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Protecting cultural property

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The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict this month celebrates its 50th anniversary.

By Shivanii Pillai and Hyder Gulam

Imagine this scenario: the National Gallery of Victoria in flames, the Victorian Arts Centre targeted by fighter aircraft or artillery bombardment, the Melbourne Museum vandalised – its irreplaceable artefacts stolen, desecrated or destroyed.

While at first this scenario may seem far-fetched or fanciful, tragically this has not been the case in many parts of the world. Apart from the human toll of war, there is damage and destruction to priceless cultural treasures.

In the conflicts of the 1990s, such as the one in the former Yugoslavia, many religious meeting places – churches, mosques and synagogues – were destroyed. In 2003, the Iraqi National Museum in Baghdad was looted during the breakdown in law and order. Such deliberate destruction increases resentment.

On the other hand, the preservation of cultural property during war assists in the rebuilding of lives, communities and identities.

Cultural property has been defined as “property of great importance to the cultural heritage of all people such as monuments of architecture or history, archaeological sites, works of art, books or any building whose main and effective purpose is to contain cultural property”.

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the Convention) is the principal international instrument for the protection of cultural property. Here is a brief overview of its provisions.

Cultural property must be protected from being stolen, destroyed, misappropriated, pillaged or being the subject of illicit trafficking. Parties to the Convention must safeguard all cultural property against foreseeable effects of armed conflict, whether it is in their own or another state party’s territory. UNESCO has simplified the intent of the law into seven fundamental directives:

1. do not damage or steal cultural property;
2. do not sell or barter cultural objects; bring it to the local administration;
3. do not destroy or abuse cultural property belonging to other ethnic groups. Remember that this may inspire them to do the same to cultural objects dear to you;
4. do not make your house in a church, monument or museum;
5. do not sell cultural objects to black market dealers. Your country needs those objects;
6. remember that cultural objects are for you, your children, grandchildren and for all humanity; and
7. do not damage cemeteries of other ethnic groups. Remember that this may inspire them to do the same to cultural objects dear to you.

[1]

Further, where a state party occupies foreign territory, it must preserve cultural property in that territory, prevent the export of cultural property from that territory and in the event that cultural property is exported, the state parties are obligated to return the property at the close of hostilities.

In recent times, the UK has enacted domestic legislation to give effect to this international obligation, namely the *Dealing in Cultural Objects (Offences) Act 2003* (UK).

The Convention requires states to prepare in peacetime for the safeguarding of cultural property against the foreseeable effects of armed conflict. This is suggested by the preparation of inventories, emergency measures for protection against fire or structural collapse, plans to transfer movable cultural objects and the designation of competent authorities responsible for safeguarding cultural property.

Acts of hostility directed against cultural property are prohibited. The following acts must not be committed intentionally:

1. making cultural property under enhanced protection the object of attack;
2. using cultural property under enhanced protection or its immediate surroundings in support of military action;
3. extensive destruction or appropriation of cultural property protected under the Convention and Second Protocol;
4. making cultural property protected under the Convention and Second Protocol the object of attack; and
5. theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the Convention.

These obligations may be waived in the case of "imperative military necessity".**[2]**

Waiver may only be invoked in two circumstances. First, cultural property may be used for purposes likely to endanger it only if there is no feasible alternative to obtain a military advantage. Thus, retreating troops may take shelter in cultural property for defence purposes where there is no alternative available. Second, cultural property may be attacked only when that property has, by its function, been made into a military object and there is no feasible alternative available to obtain a similar military advantage.

In the latter case, circumstances permitting, effective advance warning must be given.

A Second Protocol to the Hague Convention was open for ratification in March 1999. The Second Protocol, *inter alia*, adds to the system of "special protection" by adding another layer – "enhanced protection". It also defines serious violations, thus steering states towards stronger enforcement mechanisms. The Second Protocol makes provision for precautionary measures. Parties to a conflict must do everything feasible to protect cultural property. This includes refraining from attacks that may cause incidental damage and keeping cultural property away from military objectives to the maximum extent feasible.

Enforcement of the Convention and the Protocols requires states to take all necessary steps to prosecute and impose penal or disciplinary sanctions on persons, of whatever nationality, who commit, or order to be committed, a breach of the Convention.

Effective implementation of domestic legislation is required to ensure that perpetrators are punished and deterrence is achieved. States have a specific duty to criminalise violations under domestic law and to make offences punishable by appropriate penalties. Universal jurisdiction to try or extradite offenders must also be incorporated in implementing legislation.

A state must establish jurisdiction when the offence is committed in that territory, when the alleged offender is a national of that state and in relation to the first three categories when the offence is committed abroad by a non-national.**[3]** While a state has primary jurisdiction and responsibility to investigate, prosecute and punish offenders, the International Criminal Court under its Statute also has jurisdiction over war crimes committed against cultural property in both international and non-international armed conflict.

The basic principles of international humanitarian law, such as protection of civilians and distinction between military and civilian sites, are well-established as customary international law.

To date, however, this specific Hague Convention that protects cultural property has only been ratified by 111 states. Protocol I to the Convention, which primarily deals with protection of cultural property in occupied territories, is ratified by 87 states. Twenty-one states have agreed to the Second Protocol. Australia is yet to ratify the Protocols. In Australia, the task of defining cultural property is challenging.

There are longstanding debates about how to classify, identify and mark Aboriginal and Torres Strait Islander heritage – because their traditional understanding of the sacred nature of land, for example, does not fit easily within modern treaty definitions. It is hoped that further public interest in the protection of our cultural property may lead to renewed government consideration of these additional treaties.

The states which are party to the Convention are not only obligated to mitigate the destruction of cultural property during war, but also have a responsibility to set up a register of specially protected sites and mark certain monuments with a protective emblem.

Cultural icons, such as the Washington Monument, Versailles Palace and the Taj Mahal, would be protected in this way.

Thankfully, Australia has not suffered armed conflict on its shores since World War II. Nevertheless, and perhaps because of this privileged situation, Australians have an obligation to be aware of the instruments that promote the protection of cultural property, but also an opportunity to encourage and strive for adherence around the world.

2004 is the 50th anniversary of the 1954 Hague Convention for the Protection of Cultural Property.

The Convention and its two Protocols require parties to inform their citizens about the protection of cultural property as widely as possible, during war and peace. Australian Red Cross is passionately committed to the promotion of international humanitarian law – the rules of war that set standards for military behaviour.

It is the Geneva Conventions that aim to minimise suffering and to protect the victims of war. For Red Cross, the protection of cultural property by this UN treaty is closely and logically associated.

Together with the United Nations Association of Australia, Australian Red Cross intends to mark the anniversary this month with a gathering of the arts and cultural community in an appropriate setting – in the kind of historic Melbourne building that this law seeks to protect.

Golden celebrations

The Melbourne Museum will be the venue for a cocktail party to celebrate the golden anniversary of The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

The event on Wednesday, 17 November, from 6-8pm, will be hosted by the Australian Red Cross Victoria and the United Nations Association of Australia. It is being sponsored by the Melbourne Museum.

An RSVP is essential and should be made to the Australian Red Cross Victoria on ph 8327 7840.

SHIVANII PILLAI is a member of the Victorian Bar, practising in criminal law, WorkCover and planning law. She was previously the associate to Justice Hampel of the Supreme Court of Victoria, a prosecutor for the Commonwealth Director of Public Prosecutions, a legal liability consultant and a volunteer for a number of years for the Criminal Law Division of Victoria Legal Aid.

HYDER GULAM is a qualified solicitor, an accredited mediator and a registered nurse, specialising in perioperative and trauma nursing. His legal interests include the law on armed conflict, Islamic law, human rights and animal law.

The authors represent the Australian Red Cross Victoria International Humanitarian Law Advisory Committee.

[1] Adapted from "Cultural Property – Basic Rules" Division of Cultural Heritage, UNESCO.

[2] Article 6 to the Second Protocol to the 1954 Hague Cultural Property Convention.

[3] Article 16(1) and (2).