The condition of cultural property in armed conflicts

From Antiquity to World War II

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PART II

From the mid-nineteenth century to World War II

1. This period was characterized by the inception and development—which was later intensified, especially after World War II—of the international codification of the law of war, which was thus no longer exclusively customary.

The real cornerstone of the codification of the new principles of civilization and humanity in the conduct of hostilities was a internal code which, owing to the intrinsic value of its provisions, greatly influenced the adoption of similar norms by other states and the creation of corresponding rules in international law.

I am referring to the lawyer Francis Lieber's "*Instructions for the Government of the Armies of the United States in the Field*" promulgated by President Lincoln in 1863, during the American Civil War.

The influence of Lieber's *Instructions* is quite obvious if we look at the codes of military regulations later promulgated in other countries for service in the field, and even more so if we consider that they were the starting point for the draft international agreement submitted at the Brussels Conference of 1874 and stimulated the adoption of the Hague Conventions of 1899 and 1907.

2. With respect to our topic, i.e. the protection of cultural property in armed conflicts, Lieber's *Instructions* stipulated that:
a) «The property belonging to churches,... to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts... is not to be considered public property...» (and may therefore not be appropriated by the victorious army) (Art. 34).
b) «Classical works of art, libraries, scientific collections, or precious instruments (...) as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.» (Art. 35).
c) «If such (property) belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace. In no case shall they be sold or given away (...), nor shall they ever be privately appropriated, or wantonly destroyed or injured» (Art. 36).
d) Appropriation of private property is punishable in conformity with penal law (Art. 37).

3. We mentioned that Lieber's *Instructions* had considerably influenced the development of military law, i.e. the codes of military regulations adopted by other States towards the end of the nineteenth century. Confirmation of this can be found in the military manuals issued to German, English, Spanish, French, Italian, Japanese and Russian troops, all of which contained similar, if not identical, terms.

For example:
a) The English code (1890) stipulated that movable and real property belonging to institutions dedicated to charity, education, sciences and others, such as churches, museums, libraries, collections of works of art and archives, must be protected in the same way as private property. All necessary steps must be taken to spare as much as possible such buildings from bombardment. Even if taken by assault, pillaging thereof was prohibited.
b) The Italian code (1882 and 1896) stipulated that during bombardments, buildings dedicated to religion and sciences (...) must be secured against all avoidable injury, provided they were marked with a distinctive sign recognizable at a distance and were not

beeing used at the same time for military purposes. In this connection, the code specified that the mere fact that such a building was used by the defenders as a look-out post exempted the attackers from any obligation to respect it. Pillaging was prohibited and so was the despoilment of the wounded, the dead and prisoners.
c) The Spanish code (1882) also stipulated that during bombardments, the property belonging to establishments of a charitable, religious, scientific or artistic character must, as far as possible, be spared. Looting by individual soldiers was prohibited; if a small military unit made a capture, the commander-in-chief decided whether such capture belonged to the State or to the unit: in the first case, he determined the amount of the cash bonus the members of the unit were to receive; in the second case, he determined the way in which the capture itself was to be distributed. Pillaging was prohibited, even during a fierce attack, and military contingents must be assigned to protect the population and property. Any threat of looting, or promises of spoils to spur on troops, were prohibited.
d) The Russian code (1895) stipulated that all measures must be taken to spare, as far as possible, places of worship, museums, establishments of education (...) provided they were marked with a distinctive sign which was to be communicated to the enemy beforehand. Pillaging was prohibited.

4. With respect to international law, the Brussels Conference (27 July to 27 August 1874) held on the invitation of Czar Alexander II, adopted a *Declaration* which was, in fact, a project of an international agreement concerning the laws and customs of war. As no government represented at the Conference was willing to be bound by the Declaration, it was never ratified and remained a draft. It was nevertheless an important step forward in the codification of the laws of war.

The *Brussels Declaration* stipulated that:
a) "The property of (...) institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property (i.e. respected). 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." (Art. 8).
b) During sieges and bombardments, "all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science,

or charitable purposes, hospitals and places where the sick and wounded are collected, provided they are not being used at the same time for military purposes. It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand". (Art. 17).

5. The same year (1874), the Institute of International Law started to establish rules of conduct in wartime. On 9 September 1880, it unanimously approved *The Laws of War on Land,* which became known as the *Oxford Manual*—after the name of the English town where the Institute's session took place. The Manual, repeating almost verbatim the relevant provisions set forth in the *Brussels Declaration,* stipulated that:

a) "In case of bombardment all necessary steps must be taken to spare, if it can be done, buildings dedicated to religion, art, science and charitable purposes, hospitals and places where the sick and wounded are gathered, on the condition that they are not being utilized at the same time, directly or indirectly, for defence. It is the duty of the besieged to indicate the presence of such buildings by visible signs notified to the assailant beforehand". (Art. 34).

b) "The property of municipalities and that of institutions devoted to religion, charity, education, art, and science, cannot be seized. All destruction or wilful damage to institutions of this character, historic monuments, archives, works of art or science, is formally forbidden, save when urgently demanded by military necessity" (Art. 53).

As can be seen, a formal reservation was nevertheless made in favour of military necessity, in the strict sense of the word. Unlike the *Brussels Declaration,* the *Oxford Manual* provided that "Offenders (against the rules contained therein) are liable to the punishments specified in the penal law" (Art. 84).

6. On 29 July 1899 at the First International Peace Conference, and on 18 October 1907 at the Second International Peace Conference (both Conferences were held at The Hague) among other instruments, two conventions concerning the laws and customs of war on land (Hague Convention No. II of 1899 and Hague Convention No. IV of 1907) were adopted.

With respect to the protection of cultural property, the two conventions, which are very similar, took up again the provisions set forth in the instruments mentioned in par. 4 and 5 above. If we study the Hague Regulations respecting the Laws and Customs of

War on Land (Annex to the Hague Convention No. IV of 1907) we notice that:

a) For sieges and bombardments (Art. 27), the provisions are almost identical to those set forth in Art. 34 of the Oxford Manual.

b) With regard to such property in occupied territories (Art. 56), the provisions were in substance the same of those set forth in Art. 53 of the Oxford Manual. However, the reservation in favour of military necessity (Art. 56) was left out, because the Hague Convention No. II of 1899 and the Hague Convention No. IV of 1907, to which the Regulations were annexed, already contained a general reservation applicable to all the Regulations ("as far as military requirements permit").

In the 1907 version, a new provision was added which stipulated that "a belligerent Party which violates the provisions of the Regulations shall (...) be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces" (Art. 3, Hague Convention No. IV of 1907).

Both Conventions, incidentally, made it an obligation for the contracting Powers to "issue instructions to their armed (...) forces which shall be in conformity with the Regulations" (Art. 1) and both contained the *"si omnes"* clause stating that "The provisions contained in the Regulations (...) apply (...) only if all the belligerents are parties to the Convention" (Art. 2).

7. One of the instruments adopted by the Second International Peace Conference of 1907 was the Hague Convention No. IX respecting Bombardment by naval forces in time of war of objectives on land. With respect to the protection of cultural property, Art. 5 of that Convention repeats verbatim the provisions contained in Art. 27 of the Regulations respecting the Laws and Customs of War on Land (see par. 6 above); it also specifies the distinctive signs to be used to indicate property which must be spared: "... stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white".

8. On 9 August 1913, the Institute of International Law adopted, at Oxford, a new *Manual* similar to that of 1880, but relative to naval war.

Art. 28 of the 1913 Oxford Manual repeats verbatim the provisions set forth in Art. 5 of the Hague Convention No. IX of 1907 respecting bombardments by naval forces of objectives on land.

9. Among the documents examined so far and concerning, in one way or another, the protection of cultural property during bombardments, it should be noted that the Hague Convention No. IV with its annexed Regulations governing land warfare (Art. 27 and 56) and the Hague Convention No. IX (Art. 5) had international force of law on the eve of the First World War. In this context, we must also mention the general restrictions imposed based on the distinction between defended and undefended localities: "The attack or bombardment (of localities) undefended is prohibited" (Art. 25 of the Regulations annexed to the Hague Convention No. IV). Art. 1 of the Hague Convention No. IX contains a similar prohibition. However, Art. 2 immediately goes on to make that prohibition less stringent, in that it permits the bombardment after notification of "Military works, military or naval establishments, depôts of arms and war material, workshops or plant which could be utilized for the needs of the hostile fleet or army (...)" This waiver was taken up again in the 1913 *Oxford Manual* (Art. 26).

10. With reference to the protection of cultural property, in addition to the above rules concerning attacks and bombardments, we must also examine the rules relative to pillaging—a custom as old as war itself.

Art. 44 of Lieber's *Instructions* prohibits all robbery, pillage or sacking and stipulates that "A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior".

The *Brussels Declaration* of 1874 (Art. 18 and 39), the 1899 *Oxford Manual* (Art. 32), the *Hague Regulations* of 1907 (Art. 28 and 46), the *Hague Convention No. IX of 1907 (Art. 7)* and the 1913 *Oxford Manual* all expressly prohibit pillage.

11. It is common knowledge that the international regulations established in 1907 proved inadequate to protect cultural property during the First World War: the increase in the attack potential, both land-based (increasing range of cannon) and sea-based (waiver mentioned in paragraph 9 above), and the advent of air warfare (1911-1912) made it impossible to delimit the zones of combat and to ensure the protection of cultural property, a protection which—disregarding recourse to reprisals—such a delimitation was intended to ensure.

In the face of the serious damage inflicted on the historic monuments of many cities in the countries involved in the war, various measures were taken by private institutions. In 1919, the Archaeological Society of the Netherlands, for instance, published a questionnaire and a memorandum which showed that the Hague Conventions had failed to stress the need for precautionary measures to be taken in peacetime for the protection of cultural property. The Society made several suggestions for the creation of art "sanctuaries", in order to protect a cultural heritage by whose destruction the belligerents could not—it said—benefit in any way and which did not belong to any country as such, but to all civilized people, present and future. Although the Dutch suggestions did not produce any tangible results at the time, they greatly contributed towards the creation of a sound code of principles for the protection of cultural property.

12. In the aftermath of the destruction wrought during the First World War, the Conference on the Limitation of Armaments held in Washington in 1922 adopted a resolution concluding that a Commission of jurists should be called to draw up rules concerning the control of air warfare. That Commission assembled at The Hague (December 1922—February 1923) and elaborated a code of Air Warfare Rules (the *Hague Rules,* as they are commonly called) which sets forth two important provisions for the effective protection in wartime of monuments of great historic value.

The first of these provisions (Art. 25) takes up, by analogy, the terms set forth in the Hague Conventions (see paragraphs 6 and 7 above) and stipulates that:

a) "In bombardments by aircraft, all necessary steps should be taken (...) to spare, as far as possible, buildings dedicated to public worship, art, science and charitable purposes, historic monuments (...) provided that such buildings, objectives and places are not being used at the same time for military purposes".

b) "Such monuments, objects and places must be indicated (...) by signs visible from the aircraft. Using such signs to indicate buildings, objects or places other than those hereinbefore specified shall be considered a perfidious act".

c) "The signs of which the above mentioned use is to be made shall be (...) a large rectangular panel divided diagonally into two triangles, the one white, the other black" i.e. identical to those provided for in Art. 5 of the Hague Convention No IX of 1907 (see above, paragraph 7).

d) "... to ensure by night the protection of (...) privileged buildings, the necessary steps must be taken to make the aforesaid special signs sufficiently visible".

The other provision (Art. 26) aims more specifically at the protection of monuments of great historic value provided the States abstain from using such monuments and the area surrounding them for military purposes and acccept a special system of control to this end.

Art. 26 reads as follows:

1) "A State (...) may establish a protected area around such monuments (...). In time of ware, such areas shall be sheltered from bombardments".

2) "Monuments around which such area is to be established shall already be, in time of peace, the object of a notification addressed to the other Powers (...); the notification shall also state the limits of such areas. This notification cannot be revoked in time of war".

3) "The protected area may include, in addition to the space occupied by the monument or the group of monuments, a surrounding zone, the width of which may not exceed 500 metres from the periphery of the said space".

4) "Marks well visible from the aircraft, both by day and by night, shall be employed to (...) identify the limits of the areas".

5) "The marks placed on the monuments themselves shall be those mentionned in Art. 25. The marks employed to indicate the areas surrounding the monuments shall be fixed (by the State concerned) and shall be notified to the other Powers together with the list of monuments and areas".

6) "Every improper use of the marks (...) shall be considered an act of perfidy".

7) "A State which accepts the provision of this Article should abstain from making use of the historic monuments and the zone surrounding them for military purposes or for the benefit of its military organization in any manner whatsoever and should also abstain from committing, in the interior of such monument or within such zone, any act for military purposes".

8) "A commission of control (...) shall be appointed for the purpose of ascertaining that no violation of the provisions of Paragraph 7 has been committed".

In this connection, several comments are necessary. According to the *Hague Rules,* a notification of a given historic monument

may be contested by other Powers; in addition, the procedure is optional; and finally, Art. 24 of the Rules lists the objectives against which air bombardment is legitimate.

"Although the Air Warfare Rules have not been ratified they are of importance as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war" (Oppenheim-Lauterpacht, *International Law,* Seventh Edition, Vol. II, p. 519).

13. On 15 April 1935, a Treaty on the Protection of Artistic and Scientific Institutions and of Historic Monuments was signed in Washington; it is usually referred to as the Washington Pact, or *Roerich Pact,* after the name of its initiator.

The *Roerich Pact,* which was drawn up by the Governing Board of the Pan-American Union and related to the American continent, stipulated that:

1) "The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents... in time of peace as well as in war. The same respect and protection shall be due to the personnel of the institutions mentioned above.

2) "The neutrality of, and protection and respect due to, the monuments and institutions mentioned in the preceding Article, shall be recognized in the entire expanse of territories subject to the sovereignty of each of the Signatory and Acceding States, without any discrimination as to the State allegiance of said monuments and institutions. The respective Governments agree to adopt the measures of internal legislation necessary to ensure said protection and respect.

3) "In order to identify the monuments and institutions mentioned in Art. 1, use may be made of a distinctive flag (red circle with a triple red sphere in the circle on a white background).

4) "The Signatory Governments (...) shall send to the Pan American Union (...) a list of the monuments and institutions for which they desire the protection agreed to in this Treaty.

5) "The monuments and institutions mentioned in Art. 1 shall cease to enjoy the privileges recognized in the present Treaty in case they are made use of for military purposes."

14. Further attempts to draft a more comprehensive convention for the protection of monuments and works of art in time of war were undertaken by private institutions; in 1939, for instance, a

draft convention was elaborated under the auspices of the International Museums Office. As Vedovato observed, "it founded the protection of monuments on the lack of any military reason for destroying them, since the countries in which they are situated are merely their custodians and as such accountable for their fate to the international community".

Hence: a) the duty to remove movable cultural property from combat zones and the creation of refuges intended to shelter such property from damage in the event of armed conflict; the isolation of the monuments and works of art from any important military objective. b) some provisions and procedures were taken either from the *Hague Air Warfare Rules* or from the *Roerich Pact.*

The draft was approved by the League of Nations in September 1938 and distributed on 12 January 1939.

Another draft convention on the protection of historic monuments was drawn up by an international association called *Lieux de Genève,* which used the experience it had acquired during the Spanish Civil War (1936-1939), in which it had managed to set up neutralized refuges in Madrid and Bilbao, and during the Sino-Japanese conflict, in which it had succeeded in instituting safety zones in Shanghai, Nantao and Nankin. Compared to the *Hague Air Warfare Rules* and the draft convention of the International Museums Office, the draft convention drawn up by the *Lieux de Genève* was yet another step forward.

15. We have thus reached the Second World War (1939-1945) in which, for want of valid international instruments and adequate legislation drawn up in time of peace, the protection of historic monuments was virtually limited to the institution of "open cities" provided for in Art. 25 of the Regulations annexed to the Hague Convention No. IV and in Art. 1 of the Hague Convention No. IX (1907) which prohibit bombardment of undefended localities. But since the proclamation of an "open city" was not always recognized by the enemy, it did not always succeed in ensuring protection of cultural property.

CONCLUSION

In the first part of our brief study, we cast a cursory, yet informative glance—so I hope, at any rate—at the condition of cultural property in armed conflicts from Antiquity to the Napoleonic Wars.

I have used the term "condition" because, as we have seen, the term "protection" would not have been appropriate, except on a few rare occasions when individuals—soldiers with a certain cultural background or wishing to display works of art as a status symbol—respected cultural property either because of their religious feelings or of their understanding of the arts.

It is impossible to evaluate or even imagine the loss sustained by civilization as a result of the annihilation of movable and immovable cultural property through senseless burning, riotous demolition and all kinds of destruction which aimed, *inter alia,* at facilitating transport or making sale less difficult, for instance by melting down the precious metal of which some works of art were made—gold, silver, bronze—to mint coins.

It is not possible either to evaluate the losses resulting from the hiding of works of art which have not (or not yet) been rediscovered.

Despite this picture of general devastation, we must not forget that the works of art that were removed as spoils of war, but not actually destroyed, have contributed, in the course of the various changes of ownership they underwent, to cultural exchanges which enable us to follow their history.

Napoleon's case is typical: the professed objective of his methodical and large-scale pillaging was to enrich the culture of France; that objective was of course illicit, since it was achieved by divesting other peoples—the legitimate owners—of their historical and artistic heritage. In 1815, however, the Vienna Congress settled the matter of Napoleon's captures.

2. The second part of our study covered a much shorter period, extending from the mid-nineteenth century to the eve of the Second World War. We stopped there, assuming that everyone was only too familiar with the disastrous effects World War II had on cultural property, either through destruction—especially by means of incendiary or conventional bombs—or through acquisition by way of allegedly lawful means. Some of the many works of art removed from Italy at that time, subsequently recovered and presently [1] exhibited at the Palazzio Vecchio in Florence, bear witness to the latter procedure.

In connection with the codification of the laws of war during that second period, which stretches over about a century, the first tentative measures were taken reflecting a veering of opinion in

[1] November 1984.

favour of some form of protection for cultural property, not only against the ravages of war, but also, precisely, against misappropriation. These measures show, in retrospect, how long, arduous and sometimes convoluted a path ethics had to follow before becoming an integral part of law.

The fact that these measures were totally inadequate—mainly because the provisions made were nullified by the "military necessity" clause (a necessity which, as the reputed military commander Gen. Eisenhower once wryly said, sometimes conceals military and even personal convenience)—is corroborated by the increasingly frequent and insistent initiatives which eventually led to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and to the inclusion, in 1977, of complementary regulations in Protocol I additional to the Geneva Conventions. Admittedly, the present system is not perfect, but it is nevertheless a sound basis and its implementation, at any rate, is entrusted to the conscience of governments and individuals. We cannot but draw a lesson from the numerous precedents to be found in history, from Polybius to Cicero, from Plutarch to Procopius, from Vattel to Quatremère de Quincy, from Lieber to the Archaelogical Society of the Netherlands, from the Hague Regulations of 1907 to the Air Warfare Rules of 1922 and to the Roerich Pact. This means that in the course of this long period, rules of customary law have gradually emerged which require States—even those not bound under positive law—to respect cultural property.

Does this allow us to hope that, in future, the fate of cultural property in times of war will be less tragic than in the past?

We shall eschew all pessimism, for the answer to our question may lie in historicism, that philosophical theory which seeks to explain any socio-cultural phenomenon by closely correlating it to the historical context—the setting and point in time—in which it occurred.

The many paths travelled by mankind in its long and tormented history are ineluctable and each has led towards the ultimate goal. The course of this historical evolution is like an endless spiral along which the institutions established mirror the facets of their times, in the same way as each era reflects its own truth.

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