

INTER ARMA SILENT MUSAE. CAN MILITARY NECESSITY GAG INTERNATIONAL CULTURAL HERITAGE LAW?

1. Introduction

The idea of military necessity originated in the law of armed conflict (the law of war), and, while it is one of its most fundamental concepts, it is also one of the most sinister and elusive ones (William Downey, 1953, p. 252). In the past it was often invoked as a justification for atrocious violations of the laws of war (see e.g. *The Peleus case*, Law Reports of Trials of War Criminals pp. 1-21). After the Second World War, military necessity has become a concept relevant also to the field of protection of cultural property in armed conflicts. Namely, it has been inserted into the treaty framework constituted by the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (the Hague Convention; articles 4 and 11)¹ and later the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 26 March 1999 (the Second Protocol; article 6)² as the exception to the generally binding rule of respect.

¹ 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.

Article 11. Withdrawal of immunity

1. If one of the High Contracting Parties commits, in respect of any item of cultural property under special protection, a violation of the obligations under Article 9, the opposing Party shall, so long as this violation persists, be released from the obligation to ensure the immunity of the property concerned. Nevertheless, whenever possible, the latter Party shall first request the cessation of such violation within a reasonable time.
2. Apart from the case provided for in paragraph 1 of the present Article, immunity shall be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity.
3. The Party withdrawing immunity shall, as soon as possible, so inform the Commissioner-General for cultural property provided for in the Regulations for the execution of the Convention, in writing, stating the reasons.

² 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;

Consequently, whether the basic obligation under the Hague Convention to respect cultural property in armed conflicts is binding on a belligerent depends on whether the competent military commander believes that he or she is in the presence of military necessity or not. This paper will address problems connected with the interpretation of this notion and their possible impact on the fate of cultural heritage in armed conflicts.

2. Specific Problems related to Military Necessity

2.1. Lack of Definition

To date, military necessity has not been appropriately defined in international law. In different periods of history scholars have advanced various hypotheses as to the effect that it may have on the law (McCoubrey, 1991, p. 218). Present-day scholarship agrees that there is no general clause of military necessity in international law, and so it may only be invoked when there is a specific permission to do so in given provision of a treaty (Toman, 1996, p. 73, Venturini, 1988, pp. 123-131). That notwithstanding, the lack of a clear definition of this notion inevitably affects the relative decision-making process on the battlefield also when cultural property is at stake. In fact, the vagueness of the concept itself makes it easier to justify abuses of the laws of war, also those prohibiting the destruction or damaging of cultural property, through the argument of military necessity.

When making a decision on whether protected cultural property is to be attacked, a military commander might, on the one hand, overestimate the gravity of the situation and decide on an attack which is not indispensable, or, on the other hand, knowingly abuse this escape clause where it is, again, not necessary but only militarily convenient. In the first case, the commander might for instance assume that it is militarily necessary and thus justified to attack a cultural site. The latter scenario – an abusive use of the exception – will be addressed in the section below.

2.2. Risk of Abuse

As a consequence of the vagueness of the notion of military necessity, military commanders have a wide margin of appreciation in deciding whether a given situation is sufficiently serious to justify disregarding the rule of respect for cultural property. In turn, this may involve a risk as they are usually naturally inclined to preserve as much freedom from legal restraints in waging war as possible. This latitude of military commanders has been curtailed in the Second Protocol, which lists a number of requirements that need to be fulfilled for a given situation to be considered a military necessity (see footnote 2). However, this solution is still far from being perfect, *inter alia* because it requires that there be no feasible alternative to obtain a similar military advantage, the latter being again a notion which can hardly be measured and therefore inevitably remaining dependent on subjective judgment of a military commander. Another problem is that only 64 out of 126 States Parties to the Hague Convention have decided to become Parties to the Second Protocol.³ In other words, nearly a half of the total number of States Parties to the Hague Convention are not bound by the rules of the Second Protocol. Arguably, these States have significant liberty to invoke military necessity in the presence of any military interest whatsoever. Should they wish to use this excuse to account for violations of rules protecting cultural property, they would probably not be deemed to have infringed the Convention thanks to this all-encompassing waiver. This

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.

³ Data as of January 29, 2013; source: www.unesco.org

would be a classic example of an ‘‘exception eating the rule’’ scenario, i.e. permitting a behaviour that the Convention has actually been drafted to outlaw. Should this verify itself, the overall perspectives for the fate of cultural property at war are rather grim.

2.3. The ‘‘Polyphonic Discourse’’ on Military Necessity

This situation is not helped by the fact that diverse professional circles often attribute different connotations to the notion of military necessity, creating what may be called a ‘‘polyphonic discourse’’ on military necessity. O’Brien (1957, p. 117) distinguishes between the legal and military understanding of military necessity. The military circles are not bound by neither legal nor philosophical considerations as to what constitutes necessity. In practice, the military discourse typically avails itself of a much broader understanding of necessity than the one used by lawyers (O’Brien, *ibidem*). In the most extreme of cases, a situation classified as a state of military necessity by the military might even conflict with a legal rule (O’Brien, 1957, p. 116). From the views expressed by representatives of the military at the Hague Conference in 1954 it is clear that there are at least three different approaches to the relation of military necessity and the law (Toman, 1996, p. 75, Records, para. 264, pp. 140-141) In fact, the common military perception of military necessity is that of an essential element of decision-making at strategic, operational and tactical level and does not consider it in any way as an extraordinary circumstance (see for example the U.S. Operational Law Handbook, 2012, pp. 10-12). To avoid confusion, it is advisable to reserve the broader, military understanding to non-normative texts, such as military reports or literature.

Another vast connotation of military necessity is oftentimes part of the political discourse, especially when high rank politicians endeavour to thus justify breaches of humanitarian law and human rights law.⁴ It seems that sometimes the temptation to use a sweeping excuse along the lines of ‘‘*raison de guerre*’’ or even ‘‘*raison d’état*’’ proves too strong to resist. By contrast, groups interested in ensuring undisturbed applicability of rules protecting socially important assets from risks connected with warfare, such as art historians, archaeologists, environmental preservationists, human rights activists, or even indigenous or local populations, might be expected to defend a very narrow interpretation of military necessity. All things considered, one is right to observe that military necessity is an extremely confusing and elusive notion, with a dangerous potential for the observance of law. That is why the issue of its interpretation in the practice of armed conflicts must be approached with extreme caution. Moreover, it is in the best interest of cultural heritage of all mankind that this notion be as clear as possible.⁵

3. Military Necessity in the Law of Armed Conflict and in Cultural Heritage Law

3.1. Military Necessity in the Law of War

As already mentioned above, military necessity is a notion that has its origins in the law of war. In spite of the fact that military necessity is often treated as a uniform legal concept, there is no single understanding of military necessity to simultaneously fit different contexts in which it is used in that field of law.

⁴ See e.g. the memorandum of February 7, 2002 of President G. W. Bush concerning the applicability of the Geneva Convention relative to the Treatment of Prisoners of War of 1949 to the treatment of detainees in the War on Terror following the events of September 11, 2001. See in particular points 3 and 5 of the memorandum, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> (last visited: 29.01.13)

⁵ See the preamble to the Hague Convention, recitals 2 and 3.

The crux of all norms of the law of war relative to the manner of conducting hostilities has always been inspired by military necessity in its *broader sense*, which is recognized as one of the basic principles informing this branch of international law (Maugeri, 2008, p. 5, Venturini, 1988, pp. 123-131). Traditionally, it would render lawful, both in qualitative and quantitative terms, the volume of military force necessary for the attainment of the main objective of a belligerent, i.e. the complete (or partial) submission of the enemy (Venturini, 1988, p. 123, Rogers, 2004, p. 5) This chronologically first understanding of military necessity was used to justify the use of force between belligerents (Venturini, 1988, p. 123). However, its perception has changed in time and now it is more often formulated as a prohibition or limitation on the use of force (Rogers, 2004, p. 6). Following the current approach, conduct involving the use of violence which goes beyond the limits of what is necessary to defeat the enemy cannot be justified through military necessity *sensu largo*. In short, the purpose of this concept is to assess the appropriateness of the volume of violence employed by a fighting party. According to Ronzitti (2001, p. 174), military necessity *sensu largo* does not differ notably from the principle of proportionality.

Permissive character is, on the other hand, an exclusive characteristic of military necessity in the *strict sense*. It denotes a circumstance which precludes the wrongfulness of an action otherwise prohibited by law. Military necessity *sensu stricto* has to be incorporated in an explicit provision derogating a general obligation imposed by law (Maugeri, 2008, p. 2, Ronzitti, 2001, p. 174, Toman, 2009, p. 88., Venturini, 1988, p. 125), such as that in the already mentioned article 4 of the Hague Convention, article 6 of the Second Protocol and, regarding general civilian property, article 23 (g) of the Regulations respecting the laws and customs of war on land annexed to the 1907 Hague Convention. The reason underlying this limitation is that military necessity had already been taken into consideration in the norm-making process of the laws of war.

3.2. The “Importation” of Military Necessity into the Framework for the Protection of Cultural Heritage. Military Necessity in the Hague Convention

Military necessity is the only exception to the general rule of protection of cultural property expressed in article 4 of the 1954 Hague Convention. Considered as one of its major shortcomings, military necessity has been a contentious issue already during the preparatory works on the Convention (Francioni, 2002, p. 323, Gioia, 2002, p. 17). As the central point of the delicate balance between military demands and the protection of cultural property in armed conflicts, it was however bound to raise controversies (Frigo, 1986, p. 100). It should be noted that the waiver of military necessity was not present in the initial draft of the Convention as presented at the UNESCO Conference convened in 1954. It was inserted into the text during the Diplomatic Conference, upon clear request of a minority of states. During the negotiations few delegates have actually expressed interest in the possibility to waive the most fundamental conventional obligations on such grounds.

Two respective tendencies were manifested at the Diplomatic Conference. The “realists” - among these Belgium, Israel and the Netherlands - favoured this exception, contending that the new convention had to be above all militarily applicable. The “idealists”, such as the USSR and Greece, argued that the military necessity waiver was a retrograde step with respect to previous achievements of international law in this regard, and so it should be eliminated from the text, or at least significantly restricted. An interesting view was presented by the Swiss delegate at the Conference. He felt that the vagueness of this notion was of no great importance, as “the Convention was above all an affair of good faith” (Toman, 2009, p.

91). However, some of the States of greatest military potential threatened not to ratify the Convention, if the waiver they insisted upon was not included in the Convention (Zagato, 2007, p. 74). Thus, not willing to risk lack of ratification on part of the dissenting States, it was decided that the reference to military necessity should be made (Gioia, 2002, p. 17). Regrettably, the States in question did not ratify the Convention immediately, regardless of having had such significant influence on its content.⁶

3.3. Military Necessity in the Treaty Framework for the Protection of Cultural Heritage

One is right to wonder whether the same distinction between military necessity *sensu largo* and *stricto* known to the law of war applies in the same manner to cultural heritage law. After all, these are two, albeit related, disparate branches of the law. In particular, the fact that military necessity is one of the most basic principles on which the law of war is based, does not in itself imply that it will be treated as such in cultural heritage law. The latter branch of international law does not concern itself with hostilities and so does not need rules limiting wartime violence. It seems then only logical that it should not be seen as an autonomous principle there as in the law of war, but only an exception to particular rules regulating behaviour during armed conflict, where its interpretation ought to be very narrow. This corresponds to the law of war's military necessity *sensu stricto*.

However, even if we concede that it is nothing but an exception in the field of cultural heritage protection, the problem of interpretation of this notion remains, especially as it is not a monolith – a reading of the Hague Convention is conducive to thinking that there can be various “degrees” of military necessity. In fact, the 1954 Hague Convention provides for two protective regimes, each of them requiring a different, as it would appear, type of military necessity as a ground for waiving the obligation to respect cultural property. The use of ordinary cultural property, its immediate surroundings or the appliances in use for its protection for purposes which are likely to expose it to destruction or damage, or an attack against such property is lawful only where it is dictated by imperative military necessity (Article 4 para. 1 and 2, see footnote 1). By contrast, the immunity of property covered by special protection, understood as protection from hostile acts and from the use for military purposes is withdrawn only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues (article 11 para. 2, *ibidem*). One is justified in wondering where does the actual difference lay. The use of qualifying adjectives “imperative”, “exceptional” and “unavoidable” might suggest that there is a third type of military necessity, an “ordinary” one. It is no easy task to translate this slightly absurd categorization into practice, and the military is often understandably at a loss as to how to differentiate between these extraordinary circumstances, while the treaty itself gives no explanation in this regard.

In fact, it is very interesting to observe how the military copes with this problem. During a lecture given in the framework of a workshop on the protection of cultural property in armed conflicts organized by the International Institute of Humanitarian Law in Sanremo on 13-15 December 2010, retired US Army Colonel Jackson said that a military commander must “think twice before attacking cultural property, and think thrice before attacking cultural property under special protection”. At the same time, most scholars insist that there is no *differentia specifica* between these categories (Nahlik, 1975-1976, p. 1069). However, as the

⁶ Turkey ratified the Convention on 15.12.1965, the United States only on 13.03.2009, whereas the United Kingdom has yet to do so. On the other hand, the United States confirmed that it considers the 1954 Hague Convention customary international law.

regime of special protection did not prove particularly attractive to Parties to the 1954 Hague Convention, and just a few sites in total have been entered into the Register of Cultural Property under Special Protection, so in practice the military did not need to build a sliding-scale of different cases of military necessity dividing them into more and less compelling and this problem remains largely theoretical.

In order to replace the ineffective special protection regime under the Hague Convention, the Second Protocol introduces a regime of enhanced protection for cultural property. This protection may only be lost in circumstances specified in Article 13 of the Second Protocol, which makes no reference whatsoever to military necessity. The property may only be subject to attack in order to terminate its use as a military objective. According to Henckaerts (2010, p. 34), the only practical difference between the two regimes of protection is that it is absolutely prohibited to convert cultural property under enhanced protection into a military objective by using it for military purposes. A holder of property included on the List of Cultural Property under Enhanced Protection who uses it for such purposes is liable to punishment as a war criminal.

4. Conclusions

Even though the insertion of a military necessity waiver into treaties significantly weakens their protective force, the practice of leaving this gateway open continues and is unlikely to end anytime soon, as it is an expression of interests that are perceived as vital by many actors in the international arena. As Falk put it (1982, p. 80), “what dominant states find militarily useful in war is unlikely to be prohibited, and, if it is, the prohibition is unlikely to be respected in the next war, unless ideas about the usefulness of the activity have shifted.” Indeed, the exception of military necessity may be sometimes treated as a “back door” to let political and military agendas pass through. In that sense, military necessity may become military expediency where actors in the international arena want to pursue their goals unrestrained by the laws and customs of war. In this case cultural heritage would fall short of treaty protection, and that in turn is likely to result in damage and destruction which could possibly be avoided otherwise. All States Parties to the Hague Convention ought to take all steps possible to make sure that this grim scenario does not fulfil itself.⁷

Military necessity as a notion used in the Hague Convention and the Second Protocol ought to be interpreted in a very restrictive manner, as, *primo*, it is an exception to an otherwise binding rule (following the Latin directive of interpretation *exceptiones non sunt extendendae*). *Secundo*, this otherwise binding rule to protect cultural property is not just any rule – it enshrines a model of conduct which is the core obligation imposed by the Convention on its States Parties and, perhaps more importantly, an internationally recognized customary and conventional rule dictated by public conscience (see generally Francioni, 2007 and Toman, 1996, p. 68)

REFERENCES

Books, chapters in books

⁷ See the preamble to the Hague Convention, recital 6.

Falk R., 1992, "The Environmental Law of War", Glen Plant, *Environmental Protection and the Law of War: A „Fifth Geneva” Convention on the Protection of the Environment in Time of Armed Conflict?* Belhaven Press, London and New York

Francioni F., 2008 "Il Contributo del Diritto Internazionale alla Protezione del Patrimonio Culturale", Alberico Gentili. *La Salvaguardia dei Beni Culturali nel Diritto Internazionale, Atti del Convegno, San Ginesio, 22-23 Settembre 2006*, Giuffrè, Milan

Frigo M., 1986, *La Protezione dei Beni Culturali nel Diritto Internazionale*, Giuffrè, Milan

Gioia A., 2002, "La Convenzione de L'Aja del 1954", *La Tutela del Patrimonio Culturale in Caso di Conflitto*, Fabio Maniscalco ed., Massa, Naples

Henckaerts J.-M., 2010, "New Rules for the Protection of Cultural Property in Armed Conflict", *Protecting Cultural Property in Armed Conflict. An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the protections of Cultural Property in the Event of Armed Conflict*, Nout van Woudenberg and Liesbeth Lijnzaad eds., Martinus Nijhoff, Leiden-Boston

Maugeri A. M., 2008, *La Tutela dei Beni Culturali nel Diritto Internazionale Penale. Crimini di Guerra e Crimini contro l'Umanità*, Giuffrè, Milan

Rogers A.P.V., 2004, *Law on the Battlefield*, Melland Schill Studies in International Law, Manchester University Press, Manchester

Ronzitti N., 2001, *Diritto Internazionale dei Conflitti Armati*, 2. ed., Giappichelli, Turin

Toman J., 1996, *The Protection of Cultural Property in the Event of Armed Conflict. Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed on 14 May 1954 in The Hague, and on other instruments concerning such protection*, Dartmouth Publishing Company Limited, Aldershot.

Toman J., 2009, *Cultural Property in War: Improvement in Protection. A 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.

Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, 1961, **Records** of the Conference convened by the United Nations Educational, Scientific and Cultural Organization and held at the Hague from 21 April to 14 May 1954, published by the Government of the Netherlands, Staatsdrukkerij en Uitgeverijbedrijf, The Hague.

U.S. Operational Law Handbook 2012, the Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia 2012

Venturini G., 1988, *Necessità e Proporzionalità nell'Uso della Forza Militare in Diritto Internazionale*, Giuffrè, Milan

Zagato L., 2007, *La Protezione dei Beni Culturali in Caso di Conflitto Armato all'Alba del Secondo Protocollo 1999*, Giappichelli, Turin

Periodicals

Downey W., 1953, The Law of War and Military Necessity, 47 American Journal of International Law

Francioni F., 2007, Au-delà des Traités: l'Émergence d'un Nouveau Droit Coutumier pour la Protection du Patrimoine Culturel, 1 Revue Générale de Droit International Public, Vol. 111

McCoubrey H., 1991, The Nature of the Modern Doctrine of Military Necessity, 30 La Revue de Droit Militaire et de Droit de la Guerre

Nahlik S., 1975-1976, International Law and the Protection of Cultural Property in Armed conflicts, 27 Hastings Law Journal

O'Brien W., 1957, The Meaning of "Military Necessity" in International Law, 1 World Polity

Case-law

Peleus case, Law Reports of Trials of War Criminals 1947, vol.1, His Majesty's Stationery Office, pp. 1-21