

Risk-Preparedness Under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol

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Resumen

La gestión de riesgos en el marco de la “Convención de La Haya de 1954 para la protección de los bienes culturales en caso de conflicto armado” y de su Segundo Protocolo

La Sección de Normas Internacionales de la División del Patrimonio Cultural de la UNESCO tiene asignada, entre otras, la misión de contribuir a la aplicación de la Convención de La Haya de 1954 y de sus dos Protocolos. Las disposiciones esenciales relativas a las situaciones de emergencia son las que figuran en el Artículo 3 de la Convención y en el Artículo 5 del Segundo Protocolo.

En el Artículo 3 de la Convención se dispone que los bienes culturales deben señalarse con un distintivo especial. Esta disposición también se aplica a los medios de transporte y los refugios provisionales de esos bienes. El Artículo 5 del Segundo Protocolo complementa el Artículo 3 de la Convención, ya que prevé la adopción de medidas concretas: elaboración de inventarios, preparación de planes de urgencia, designación de las autoridades competentes encargadas de la salvaguarda de los bienes culturales, etcétera. La aplicación concreta de esas disposiciones depende de cada Estado Parte en la Convención, en función de sus estructuras administrativas y financieras, de su política cultural y de su doctrina en materia de defensa nacional.

Résumé

La prévention des risques en application de la Convention pour la protection des biens culturels en cas de conflit armé (Convention de La Haye, 1954) et de son deuxième Protocole

La Section des normes internationales de la Division du patrimoine culturel de l'UNESCO est responsable entre autres de l'administration de l'application de la Convention de La Haye et de ses deux Protocoles. Les clauses essentielles concernant les situations d'urgence sont rassemblées dans l'article 3 de la Convention et dans l'article 5 du deuxième Protocole.

L'article 3 stipule la possibilité de marquer le bien culturel sous une protection spéciale. Cette clause s'applique également au transport et aux abris improvisés. Le second article, se rapportant à la “Sauvegarde des biens culturels”, est un complément de l'article 3 puisqu'il prévoit l'adoption de mesures concrètes comme l'élaboration d'inventaires, des plans d'urgence, la désignation des

autorités compétentes responsables de sa sauvegarde, etc. Ces mises en œuvre concrètes dépendent de chaque État Partie en fonction des structures administratives et financières, de sa politique culturelle et de sa doctrine de défense nationale.

First of all, let me thank the International Council of Museums and the Indian authorities for their kind invitation and for providing me with the opportunity to make a presentation on the risk-preparedness under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention) and its 1999 Second Protocol*.

My presentation is divided into two parts: the first is a brief introduction to the Section of International Standards in the Cultural Heritage Division of UNESCO, which is responsible for the administration of the Hague Convention and its two Protocols, as well as for other issues to which I shall refer; the second part will focus on risk-preparedness under the Hague Convention and its 1999 Protocol.

I will start by a brief introduction to our Section. The International Standards Section is the only unit within UNESCO responsible for the international legal protection of cultural heritage. In addition to the Hague Convention and its two Protocols, it administers the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, plus the eleven UNESCO recommendations for the protection of cultural heritage. The third, and at the same time best known and widely accepted UNESCO Convention for the protection of cultural heritage (the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage) is not administered by our Section, but is implemented by the World Heritage Centre, a separate administrative entity within UNESCO.

In the last two years, the Section achieved a major result by finishing work on the elaboration of two new Conventions and one Declaration: the Convention on the Protection of Underwater Cultural Heritage, adopted by the thirty-first session of the General Conference of UNESCO in Paris in November 2001, the Convention for the Safeguarding of Intangible Cultural Heritage, and the Declaration concerning the Intentional Destruction of Cultural Heritage, both adopted by the thirty-second session of the General Conference of UNESCO in Paris in October 2003.

In addition to running workshops on the promotion and application of the Conventions mentioned above, our Section administers the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, a twenty-two member intergovernmental body dealing with claims which cannot be covered under the 1970 illicit traffic Convention. It also sends expert missions, at the request of Member

* Ed. this paper was written before the entry into force (9th March 2004) of the Second Protocol to the Hague Convention.

States, to consult with national authorities in the preparation or amendment of national legislation for the protection of cultural property.

Our Section publishes documentary material on all these standard-setting activities, including reference material such as "Preventing Illicit Traffic in Cultural Property" or national reports on the implementation of the Hague Convention (the 2003 Secretariat's global report is being finalised).

The text of the Hague Convention and its two Protocols, together with the list of States Parties thereto (to date, there are 105 States Parties to the Hague Convention, eighty-seven of which are party to the 1954 Protocol), as well as other relevant information on our activities can be found on the UNESCO Web site.

Let me now come to the second and principal part of my presentation on risk-preparedness under the Hague Convention and its Second Protocol. The essential provisions on risk-preparedness are contained in Article 3 of the Hague Convention and Article 5 of the Second Protocol. Article 3 on the safeguarding of cultural property provides for a general obligation of States Parties to take appropriate measures, in time of peace, for the safeguarding of cultural property situated within their own territory to protect it from the foreseeable effects of an armed conflict¹. In other words, the three key elements of the notion of safeguarding cultural property are: temporal (adoption of the relevant measures in peacetime), territorial (the State Party's territory) and subject-matter (foreseeable effects).

It should be stated that Article 3 neither defines the safeguarding measures, nor provides concrete examples. Thus, their determination and subsequent implementation are left to the discretion of the States Parties. The last report on the implementation of the Hague Convention,² published by the Secretariat in 1995, contains some examples of practices by States Parties in implementing the safeguarding measures such as the categorisation and subsequent preparation of inventories of cultural property, elaboration of relevant documentation (e.g. microfilms, maps and photographs), and the preparation of shelters or evacuation of military installations from city centres to suburban areas³. I would advise you to read the Swiss and Slovenian national reports on the implementation of the Convention and exchange your national experience in this field in both working groups and informal discussions so that you can determine which safeguarding measures are the most appropriate to adopt and/or improve in your country.

You may be interested to learn that in 1958 UNESCO published a detailed technical handbook on safeguarding measures⁴ describing hazards threatening cultural property and providing advice on technical measures and how to organise the protection of cultural property. While the handbook does not cover risk factors arising with the use of new technologies and does not take into account the latest developments in modern weaponry, it is still useful as a basic reference document for the practical information on issues such as the construction or equipping of shelters for movable cultural property as this is still relevant.

To finish on the safeguarding measures under the original Convention, let me mention two other issues which do not strictly belong to the category of safeguarding measures, but are very closely related to them, i.e. the marking of cultural property with the distinctive emblem of the Hague Convention and the special protection regime.

I will start with the marking. A State Party to the Convention may consider the possibility of marking cultural property with the distinctive emblem of the Convention (see Arts. 6, 16 and 17). Marking is not compulsory for cultural property covered by general protection, the choice being left to the discretion of the State Party. The Convention does, however, require compulsory marking for cultural property given special protection, for the transport of cultural property with special protection, for urgent cases and for "improvised refuges". These last three cases relate to wartime, but from a practical point of view, it is preferable to prepare marking in peacetime.

The experience of marking of cultural property with the emblem of the Convention is not unanimous as some States are reluctant to do so, as this would provide a potential adversary with a "hit-list". Unfortunately, the experience of the war in former Yugoslavia has confirmed this. The Croatian national report on the implementation of the Convention, published in the 1995 report from the Secretariat, contains information on the intentional targeting of cultural property marked with the emblem of the Convention⁵. However, other States Parties, such as Austria or Switzerland, have proceeded with the marking, thus making the population aware of the cultural property. It should be stated that the decision to mark or not to mark will depend on a number of factors such as the national defence policy of the country concerned, its cultural traditions and the organisation of the national administration responsible for the protection of cultural property.

Let me now come to the regime for special protection. The Hague Convention provides for two protection regimes – general and special. General protection is granted to all categories of cultural property, regardless of the nature (movable or immovable), origin, ownership or inclusion in a specific inventory, and whether it be public or private. Special protection which is higher is granted to three categories of property (see Article 8(1) of the Hague Convention):

- refuges intended to shelter movable cultural property in the event of armed conflict;
- centres containing monuments;
- other immovable cultural property of very great importance.

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 objective⁶;
- it must not be used for military purposes;
- all other States Parties must agree to it.

The last condition is very important because it implies that the granting of special protection is not a right of the State Party left solely to its discretion. On the contrary, for example, the lack of unanimity based on the non-recognition by four States Parties of the then Government of Cambodia prevented the granting of special protection to several Cambodian sites in 1972.

Once cultural property is placed under special protection, it is listed in the International Register of Cultural Property under Special Protection maintained by the Director-General of UNESCO. To date, cultural property in three High Contracting Parties (Germany, the Holy See and the Netherlands) has been entered in the Register at the request of those States (a total number of four refugees as well as the whole of the Vatican City State). Two States (Austria and the Netherlands) have withdrawn registrations.

When assessing the special protection regime, it should be noted that to date it has never developed its full potential, given that only three States Parties have placed five sites under special protection, and that the last entry in the Register took place in 1978. In addition to the strict requirement of unanimity, there may be other reasons for States not submitting cultural property for special protection, such as the impossibility of complying with the condition of adequate distance from a military objective for densely populated countries, technical difficulties in submitting nominations or the fear of providing terrorists with potential targets.

For these and other reasons, the March 1999 Diplomatic Conference extended the regime of special protection in the Hague Convention to include what was basically a new regime of enhanced protection in Chapter 3 of the Second Protocol⁷, as a new supplementary instrument to the Hague Convention. Cultural property submitted for enhanced protection must be:

- of the greatest importance for humanity;
- protected by adequate domestic legal and administrative measures;
- not used for military purposes or to shield military sites.

For the last requirement, a declaration to this effect must be provided. Enhanced protection is granted by the inclusion of the cultural property in question on the List of Cultural Property under Enhanced Protection.

What are the most substantial differences between the special protection and enhanced protection regimes? They may be summarised as follows:

- conditions for obtaining enhanced protection are easier to comply with than the conditions for special protection;
- enhanced protection is granted by the Committee for the Protection of Cultural Property in the Event of Armed Conflict (the Committee), a new supervisory body for the implementation of the Second Protocol and, de facto, for the original Hague Convention;
- unanimity is no longer required, as enhanced protection may be granted by a majority of four-fifths of the members of the Committee; this will facilitate the granting of such protection.

The regime for enhanced protection is not operative yet because the Second Protocol has not yet entered into force.

Let me now come to the safeguarding of cultural property under the Second Protocol. Article 5 of that Protocol on the Safeguarding of cultural property complements Article 3 of the Convention by requiring the adoption of the following concrete measures: the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, preparation for the removal of movable cultural property or the provision of adequate *in situ* protection of such property, and the designation of competent authorities responsible for its safeguarding.

The practical implementation will depend on each State Party's administrative structures, financial and other resources, cultural policy and, last but not least, the doctrine of national defence. Those measures may not only prove helpful in case of armed conflict but also in the event of natural disasters such as flood or earthquake or, very importantly, as a highly effective weapon against art theft. The experience of the floods in Germany and the Czech Republic in the summer of 2002 showed, for example, that the consequences affecting cultural property would have been more dramatic if no safeguarding measures had been implemented.

To conclude, let me reiterate the importance of the implementation of the safeguarding measures under the Hague Convention and its Second Protocol at the national level because such measures will contribute to better protection of cultural property in the event of human-made or natural disasters and will act as a powerful deterrent to art theft. Let me also underscore the importance of involving cultural heritage professionals with different professional backgrounds and experience in the planning and practical implementation of the safeguarding measures, because only a multidisciplinary approach can be successful. Finally, let me express hope that this meeting will also help raise awareness of the importance of implementing the Hague Convention and its Second Protocol, thus promoting better knowledge of the agreements and ultimately supporting their universality.

¹ For a detailed commentary on Article 3, see Jiri Toman, *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 and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection*, Dartmouth Publishing Company/UNESCO, 1996, pp. 59–66.

² Information on the Implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague 1954, 1995 Reports, UNESCO document CLT-95/WS/13, Paris, December 1995.

³ In particular, see the Swiss and Slovenian national reports on the implementation of the Hague Convention, *ibid.*, pp. 44–45 and 42–43, respectively.

⁴ A. Noblecourt, *Protection of Cultural Property in the Event of Armed Conflict*, Paris, UNESCO, 1958.

⁵ Information on the Implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, *op. cit.*, p. 23.

⁶ Military objectives are defined as "... objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." (cf. Article 52(2) of Additional Protocol I of 1977 to the four 1949 Geneva Conventions for the protection of war victims, Protocols additional to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1977, p. 37.

⁷ To date, the Second Protocol has been ratified or acceded to by the following sixteen States Parties to the Convention: Argentina, Austria, Azerbaijan, Belarus, Bulgaria, Cyprus, El Salvador, the Federal Republic of Yugoslavia, the former Yugoslav Republic of Macedonia, Honduras, Libyan Arab Jamahiriya, Lithuania, Nicaragua, Panama, Qatar and Spain. Thus, the deposition of four additional instruments of ratification, acceptance, approval or accession with the Director-General of UNESCO is required for its entry into force.