed, since the Appeals Chamber did not have the power to enter a new conviction on appeal under fundamental principles of international human rights law: *see Prosecutor* v. *Prlić et al., supra* note 10, Appeal Judgment, Dissenting Opinion of Judge Fausto Pocar, note 14.

[21] *Id.*, paras. 422-426.

end of the war, and which are *lawful* according to the modern law and usages of war."[22]

With respect to the lawfulness of the attack on the Old Bridge, the Appeals Chamber also failed to discuss the principle of proportionality as required by customary international law and Article 51 (5) (b) of Protocol I of 1977. Additionally, and even more importantly, it failed to take into account that the Old Bridge of Mostar constituted cultural property protected under the general principles of international humanitarian law. Thus, the Chamber overlooked the existence of Article 53 lett. *a*) of Protocol I of 1977, which prohibits "to commit any act of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of people." It also ignored the provision of Article 4 (2) of the 1954 Hague Convention, referred to by Article 53 of Protocol I of 1977, according to which a waiver of the obligation to abstain from acts of hostility towards cultural property can be justified only when military necessity "imperatively" requires that waiver, a condition which would have implied to verify whether the destruction of the bridge was the only option available to gain the desired military advantage.[23] The failure to take account of the cultural nature of the Old Bridge cannot be justified by the argument that the charge against the accused did not mention it and was rather limited to the crime of wanton destruction not justified by military necessity, because the decision on whether military necessity was justified implied a consideration of the lawfulness of an attack on civilian objectives under international law, and the general rules that regulate military attacks as well as the special rules applicable to attacks which endanger cultural objects must in any event be observed.[24]

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[22] *See Prosecutor* v. *Kordić and Čerkez*, ICTY Case No IT-95-14/2, Appeal Judgment, 17 December 2004, para. 686 (*emphasis added*), quoting Article 14 of the Lieber Code.

[23] *See supra*, para. 3.

[24] On the unsatisfactory reasoning of the Appeals Chamber in this case see also, more in detail and for further references, *Prosecutor* v. *Prlić et al., supra* note 10, Appeal Judgment, Dissenting Opinion of Judge Fausto Pocar, paras. 12-15.

### *5. The Impact of the Second Protocol on the 1954 Hague Convention*

It should be finally noted that the proposed conclusion in this paper corresponds to the interpretation of Article 4 (2) of the 1954 Hague Convention offered by the Second Protocol to that convention adopted at the Hague in 1999[25] with a view to supplement the Convention's provisions through measures to reinforce their implementation. Article 6 (a) of the Protocol sets forth that, with the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention,

> 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) the 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.

The Protocol thus offers a textual interpretation of the notion of imperative military necessity required by the said Article 4 (2) for a waiver of the abstention from directing acts of hostility against cultural property. As an additional guarantee, the same provision of the Protocol states that "the decision to invoke imperative military necessity can 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 and that in case of an attack, an effective advance warning shall be given whenever circumstances permit."[26]

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[25] Second Protocol relating to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, concluded at The Hague on 26 March 1999, intended to integrate the provisions of the Convention through measures aimed at strengthening their application.

[26] Article 6 (c) and (d), Second Protocol, *supra* note 25.

It is true that the Second Protocol to the 1954 Hague Convention has had a limited – albeit growing – number of ratifications, but, as this paper has tried to demonstrate, the notion of imperative military necessity can only be understood as a strengthened condition, as compared with mere military necessity, also from the point of view of customary law. Consequently, Article 6 of the Second Protocol should be considered as a mere codification of customary law and a confirmation of a correct interpretation of Article 4 (2) of the 1954 Hague Convention. This conclusion may also be drawn from the preambular provision of the Protocol which refers to the consideration that the rules governing the protection of cultural property in the event of armed conflict should reflect developments in international law.

This view has also found an authoritative confirmation in the recent Military Manual on the protection of cultural property published by UNESCO in cooperation with the International Institute of Humanitarian Law, according to which an attack can be conducted against cultural property only when such property becomes a military target and there is no alternative option available other than to attack it.[27]

[27] *Cf.* UNESCO & INT'L INSTITUTE OF HUMANITARIAN LAW, PROTECTION OF CULTURAL PROPERTY. MILITARY MANUAL, paras. 100-105 (Roger O'Keefe, Camille Péron, Tofig Musayev & Gianluca Ferrari eds., San Remo 2016).