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THE DOCTRINE OF MILITARY NECESSITY AND THE PROTECTION OF CULTURAL PROPERTY DURING ARMED CONFLICTS

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I. INTRODUCTION

"Nothing can stand against the argument of military necessity." [1]

The difficulties of balancing the interests of the military in an armed conflict with the protection of cultural property[2] in an archaeo-

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1. General Dwight Eisenhower, Order of the Day, Dec. 24, 1943, *in* JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 74 (1996).

2. Throughout this Article the term "cultural property" will be used rather than the broader term "cultural heritage." For a discussion of these terms see Lyndel V. Prott & Patrick J. O'Keefe, *Cultural Heritage or Cultural Property*, 2 INT'L J.

logically rich state such as Iraq are immense.[3] During armed conflict, cultural property can be damaged for numerous reasons, either intentionally as a target, particularly if used to "shield" military hardware or personnel;[4] or inadvertently as "collateral damage," often arising from ignorance as to the cultural value of the property. A conflict naturally arises when balancing the needs to successfully complete a military operation and preserving the cultural property. This conflict was clearly illustrated in the now notorious incident of the looting and damaging of the Baghdad Museum.[5] The key to resolving this conflict may be found in the humanitarian law doctrine of military necessity,

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CULTURAL PROP. 307 (1991) and Janet Blake, *On Defining the Cultural Heritage,* 49 INT'L & COMP. L.Q. 61 (2000).

3. Much of Iraq has been inhabited for over 7000 years. It encompasses the birthplace of the city-states that made up Mesopotamia. The Sumerian culture that settled in the area between the Tigris and Euphrates rivers developed some of the earliest forms of writing and legal structures that now underpin most modern societies. Harvey E. Oyer III, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict – Is It Working? A Case Study: The Persian Gulf War Experience*, 23 COLUM.-VLA J.L. & ARTS 49, 57 (1999).

4. For example, the Iraqi military stationed military vehicles between the museum complex and the Arch of Ctesiphon on the third-century BC archaeological site despite the museum complex being marked by the blue shield designating protection under the 1953 Hague Convention. *Iraq Accused of Sheltering Behind Antiquities,* THE AGE, April 2, 2003, *available at* http://www.theage.com.au/articles/2003/04/02/1048962802405.html. During the 1991 Gulf War, Iraq stationed two fighter aircraft adjacent to the Temple of Ur. It is not clear what the Iraqis' intention was in doing so. Kevin Chamberlain maintains that this was done in the hope that the possibility of damaging the temple would deter any attempt to destroy the aircraft. Kevin Chamberlain, *The Protection of Cultural Property in Armed Conflict*, 8 ART ANTIQUITY & L. 209, 210 (2003); *see* Marion Forsyth, *Casualties of War: The Destruction of Iraq's Cultural Heritage as a Result of U.S. Action During and After the 1991 Gulf War,* 14 DE PAUL-LCA J. ART & ENT. L. & POL'Y 73, 91 (2004).

5. Matthew Bogdanos, *Briefing on the Investigation of Antiquity Loss from the Baghdad Museum* (Sept. 10, 2003), http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID+3149. For an account of the looting and the value of the loses sustained by the Museum, see THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA (Milbry Polk & Angela M. H. Schuster eds., 2005); DAN CRUICKSHANK & DAVID VINCENT, PEOPLE, PLACES AND TREASURES UNDER FIRE IN AFGHANISTAN, IRAQ AND ISRAEL 126-27 (2003); and McGuire Gibson, *Cultural Tragedy in Iraq: A Report on the Looting Of Museums, Archives, and Sites,* 6 (1) INT'L FOUND. ART RES. J. (2003), *available at* http://www.ifar.org/joun_main.htm (last visited Jan. 13, 2007).

and in particular, its manifestations in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[6]

II. THE DOCTRINE OF MILITARY NECESSITY

The doctrine of necessity underlies both *jus ad bellum* and *jus in bello*. *Jus ad bellum* refers to the legal norms which restrict the circumstances in which states can resort to the use of force, while *jus in bello* refers to the placing of limits on the manner in which hostilities are conducted when restraints on the use of force fail.[7] This distinction is reflected in the notion that *jus in bello* applies at the advent of armed conflict to all parties, irrespective of which party was the aggressor or the basis upon which the armed conflict is waged (*jus ad bellum*).[8] The relationship between *jus ad bellum* and *jus in bello* is, however, more complex than may be first apparent. *Jus ad bellum* focuses on the actions of states, and the principle of necessity determines whether a situation warrants the use of armed force.[9] Modern application of the principle of necessity is restricted to the use of force in self-defense or in accordance with the collective security system established under Chapter VII of the United Nations Charter, and aims to maintain the international peace and security.[10] While debate may arise in any given situation as to whether the need to resort to armed conflict has arisen, there is agreement that such a debate is required; that is, that the requirement of necessity must be met.[11] If this requirement of necessity is met, states are not then free to wage *unre-*

6. United Nations Educational, Scientific and Cultural Organization [UNESCO], Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Hague Convention on Cultural Property 1954], *reprinted in* THE LAWS OF ARMED CONFLICTS 999 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004). As of May 9, 2005 there were 114 states party to the Convention. *Id.*

7. JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 1 (2004). For a discussion on the origin of the terms *jus ad bellum* and *jus in bello*, see Robert Kolb, *Origin of the Twin Terms Jus ad Bellum / Jus in Bello*, 320 INT'L REV. RED CROSS 553 (1997).

8. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 2-4 (2004).

9. GARDAM, *supra* note 7, at 12.

10. *Id.* at 6; DINSTEIN, *supra* note 8, at 1.

11. GARDAM, *supra* note 7, at 4-7.

stricted warfare.[12] The forceful response must be proportionate to the legitimate aims of the use of force.[13] If, for example, armed force is required as a measure of self-defense, the force used by a state must be the minimum that is required for self-defense.[14] This proportionality requires consideration of the level of destruction of enemy territory, infrastructure, and property, as well as levels of combatant casualties and collateral civilian damage.[15] These considerations are based on humanitarian needs not at the level of the individual, but at the level of the state, and in theory are distinguishable from the individual humanitarian considerations that underpin *jus in bello*.[16] Unlike *jus ad bellum*, this evolving body of *jus in bello*, or more appropriately termed "international humanitarian law," operates at the level of the individual.[17]

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12. Christopher Greenwood, *Historical Development and Legal Basis, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 1, 30-31 (Dieter Fleck ed., 1995).

13. GARDAM, *supra* note 7, at 12 (noting the difficulty of answering "the question of 'proportionate to what?'").

14. Greenwood, *supra* note 12, at 30. For example, the right of the United Kingdom to use force in response to Argentina's invasion of the Falkland Islands would not justify an invasion and complete submission of Argentina. *Id.* at 30-31. Similarly, the amount of force that could be used by the Coalition forces in the Persian Gulf in 1991 would only be that required to achieve the aims of the Security Council Mandate in Resolution 678 - that is, "the expulsion of Iraqi forces from Kuwait, ensuring Iraqi compliance with all relevant Security Council Resolutions, and the restoration of peace and security in the region." *Id.*; *see also* MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER 72 (1994) (explaining the fundamental policy underlying the concept of military necessity as the minimization of "unnecessary destruction of values"); GARDAM, *supra* note 7, at 16 (rationalizing proportionality in self-defense actions as preventing unnecessary destabilization of the greater international security environment).

15. GARDAM, *supra* note 7, at 16-17.

16. *Id.* at 17, 19.

17. *Id.* at 17; *see also* UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 2 (2004) (noting the modern trend toward using the phrase "international humanitarian law" in place of *jus in bello*). Humanitarian law is described as that which "comprises all those rules of international law which are designed to regulate the treatment of the individual – civilian or military, wounded or active – in international armed conflict." PfP Consortium Working Group on Curriculum Development, Reference Curriculum on International Humanitarian Law 2 (June 17, 2002) (unpublished manuscript, *available at* http://www.isn.ethz.ch/

In contrast to the application of necessity in *jus ad bellum*, necessity in *jus in bello* has developed to take the form of the more elusive doctrine of "military necessity."[18] The nature and scope of this doctrine have long been uncertain.[19] The doctrine is most often used in a sense which requires a balance between the need to achieve a military victory and the needs of humanity.[20] In this sense, necessity has been viewed as a limitation to unbridled barbarity. The application of the doctrine of military necessity makes use of the principle of proportionality as a mechanism for determining the positioning of a fulcrum between these competing poles.[21] Using proportionality thus gives effect to the recognition that the choice of methods and means of conducting war or armed conflict are not unlimited.[22]

While in theory necessity and proportionality are applied differently in *jus ad bellum* and *jus in bello*, in practice it may be difficult to satisfactorily distinguish and apply these concepts.[23] This difficulty is due to the challenges of relating military necessity as a restraint on actions to the objectives of those actions. The means and methods of conducting war operate to achieve a particular military objective, which consequently assists in achieving a larger political objective.[24]

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wgcd/Ref_curricula/rc_IHL_Klappe_2002-06-06.doc) (attributing this definition to Christopher Greenwood); *see also* Greenwood, *supra* note 12, at 33-34 (discussing international humanitarian law's binding effect on the individual); GARDAM, *supra* note 7, at 19 (identifying the individual as international humanitarian law's primary focus).

18. *See* GARDAM, *supra* note 7, at 4-8.

19. Hilary McCoubrey, *The Nature of the Modern Doctrine of Military Necessity*, 30 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 215, 218 (1991); *see also* GARDAM, *supra* note 7, at 2.

20. GARDAM, *supra* note 7, at 2.

21. *See* MCDOUGAL & FELICIANO, *supra* note 14, at 522-23 (observing that in abstract, humanity and military necessity appear to be "tautologous opposites" and describing the wartime decision-making process as "a continuous effort to adjust and accommodate the specific requirements of both these interests in a series of concrete contexts").

22. GARDAM, *supra* note 7, at 10.

23. Gardam explains that this ambiguity is also partly because the application of these concepts in *jus ad bellum* does "incorporate overtly humanitarian consideration," though not necessarily at the level of the individual. GARDAM, *supra* note 7, at 17.

24. *See* MCDOUGAL & FELICIANO, *supra* note 14, at 525.

While necessity might determine the legitimacy of the armed attack, proportionality determines the amount of force that might be used.[25] In a sense, necessity operates at a macro level, while international humanitarian law operates at a micro level, though both might lie on the same continuum given the difficulties in the transition between *jus ad bellum* and *jus in bello*.[26] This difficulty is most apparent when the principles of necessity and proportionality have been incorporated into conventional international law, particularly international humanitarian conventions. The development of these conventions, and the application of these principles require some consideration if one is to arrive at an understanding of their application in a modern armed conflict.

A. The Development of Military Necessity in International Humanitarian Law

Throughout history, mankind's most basic human nature has restricted the manner in which wars are fought. The earliest writings of ancient civilizations evince attempts to limit the ways of war and to codify the resulting rules.[27] The underlying theory is assumed to lay in

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25. GARDAM, *supra* note 7, at 11-12.

26. Gardam illustrates these differences by referring to the air campaign undertaken by the United States in the 1990-1991 Persian Gulf conflict. GARDAM, *supra* note 7, at 21. One aim of this conflict was to incapacitate the Iraqi regime, which could be achieved through destruction of the Iraqi electricity production facilities and telecommunications system. *Id.* Air strikes were used to achieve these aims. *Id.* The legitimacy of this aim of incapacitating the regime and this chosen manner of achieving it is a matter of proportionality in *jus ad bellum*. *Id.* Similarly, consideration as to whether an attack on a state's museums is proportionate to the objective of demoralizing an enemy is a question of proportionality in *jus ad bellum*. *Id.* On the other hand, the detailed conduct of each air strike is governed by the proportionality requirement of *jus in bello*, taking into consideration, for example, the need to destroy a particular telecommunications facility by way of an air strike without endangering civilian lives or damaging nearby cultural or civilian property. *Id.*; *see also* William V. O'Brien, *The Meaning of Military Necessity in International Law*, 1 WORLD POLITY 109, 113 (1957) (distinguishing between military necessity and state necessity, stating: "State necessity manifests itself on the level of international politics and diplomacy rather than at the level of competing military commanders").

27. The earliest written evidence of a systematic code was that of the Saracens, based on the Koran. Written treaties on *jus in bellum* might be said to begin in 1598 with the publication of Gentilis' *De iure belli*, followed in 1625 by Grotius' *De iure belli ac pacis*. Rousseau's *Le Contrat Social* in 1772 further influenced the development of humanitarian law, as did Henry Dunant's *Un Souvenir de Solfirino* in

the acceptance that, while the object of warfare is to achieve the submission of the enemy, which may require the disabling of as many enemy combatants as possible, this should only be achieved in a manner that does not cause any unnecessary suffering or damage.[28] This limitation to the means of waging war is not, however, necessarily humanitarian in nature, and much of the early restraints were based on economic, political, and military considerations.[29] However, the need for a balance between the considerations of humanity and the military actions necessary to win a war is regarded as defining the very nature of international humanitarian law, making military necessity a central principle in this balance.[30] Military necessity has been described as "a basic principle of the law of war, so basic, indeed, that without it there could be no law of war at all."[31]

The codified restraints on war did not, however, prevent the commission of wartime atrocities, and wars of past centuries were often no more savage than the wars of the last 100 years.[32] Technological developments in the eighteenth and nineteenth centuries, however, required the revision of many of the existing restraints to war. These developments coupled with the eighteenth century movement to humanize war culminated in the adoption of a number of important texts. The first text is the Instructions for the Government of Armies of the United States in the Field in 1863, known as the Lieber Code.[33] While

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1862. *See* HILARY MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENT IN THE LIMITATION OF WARFARE 8-17 (2d ed. 2004); A.P.V. ROGERS, LAW ON THE BATTLEFIELD 1 (2d ed. 2004); Greenwood, *supra* note 12, at 6-7.

28. Greenwood, *supra* note 12, at 30. The Handbook of Humanitarian Law in Armed Conflict reflects the Joint Service Regulations for the German military, stating that "[i]n war, a belligerent may apply only that amount and kind of force necessary to defeat the enemy. Acts of war are only permissible if they are directed against military objects, if they are not likely to cause unnecessary suffering, and if they are not perfidious." *Id.*

29. Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 53 (1994); GARDAM, *supra* note 7, at 17.

30. DINSTEIN, *supra* note 8, at 16.

31. O'Brien, *supra* note 26, at 110.

32. af Jochnick & Normand, *supra* note 29, at 59-60.

33. Instructions for the Government of Armies of the United States in the Field, U.S. War Dep't General Orders No. 100 (Apr. 24, 1863) [hereinafter Lieber

states had previously laid down rules as to how their armed forces should be internally controlled and disciplined, and scholars had long proposed rules on the manner in which states should conduct war and treat each other's combatants, citizens, and property; the Lieber Code was the first formal set of rules laid down by a state as to how both its own armies and that of its enemies should be treated.[34] The Code had a profound influence on the subsequent conventional development of international humanitarian law. One of its lasting legacies is the emergence of the humanitarian law principle that the conduct of war is subject to the concept of military necessity.[35] Article 14 of the Code states, "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."[36]

Military necessity is here firstly defined in a *jus ad bellum* context, applying the principle to the measures that are indispensable, and not simply convenient or expedient, to achieve the aim of the actual conflict. Burris M. Carnahan traces the history of this drafting to President Abraham Lincoln's desire to ensure that he acted within the President's constitutional war powers, and that all acts be limited to those that achieved a military rather than political purpose.[37] As such, having determined politically that war is unavoidable, a state is limited to only those acts which are indispensable to the aim of the conflict.[38] But Article 14 also goes on to add that the acts of the state must

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Code], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 3. Drafted by Francis Lieber, a law professor at Columbia University, the code was in response to the necessity of providing detailed rules of war for the huge number of volunteer officers and men engaged in the U.S. Civil War. *See* Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 214 (1998).

34. The Lieber Code was drafted in the context of a Civil War, and while the Union did not wish to recognize Confederate forces as those of a sovereign state, it nevertheless regarded the conduct of the conflict as if it were between international belligerents for the purposes of the emerging humanitarian law. *See* RICHARD S. HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR PRECEDENT 2 (1995).

35. Carnahan, *supra* note 33, at 213.

36. Lieber Code, *supra* note 33, art. 14.

37. Carnahan, *supra* note 33, at 220.

38. *Id.* at 222.

also be "lawful according to the modern law and usages of war."[39] The latter is given context by Articles 15 and 16. Article 15 lists a number of military objectives which are legitimate to achieve the aims of a conflict.[40] The positive listing of legitimate aims naturally has a limiting effect, though the Article does not appear to have been intended to be exhaustive. Article 16, however, reflects the limiting role of military necessity in *jus in bello*, declaring that:

> Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any war, nor of the wanton devastation of a district. It admits of deception but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.[41]

Thus military necessity in Article 14 is used in two senses: the first directs states in the actions that may be indispensable to the war; the second limits the means and methods of undertaking these actions. It is applied to matters of *jus ad bellum* and *jus in bello* as if they were on the same continuum. The additional phrase contained in Article 14, describing those means that are "lawful according to modern law and

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39. Lieber Code, *supra* note 33, art. 14.

40. *Id.* art. 15. Article 15 states:

> Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

Id.

41. *Id.* art. 16.

usages of war,"[42] in itself contains the second usage of military necessity, as defined in Articles 15 and 16.

The use of military necessity in two senses had unfortunate consequences, and raised the specter of its use as a means or justification for the waiving of rules. This possibility was raised by the Confederacy. Confederate Secretary of War James Seddon said that "in this code of military necessity . . . the acts of atrocity and violence which have been committed by the officers of the United States and have shocked the moral sense of civilized nations are to find an apology and defense."[43] This is directed not at the military necessity identified in Article 16, but that of Article 14, suggesting that this allowed any method of warfare that was "indispensable for securing the ends of war."[44] The Union had, for example, considered that seizure and destruction of cotton, not for use by the Union forces, but to harm the Confederate economy, was a military necessity.[45] So too was the emancipation of slaves in rebel areas.[46] President Lincoln had originally promised to respect all private property and not interfere with slavery in the Confederate States, but as winning the war began to prove more difficult, the aims of the war changed, as did the acts of the Union to reflect what was necessary in light of the changing aims.[47] This evolving use of military necessity as a justification rather than a limitation sowed the seeds for the development of the principle of *Kriegsraison geht vor Kriegsmanier*: the principle developed in Germany prior to World War I under which military necessity outweighed any rule of humanitarian law.[48]

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42. *Id.* art. 14.

43. Carnahan, *supra* note 33, at 217 (quoting Letter from James A. Seddon, Secretary of War, Confederate Army, to Colonel Robert Ould, Confederate Agent for Exchange of Prisoners (June 24, 1863)), *reprinted in* HARTIGAN, *supra* note 34, at 120, 123.

44. Lieber Code, *supra* note 33, art. 14.

45. Carnahan, *supra* note 33, at 226.

46. *Id.*

47. *Id.* at 227.

48. Michael G. Cowling, *The Relationship Between Military Necessity and the Principle of Superfluous Injury and Unnecessary Suffering in the Law of Armed Conflict*, 25 S. AFR. Y.B INT'L L. 131, 136 (2001). Cowling notes that it was the adoption of the Lieber Code by Prussia in 1870 which paved the way for the development of the doctrine of *Kriegsraison*. *Id.* The doctrine of *Kriegsraison* was, for example, used by Germany to justify the devastation to the Somme region during the

The perception that humanitarian law acted as a limitation to the means and methods of waging war finds conventional expression in the 1864 Geneva Convention for the Amelioration of the Condition of Wounded in Armies in the Field.[49] Inspired by Henry Dunant, the founder of the Red Cross movement, the Convention recognized the right of wounded personnel to medical assistance as well as their right, shared with those providing this assistance, to protection and respect from belligerent forces.[50] Similarly, the 1868 Declaration of St. Petersburg may be regarded as a consequence of the realization that the increasing "arms race" and subsequent technological developments in arms and ammunitions could cause immense suffering to combatants.[51] The Declaration recognizes that "[t]he *only* legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy" and "[t]hat for this purpose it is *sufficient* to disable the greatest possible number of men."[52] Having legitimized these aims of war, the Declaration then proceeds to determine how "the necessities of war ought to yield to the requirements of humanity" in relation to the use of certain small caliber exploding projectiles.[53] It was concluded that, because the use of these exploding projectiles would needlessly aggravate the suffering and rate of death of combatants, it would be against the laws of humanity to employ them.[54] Military necessity appears to be employed in a limiting sense that outlaws certain behavior that is not necessary to achieve a military objective. However, in neither the 1864 Convention nor the 1868

German retreat in 1917 and 1918. BURLEIGH C. RODICK, THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW 60 (1928). For a more detailed discussion of the principle proponents of this view, see O'Brien, *supra* note 26, at 118-28.

49. Convention for the Amelioration of the Condition of Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, T.S. No. 377, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 365.

50. DINSTEIN, *supra* note 8, at 10; Convention for the Amelioration of the Condition of Wounded in Armies in the Field, *supra* note 49, arts. 3, 6.

51. *See* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 91 (identifying Russian military authorities' modification of a projectile to explode on contact with a soft substance as impetus for adopting treaty to prohibit this "inhuman instrument of war").

52. Declaration of St. Petersburg, Nov. 29, 1868, 138 Consol. T.S. 297 (emphasis added).

53. *Id.*

54. *Id.*

Declaration did the limitations materially alter the manner in which wars were then waged; rather they acted to legitimize uses not then codified.[55]

The difficulty in delimiting military necessity in the context of reaching agreement among a large number of states with different military capabilities gave rise to the development of a mechanism to privilege military considerations over humanitarian considerations in some circumstances. The growing body of limitations on the means and methods of waging war introduced the perception that too strict an adherence to these rules would lead to military disadvantage.[56] Thus, it was concluded that while the proscriptive conventional norms might be viewed as a default fulcrum between the poles of humanity and military necessity, certain specific military situations might require moving this fulcrum.[57]

The development of international humanitarian law by way of conventional provisions which may appear to act as limitations culminated in the Hague Conventions of 1899 and 1907.[58] At first glance, the Hague Conventions are couched in humanitarian terms that act as limitations. For example, Article 22 of Convention (II) with Respect to the Laws and Customs of War on Land, states that "[t]he rights of belligerents to adopt means of injuring the enemy are not unlimited" while Article 23 prohibits the employment of "arms, projectiles, or material of a nature to cause superfluous injury."[59] Unfortunately, what constitutes a "superfluous injury" is not defined, and the limitations placed on the means of conducting warfare are those which do not impede military needs.[60] This military favoritism is the result of

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55. For example, af Johnick and Normand note that the weapons forbidden in the 1868 Declaration were, at the time the Declaration was concluded, unreliable and obsolete. af Jochnick & Normand, *supra* note 29, at 66-67.

56. INGRID DETTER, THE LAW OF WAR 395 (2d ed. 2000).

57. MCDOUGAL & FELICIANO, *supra* note 14, at 523. "Historically . . . the line of compromise has, more frequently than not, tended to be located closer to the polar terminus of military necessity than to that of humanity." *Id.*

58. DINSTEIN, *supra* note 8, at 9-10.

59. Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429 [hereinafter Convention (II) of 1899], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 60.

60. For examples of limitations which did not in fact limit the manner in which wars were conducted at the time, see af Jochnick & Normand, *supra* note 29, at 72-74.

the conference considering military necessity when drafting the rules; therefore each rule was framed "so as to make its observance possible from the military point of view."[61] Thus, when a rule was stated which was not qualified by a military necessity exception, it was assumed that all military concerns had been considered and discounted in the formulation of the rules.[62] There are, however, relatively few rules in the Hague Conventions which are not qualified. Most rules, like Article 23(g) of Convention (II) of 1899, which aims to protect the enemy's property, are subject to an exception when "imperatively demanded by the necessities of war."[63] The overriding interests of the military necessity exception are prevalent in the preamble to Convention (II) of 1899, which declares that:

> In the view of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war *so far as military necessities permit*, are destined to serve as general rules of conduct for belligerents in their relations with each other and with populations.[64]

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61. O'Brien, *supra* note 26, at 130.

62. *Id.*

63. *Id.* For examples, see Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Convention (IV) of 1907], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 66, 67, 73, 80. Article 54 states that "[s]ubmarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity." *Id.* art. 54. Article 5 states that "[p]risoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits, but they cannot be confined except as in indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist." *Id.* art. 5. Article 23(g) states that it is forbidden "[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." *Id.* art. 23. *See also* RODICK, *supra* note 48, at 60.

64. Convention (II) of 1899, *supra* note 59, pmbl. (emphasis added). The preamble to Convention (IV) of 1907 contains a substantially similar provision, though the wording has been altered somewhat. It reads: "According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants." Convention (IV) of 1907, *supra* note 63, pmbl.

The general tenor of the Hague Conventions is that, through structured rules, military necessity will limit unrestricted warfare. However, military necessity was reintroduced as a justification to evade these newly structured rules. This approach legitimizes conduct that is required by military necessity, and in effect, serves to do the opposite of what the limitation seeks to achieve.

This approach to military necessity was followed by a number of international humanitarian conventions, including the 1929 Convention on Prisoners of War,[65] and reached its zenith in the Geneva Conventions of 1949. The latter contains several provisions which allow military necessity to justify waiver of express rules.[66] In particular, Article 27 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War provides that, "the Parties to the conflict may take such measures of control and security in regard to protected persons *as may be necessary as a result of war*."[67] This section justifies possible evasion, based on military necessity, of almost all of the convention provisions. The resulting conventional regime only prohibited those means and methods of waging warfare which were relatively unimportant to the military, but provided a vague and potentially wide exception to those methods and means of military importance. As William V. O'Brien concluded in 1957, "[t]he law of war itself is dominated by prohibitions of outmoded and ineffective means.

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65. Convention Between the United States of America and Other Powers, Relating to Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 421. Article 1 provides that the Convention applies "[t]o all persons belonging to the armed forces of belligerent parties, captured by the enemy in the course of military operations at sea or in the air, except for such derogations as might be rendered inevitable by the conditions of capture."

66. *See* Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 12, 42, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 459, 465, 475; Geneva Convention Relative to the Treatment of Prisoners of War arts. 8, 23, 76, 126, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 507, 515, 521, 538, 556; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 49, 83, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 575, 594, 604.

67. Geneva Convention (IV), *supra* note 66, art. 27 (emphasis added).

When more efficacious means are restricted, it is generally under the qualifying exception of military necessity."[68]

The 1977 Protocol I Additional to the 1949 Geneva Convention continues this trend, because it contains extensive reference to military necessity as a justification for the evasion of rules.[69] Military necessity now takes on a sinister form. It is regarded as a principle in conflict with humanitarian values, rather than a general limitation on the means and methods of waging warfare.[70] Thus, while earlier conventional codifications of the law of war appear to use military necessity as a limitation on the means and methods of waging war, a narrower conception of necessity has developed in later conventions to act as a justification rather than a limitation, and which have acted to "privilege military necessity at the cost of humanitarian values."[71] This mechanism raises a specter that reinvigorates the principle of *Kriegsraison geht vor Kriegsmanier.*[72]

B. Military Necessity as a Basis for the Evasion of Humanitarian Norms

It is generally accepted that conventional international humanitarian norms were constructed to account for the requirements of military necessity, and therefore they achieve a balance between these requirements and the needs of humanity.[73] As such, the "default posi-

68. O'Brien, *supra* note 26, at 135.

69. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol Additional to the Geneva Conventions], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 711; *see also* McCoubrey, *supra* note 19, at 218.

70. *See* Protocol Additional to the Geneva Conventions, *supra* note 69, art. 54(5), (2). Article 54(5) qualifies Article 54(2) by allowing for a scorched earth policy to be legitimately adopted in that foodstuffs and agriculture may be destroyed even though these may be indispensable to the survival of the civilian population if this is required by imperative military necessity. *See also* O'Brien, *supra* note 26, at 140 (discussing the "Hostage" case in which the Nuremberg Military Tribunal accepted the justification of military necessity in relation to a scorched earth policy adopted by Germany in Finland to stall a Russian assault).

71. af Jochnick & Normand, *supra* note 29, at 50.

72. *See supra* note 48 and accompanying text.

73. O'Brien, *supra* note 26, at 150.

tion" is that military necessity is already taken into account in the structure of the rules. Therefore, military necessity can only be raised if the conventional humanitarian rules themselves are qualified by reference to a military necessity exception.[74] In the words of Burleigh Cushing Rodick:

> [T]here are certain rules of international warfare so firmly established that no employment of the doctrine of necessity will excuse their violation unless the rule itself contains a more or less definitive statement of the circumstances under which violations by reason of this plea will be excused. This theory holds, in other words, that the doctrine of necessity should be limited to those circumstances in which the law has in advance given an express sanction for its use.[75]

However, scholars have argued that, though such an approach would restrict the use of military necessity as a justification, they doubt that it allows for a realistic application of humanitarian rules to armed conflict.[76] It assumes that the drafters of the rules that do not contain a specific exception on the grounds of military necessity

> could have foreseen, and did foresee, all possible factual circumstances under which the particular rules would have to be applied and under which future wars would be fought, and that it appropriately concluded that in no conceivable operational context could their observance conflict with the imperious needs of survival which may confront particular forces.[77]

It is therefore argued that military necessity may be raised as a justification, irrespective of whether this possibility is raised in the text of

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74. DINSTEIN, *supra* note 8, at 18; RODICK, *supra* note 48, at 60; *see* TOMAN, *supra* note 1, at 73, 81 (listing examples of different express military necessity exceptions).

75. RODICK, *supra* note 48, at 59. Writing in 1928, Rodick, however, appears to concede that in relation to acts that are not directly associated with military operations, such as the seizure, requisition, and destruction of enemy property, the pleas of military necessity might still hold in strict circumstances. *Id.* at 59-60.

76. MCDOUGAL & FELICIANO, *supra* note 14, at 674.

77. *Id.*

the rules.[78] This interpretation may certainly be the case where it becomes impossible not to breach a rule.[79] However, it is more difficult to apply in other circumstances.

The difficulty in such an approach is essentially the same as that which arises from a broad military necessity justification in a rule itself: the determination of the nature and definition of military necessity. This is particularly the case where the justification in the rule itself simply reflects the acknowledgement that the negotiating states refused an unconditional commitment to the humanitarian rule.[80] This commitment manifests itself from simple express exceptions, such as the phrase: "in cases of imperative military necessity,"[81] to implicit references, such as, a banning on indiscriminate attacks which may cause loss of civilian life or damage to civilian property which would be considered "*excessive* in relation to the concrete and direct military advantages anticipated."[82] Given that most of the conventional rules that do not contain a military necessity exception clause concern redundant issues in the means and methods of waging war, and thus are unlikely to require any judicial determination; there seems to be little reason to include recourse to a military exception in every potentially

78. *But see* DINSTEIN, *supra* note 8, at 18-19 ("Once [the law of international armed conflict] bans a particular conduct without hedging the prohibition with limiting words . . . it is illegitimate to rely on military necessity as a justification for deviating from the norm.").

79. *See* MCCOUBREY, *supra* note 27, at 303-04.

80. *Id.* at 304.

81. For example, Article 62(1) of the Protocol Additional to the Geneva Conventions declares, "[c]ivilian civil defence organizations and their personnel shall be respected and protected, subject to the provisions of this Protocol, particularly the provisions of this Section. They shall be entitled to perform their civil defence tasks except in case of imperative military necessity." Protocol Additional to the Geneva Conventions, *supra* note 69, art.62(1).

82. Article 51(5)(b) of the Protocol Additional to the Geneva Conventions states, "[a]mong others, the following types of attacks are to be considered as indiscriminate: (a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Protocol Additional to the Geneva Conventions, *supra* note 69, art. 51(5)(b).

controversial rule.[83] The only reason to include such recourse would be as a way of justifying the very act which the rule attempts to prevent. The construction of a set of detailed humanitarian rules which seek to achieve a balance between the waging of war in a way to defeat an enemy and the needs of humanity, which then contain an undefined escape clause in the guise of military necessity, in itself says little about the mechanism for achieving such a balance.

C. The Principle of Proportionality in International Humanitarian Law

The principle of distinction or differentiation requires that legitimate military objects, such as combatants and military installations and equipment, be distinguished from non-military objects, such as civilians and cultural property.[84] Should non-military objects be the subject of possible military action, the first consideration would be whether it is necessary in the circumstances to act in a manner that, but for the justification of military necessity, would breach a rule of humanitarian law.[85] However, given the endemic conventional recourse to military necessity, addressing this initial inquiry is unlikely to yield a useful conclusion, and the crux of the matter is more likely to be whether the nature and degree of the actions taken are proportionate to the military advantage to be gained. As such, recourse to the military necessity exception does little more than invoke the principle of proportionality.

The determination of a balance between the competing forces of necessity and humanity requires a fulcrum – a role fulfilled by the principle of proportionality.[86] Proportionality in this sense is quite different to that used in relation to *jus ad bellum*.[87] It is concerned with

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83. *See* af Jochnick & Normand, *supra* note 29, at 72-74 (explaining that the Hague Convention banned three weapons for humanitarian reasons: asphyxiating gases, dum dum bullets, and balloon-launched weapons).

84. DINSTEIN, *supra* note 8, at 82; af Jochnick & Normand, *supra* note 29, at 53; MCDOUGAL & FELICIANO, *supra* note 14, at 524.

85. GARDAM, *supra* note 7, at 7.

86. UK MINISTRY OF DEFENCE, *supra* note 17, at 25. The Ministry of Defence claims that the principle of proportionality is "a link between the principles of military necessity and humanity." *Id.*

87. GARDAM, *supra* note 7, at 14.

the means and methods of warfare in relation to individuals, so that, while the resort to force might be necessary and the amount of force used proportionate, the methods used may cause such injury and suffering as to be disproportionate to the military objective sought.[88] In this context proportionality "underlies and guides the application of the whole regime."[89] However, the question of the proportionality of the actions taken in relation to the breach of the humanitarian conventional rule would not be any different if the rule did not contain a broad justification clause, but rather assumed that such a justification were possible in principle. The determination of a breach of any humanitarian rule would thus simply be a question of proportionality.

A general discussion of proportionality in relation to military necessity is beyond the scope of this Article. This Article is primarily concerned with the mechanism for the raising of military necessity as a justification rather than a consideration of how the rules of proportionality measure the actual conduct of a belligerent in relation to the aims of that conduct. Needless to say, it has been the topic of discussion in numerous forums and adjudicatory pronouncements, particularly following World War II in which the military tribunals grappled with the issues of military necessity and the application of the proportionality principle as a justification and defense to charges of war crimes.[90] This development is in part a result of the fact that activities that could constitute war crimes range along the continuum from is-

88. *Id.*

89. *Id.* at 3.

90. MCCOUBREY, *supra* note 27, at 117, 305. One example is the *Peleus* case, in which the justification for massacring survivors of a sunken merchant ship as being necessary to avoid detection of the submarine was rejected. *Id.* Another example is the failed attempt by General Jodl to argue that military necessity required the destruction of property in Northern Norway during World War II to prevent incursions by Soviet troops. DETTER, *supra* note 56, at 397. A third example is the attempt to justify mass deportation of inhabitants of occupied territories for purposes of slave labor in Germany on the grounds of military necessity. MCDOUGAL & FELICIANO, *supra* note 14, at 676-79. *See also* O'Brien, *supra* note 26, at 138-49. For a number of earlier examples of military necessity raised as a defense, see William Gerald Downey, *The Law of War and Military Necessity*, 47 AM. J. INT'L L. 251, 255-62 (1953).

sues of *jus ad bellum* to localized issues of *jus in bello*.[91] The difficulty in the application of the principle of proportionality is also heightened by the context of such actions taking place against the backdrop of the principle of *vie victis*; with only the losing belligerent's actions likely to be under scrutiny.[92]

Military necessity, though taking the guise of a limitation, has ensured that military concerns have taken a privileged position in relation to humanitarian concerns. With the use of express justification clauses on the grounds of military necessity, humanitarian law has acted to legitimize certain conduct, and serves to promote such conduct.[93] This effect is more so when elaborate and detailed justification clauses are constructed that have the effect of further limiting the application of the principle of proportionality to a determination of a breach of the humanitarian rule. This result is no more evident than in the conventional rules designed to protect cultural property during armed conflict.

III. MILITARY NECESSITY AND CULTURAL PROPERTY

Wars have long resulted in both the destruction of property and pillaging of property as war booty.[94] Indeed, many wars have been based on these very aims.[95] The earliest restraints on destruction of cultural property relate to the sparing of temples, churches and similarly sacred and hallowed places.[96] That such property might be protected for artistic or historical reasons rather than due to its religious nature only emerged during the Renaissance and appeared at that time in some of the earliest writings on the nascent international law.[97] This

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91. For example, on one end are allegations against military and political figures for waging aggressive war and on the other are allegations against low ranking commanders for a range of breaches of humanitarian law.

92. DETTER, *supra* note 56, at 394; *see also* af Jochnick & Normand, *supra* note 29, at 89-95.

93. af Jochnick & Normand, *supra* note 29, at 57.

94. TOMAN, *supra* note 1, at 3.

95. *Id.*

96. *Id.* at 4.

97. *Id.* Exponents included Jacob Przyluski, Alberic and Justin Gentilis, and Emmerich de Vattel. *Id.* De Vattel did subject the protection of cultural property to an exception in cases of military necessity. *See* David Keane, *The Failure to Protect*

emerging concern for property that has a cultural value was cemented during the nineteenth century. The condemnation of the plunder of artistic works and the practice of restitution followed the defeat of Napoleon; such plunder was deemed to be "contrary to the practice of war between civilized nations."[98] Such concerns were also apparent in efforts to humanize war, evident in the Lieber Code of 1863, which contains a number of provisions relating to the protection of religious institutions, institutions of learning, and museums of fine arts.[99] In particular, Article 35 provides that "[c]lassical works . . . must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded," while Article 36 provides that such works of art shall not "be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured."[100]

The inclusion of provisions for the protection of cultural property within the developing humanitarian regimes reflects the close connection between the individual and cultural property, which is clearly evident in the Hague Conventions of 1899 and 1907. The most important of the Hague Conventions in relation to cultural property is Convention IV, which includes Annexed Regulations.[101] It contains a number of provisions relating to civilian private property, such as Article 23(g) of the Regulations, which provides that it is prohibited: "[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."[102] These regulations further contain two articles specifically designed to provide protection for cultural property: Articles 27 and 56. Article 27 provides:

> 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

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Cultural Property in Wartime, 14 DE PAUL-LCA J. ART & ENT. L. & POL'Y 1, 17 (2004).

98. TOMAN, *supra* note 1, at 7.

99. *See* Lieber Code, *supra* note 33, arts. 34, 35, 36.

100. *Id.* arts. 35, 36.

101. Convention (IV) of 1907, *supra* note 63.

102. *Id.* art 23. *See also id.* Annex, arts. 25, 28, 47.

> not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.[103]

Like Article 23, the protection provided is not, from the terms of Article 27, absolute, being subject to the overriding exemption of military necessity contained in the Article in the form of the phrase "as far as possible."[104] The protection regime in the latter Article is rather narrow, applicable only in cases of siege or bombardment, and only if the besieged have notified the enemy of the existence of such cultural property beforehand and have then indicated the presence of this property with "distinctive and visible signs."[105] However, according to Rodick, this may not necessarily be sufficient to protect such property because "military necessity also requires that these objects must not be so numerous or located in such a way as to interfere with the prosecution of lawful military operations."[106] Further, should the property be used for military purposes, it loses all protection.[107] In such an eventuality, it is not necessary that the destruction of the cultural property be militarily imperative, only that the enemy has used it for its military purpose.

Article 56 of the Regulations concerns cultural property in occupied territory, and declares:

> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.[108]

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103. *Id.* Annex, art. 27.

104. *Id.* Annex, arts. 23, 27.

105. *Id.* Annex, art. 27.

106. RODICK, *supra* note 48, at 64 (giving examples such as the Russian shelling of hospitals in Rustchuck during the Russo-Turkish War, where the Turks had established hospitals flying the Red Crescent throughout the center of the town in such a way as to make any hostility impossible without damaging these institutions).

107. Convention (IV) of 1907, *supra* note 63, Annex, art. 27.

108. *Id.* Annex, art. 56.

Unlike Article 27, this Article contains no military necessity exemption.[109] Since this Article applies to cultural property under the control of an occupation force, it may no longer pose an obstacle to military operations, and thus there is no need for a military necessity exemption to ensure a successful military outcome.

The Hague Conventions of 1899 and 1907 established the basic structure for the protection of cultural property. A measure of protection is provided so long as protecting belligerents have identified the property, advised the enemy of its existence, and ensured the property did not support any military purpose. This basic structure was evident, for example, in the Hague Convention (IX) on Naval Bombardment,[110] and later in the 1922 Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare[111] and the Roerich Pact of 1935.[112]

The Spanish Civil War prompted a further international inquiry into the protection of cultural property during armed conflict, though this was undertaken in a manner which deferred to the interests of the military.[113] The committee convened by the International Museum's Office stated that it had "carefully refrained from proposing any rules or measures which would prove inoperative or inapplicable when the time came."[114] The destruction of cultural property during World War

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109. TOMAN *supra* note 1, at 10.

110. Hague Convention IX, Concerning Bombardment by Naval Forces in Time of War art. 5, Oct. 18, 1907, 36 Stat. 2351, T.S. No. 51 [hereinafter Hague Convention XI], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 1079.

111. These rules require that all necessary steps be taken to spare buildings dedicated to public worship, art, science, charitable purposes, and historic monuments, but only "as far as possible." While these rules were never adopted in a legally binding form, they were said to represent, to a great extent, the customary rules and general principles underlying the conventions on the law of war on land and sea. Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 315, 319.

112. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 290 [hereinafter Roerich Pact], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 991. The Roerich Pact is binding on ten states: the United States, Brazil, Chile, Columbia, Cuba, Dominican Republic, El Salvador, Guatemala, Mexico, and Venezuela. *Id.*

113. TOMAN, *supra* note 1, at 18-19.

114. *Id.* at 19.

II shattered any illusion that existing international laws provided effective protection.[115] The immediate response to this conflict was the adoption in 1949 of the Geneva Conventions.[116] While these Conventions did not provide any specific protection for cultural property, Article 53 of Convention (IV) Relating to the Protection of Civilian Persons in Time of War did provide general provisions for civilian and some state property in occupied territory, which could include cultural property.[117] Unfortunately, unlike that which was included in Article 56 of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War, Article 53 provides protection unless "such destruction is rendered absolutely necessary by military operations."[118] While the creation of a general limiting rule subject to an overriding exemption clause left cultural property in considerable danger, it applied to property in general and was subject to any later specific rule relating to cultural property.[119] Such a rule was provided in the 1954 Hague Convention.[120]

IV. 1954 HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

The 1954 Hague Convention is a reaction to the vast destruction of the European cultural heritage during World War II.[121] This Convention sought to address the shortcomings evident in the Hague Conventions of 1899 and 1907 and to supplement the post-war Geneva Conventions by providing a comprehensive protection regime that addressed the rights and duties of states relating to cultural property not only during an armed conflict but also prior to and following such a conflict.[122] It thus sought to impose a permanent protection regime on States Parties, though the core protective measures would only come into effect during an actual conflict. The core protective structure,

115. *See id.* at 21.

116. *See id.*

117. Geneva Convention (IV), *supra* note 66, art. 53.

118. *Id.*

119. *Id.*

120. Hague Convention on Cultural Property 1954, *supra* note 6, art. 4.

121. KEVIN CHAMBERLAIN, WAR AND CULTURAL HERITAGE 22-23 (2004); TOMAN, *supra* note 1, at 21.

122. TOMAN, *supra* note 1, at 59-69; CHAMBERLAIN, *supra* note 121, at 32-33.

however, did not differ fundamentally with the structure that applied in the 1899 and 1907 Hague Conventions; that is, exempting the protection regime on grounds of military necessity, requiring prior notification to opposing belligerents, and requiring prior visible identification of certain categories of cultural property.

The Convention applied to various States Parties in a number of conflicts in the following forty-five years.[123] However, the destruction of cultural property in conflicts such as in Afghanistan following the Soviet invasion; in the Iran-Iraq war; in the First Gulf war, particularly in Kuwait; and in the conflict in the former Yugoslavia, highlighted a number of inadequacies in the Convention and required its revision, which took the form of a Protocol to the Convention in 1999.[124] A major area of concern had been in regard to the provision of the military necessity justifications contained in the Convention.[125] Unfortunately, the 1999 Protocol has failed to address this concern, and in many respects, has exacerbated the problem. While it is beyond the scope of this Article to deal with the Convention and the 1999 Protocol comprehensively, it is necessary to highlight the core conventional provisions and briefly describe the scope of the Convention.

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123. *See* Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict,* 42 A.F. L. REV. 277, 295-96 (1997) (concerning the conflicts in Cambodia, Lebanon, Iraq and Iran); David A Meyer, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law,* 11 B.U. INT'L L.J. 349, 358-59 (1993) (concerning the conflicts in Cambodia and the Middle East); CHAMBERLAIN, *supra* note 121, at 2-3 (concerning the conflict in Iraq and the Balkans); Oyer, *supra* note 3, at 57-65 (concerning the conflict in Kuwait and Iraq in 1991); THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD, *supra* note 5 (concerning the conflict in Iraq, and the looting of the Baghdad Museum); CRUICKSHANK & VINCENT, *supra* note 5 (concerning the conflicts in Afghanistan, Iraq, and Israel); Gibson, *supra* note 5 (concerning the conflict in Iraq).

124. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, *adopted* Mar. 26, 1999, 38 I.L.M. 769 [hereinafter Second Protocol to the Hague Convention], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 1037; *see also supra* note 123 and accompanying text.

125. PATRICK BOYLAN, REVIEW OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 54 (1993).

A. The Expanded Scope of Protection Provided by the 1954 Hague Convention

As part of the post-World War II development in international humanitarian law, the Convention is closely related to the 1949 Geneva Conventions. Therefore its scope mirrors that of the Geneva Conventions, applying to armed conflict of an international character, whether declared or not, even if one of the belligerents does not recognize a formal state of war.[126] A state of international armed conflict occurs upon the commencement of hostilities, irrespective as to how those hostilities arose or the legality of the use of force.[127] Given that armed conflict would almost invariably result in the armed forces of at least one belligerent state occupying the territory of another state, the Convention will apply to the occupation of that territory, be it partial or total, even if the occupation did not meet with any armed resistance.[128]

While the scope of the Hague Convention was further broadened by the imposition of peace time duties on States Parties, the scope of cultural heritage protected under the Convention was narrowed. The protection applies only to "movable and immovable property of great importance to the cultural heritage of [all] people."[129] The term "cul-

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126. The Hague Convention on Cultural Property 1954, *supra* note 6, art. 18(1), states that "[a]part from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by, one or more of them." *See also* CHAMBERLAIN, *supra* note 121, at 66-67 (discussing cases of self-defense, peacekeeping operations, and possibly "wars of national liberation"); TOMAN, *supra* note 1, at 195-206.

127. Mary Ellen O'Connell, *Occupation Failures and the Legality of Armed Conflict: The Case of Iraqi Cultural Property*, 9 ART ANTIQUITY & L. 323, 328 (2004); *see also* CHAMBERLAIN, *supra* note 121, at 3.

128. Hague Convention on Cultural Property 1954, *supra* note 6, art. 18(2).

129. *Id.* art. (1)(a). Article (1)(a) includes examples that might occur, such as "monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above." *Id.* The definition of cultural property in Articles (1)(b) and (c) includes two further entities: "centres containing monuments" and "buildings whose main and effective purposes is to

tural heritage of all mankind"[130] is a summation of every state's cultural property; it is "the full gamut of each high contracting party's national cultural heritage, as defined by that party itself."[131] While at first glance it may appear that this definition of "cultural heritage" would include a huge number of sites and objects, the nature of the duties undertaken by the States Parties pursuant to the Convention actually limited the affected numbers considerably.[132] While this definition of cultural property had been criticized as being out-of-date and narrow, the 1999 Protocol to the Convention has not amended it.[133]

The introduction into the Convention of peace-time duties for all States Parties differentiates it from the previous Conventions that touched on the protection of cultural property.[134] A primary duty is imposed on states to "prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they

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preserve or exhibit the movable cultural property," such as the Baghdad Museum. *Id.* arts. (1)(b), (c). "Centres containing monuments" could apply to entire towns or cities that have a high concentration of historic buildings, who seek to prevent a repetition of the bombing of cities such as Dresden and Exeter during World War II. It is unfortunate that the definition of cultural property includes the buildings that house the cultural property as defined by each state. It would have been preferable to have defined the cultural property as that defined by each state, and then, in a separate Article, have declared that these buildings receive the same protection as the cultural property identified. This framework would have removed the inclusion in the definition of buildings which in themselves do not have cultural value. *See also* Prott & O'Keefe, *supra* note 2, at 312-19 (discussing the difficulties in defining cultural heritage); Sabine von Schorlemer, *Legal Changes in the Regime of the Protection of Cultural Property in Armed Conflict*, 9 ART ANTIQUITY & L. 43, 44 (2004) (defining cultural heritage as ranging from "books and archives to urban centres containing monuments").

130. Hague Convention on Cultural Property 1954, *supra* note 6, pmbl.

131. Roger O'Keefe, *The Meaning of Cultural Property Under the 1954 Hague Convention*, 46 NETH. INT'L L. REV. 26, 55 (1999).

132. *Id.* at 50.

133. BOYLAN , *supra* note 125, at 143; Second Protocol to the Hague Convention, *supra* note 124, art. 10.

134. TOMAN, *supra* note 1, at 59. The 1899 and 1907 Hague Conventions did not provide for any duties to prepare in times of peace for the possibility of protection during an armed conflict. This omission was raised in the 1938 preliminary *Draft International Convention for the Protection of Historic Buildings and Works of Art in Time of War. Id.*

consider appropriate."[135] The Conference rightly regarded the state in whose territory the cultural property is situated as being best able to provide the most effective protection regime.[136] It appears that the granting of such wide discretion as to how that state should safeguard the cultural property appears to be based on the need to refrain from intruding in the affairs of that state and to allow the state to determine the appropriate level of protection based on its financial, material, and technical resources.[137]

While recognizing that it is impossible for a state to ensure that all cultural property is protected, the nature of an international convention that regulates state behavior in relation to cultural property situated in its territory necessitates, at the minimum, a state agreeing on having its actions with respect to that property regulated to an extent, including regulation by imposing some peace time obligations on a state.[138] In particular, States Parties undertake to include provisions in their military regulations and instructions that will ensure compliance with the conventional rules and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.[139] States Parties are also required to establish, or to plan for the establishment of, specialized personnel "to secure respect for the cultural property and to co-operate with the civilian authorities re-

135. Hague Convention on Cultural Property 1954, *supra* note 6, art. 3.

136. TOMAN, *supra* note 1, at 61; CHAMBERLAIN, *supra* note 121, at 33.

137. CHAMBERLAIN, *supra* note 121, at 34-35; TOMAN, *supra* note 1, at 61. An earlier draft of the Convention had required a states to "ensure," rather than simply to "prepare" for, safeguarding of the property and had not contained the qualifier of only taking such measures as that state considers appropriate. *Id.* As such, the list of examples of appropriate protective measures contained in an earlier draft of the Convention was excluded, and an example of other appropriate measures was relegated to Resolutions that accompanied the final Convention. *Id.* at 61-62, 355. The earlier draft of the Convention included the possibility of establishing refuges, the institution of a civilian service that could undertake the protective measures when an armed conflict arose, the stockpiling of packaging material for the protection of movable property, and preparation for specific threats such as fire and collapse of buildings. *Id.* at 60. Resolution II adopted by the Conference urged States Parties to establish a national advisory committee and define its function, which would include performing the tasks required under the Convention. *Id.* at 61-62.

138. CHAMBERLAIN, *supra* note 121, at 32-33.

139. TOMAN, *supra* note 1, at 91, 95-96 (referencing examples of provisions contained in some states' military manuals); *see also* Hague Convention on Cultural Property 1954, *supra* note 6, art. 30(3)(a).

sponsible for safeguarding it" during an armed conflict.[140] The Convention provides for a distinctive emblem to identify cultural property, though its use and the timing of its placement is voluntary.[141]

B. The Core Conventional Duties

The protection of cultural property in times of armed conflict requires States Parties to undertake positive measures to "safeguard" the cultural property as well as to "respect" such heritage by taking further positive actions, and by refraining from committing a number of acts in respect of that property.[142] These positive and negative duties are imposed, during times of peace as well as during armed conflict, on both the states in whose territories cultural property needs to be protected and the states who are engaged in armed conflict thus putting cultural property at risk.[143]

The "respect" required by the Convention for cultural property in a state's own territory as well as in the territory of other States Parties consists of duties to both act and refrain from acting. For example, States Parties have an absolute obligation to refrain from "requisitioning movable cultural property situated in the territory" of another State Party and to refrain from any act of reprisal against cultural property.[144] States Parties also have a positive and absolute obligation to

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140. Hague Convention on Cultural Property 1954, *supra* note 6, art. 7(1).

141. *Id.* arts. 6, 16-17; Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict arts. 20, 21, May 14, 1954, 249 U.N.T.S. 270 [hereinafter Regulations of Hague Convention], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 6, at 1012.

142. Hague Convention on Cultural Property 1954, *supra* note 6, arts. 2, 3, 4. Article 2 declares: "For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property." *Id.*

143. von Schorlemer, *supra* note 129, at 45.

144. Hague Convention on Cultural Property 1954, *supra* note 6, art. 4(3)-(4). A *lacuna* exists in Article 4(3) in that it does not prevent the requisitioning by a state of cultural property situated in its own territory but belonging to another State Party. For example, during the Suez crisis in 1956, Egypt requisitioned the French Institute of Oriental Archaeology in Cairo. It has been suggested that such a requisition could be a breach of a state's duty to protect cultural property on its own territory or amount to a reprisal contrary to Article 4(4). TOMAN, *supra* note 1, at 71; CHAMBERLAIN, *supra* note 121, at 40. While possible, these duties would not neces-

"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."[145]

The essence of the Convention's protection regime is found in the duty of States Parties to refrain 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."[146] However, having created this protective regime, Article 4(2) goes on to declare that these protective obligations "may be waived only in cases where military necessity imperatively requires such a waiver."[147]

The inclusion of such an express provision within Article 4 was a contentious issue during the drafting of the Convention.[148] The final compromise text reflects this tension in its interpretational and practical difficulties.[149] For example, the text provides little guidance as to when this threshold is reached, or who might make this decision. The lack of a "military necessity" definition was criticized in the Boylan Report, which led to an attempt in the 1999 Protocol to give further meaning to the term.[150]

The lack of a definition does not, however, mean that the exception can be raised simply out of military convenience.[151] Whether an act is mandated by military necessity will require the application of

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sarily apply, as the requisition may have occurred in order to provide protection and may not necessarily amount to a reprisal if that belligerent state is the aggressor.

145. Hague Convention on Cultural Property 1954, *supra* note 6, art. 4(3). This duty cannot be waived on the basis of military necessity. CHAMBERLAIN, *supra* note 121, at 39. It also applies to both the prevention of theft, pillaging etc by the armed force of a belligerent state and to the civilian population. *Id.*

146. Hague Convention on Cultural Property 1954, *supra* note 6, art. 4(1).

147. *Id.* art. 4(2).

148. For a discussion of the negotiations regarding the inclusion of military necessity, see TOMAN, *supra* note 1, at 74-81. A proposal to delete any reference to military necessity was rejected by twenty-two votes against eight, with eight abstentions and eight members being absent at the vote. *Id.* It is suggested that the Conference then left Article 4(2) intentionally vague so that the provision would be flexible enough to accommodate a wide range of military necessities. *Id.*

149. *Id.* at 79.

150. BOYLAN, *supra* note 125, at 54.

151. ROGERS, *supra* note 27, at 4-5.

the principle of proportionality.[152] As such, should a belligerent have to use cultural property in a manner which exposes the property to destruction or damage, or have to act in a hostile manner in relation to that property, the degree of danger or damage to which the cultural property is exposed must be proportionate to the nature of the imperative military objective to be achieved.[153] This being the case, the explicit inclusion of a military necessity exception simply invokes the principle of proportionality.[154] However, it also acts to give destruction of cultural property a possible justification, elevating such acts to a realm of potential legitimacy.

C. Special Protection Regime

To provide an enhanced system of protection for cultural property of great importance, the Convention introduces the concept of special protection. This regime applies to a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, as well as to centers containing monuments and other immovable cultural property *of very great importance*, provided that they are not used for military purposes, are situated at an adequate distance from any large industrial center or important military objective, and are registered in the International Register of Cultural Property.[155] While the use of the emblem for cultural property under special protection is mandatory during an armed conflict, the emblem need only be placed

152. GARDAM, *supra* note 7, at 8-9.

153. CHAMBERLAIN, *supra* note 121, at 38.

154. For a contrary opinion, see Forsyth, *supra* note 4, at 91. Forsyth argues that in relation to the stationing of Iraqi aircraft next to the Temple of Ur in 1991 during the Gulf War, the military "would be justified under the laws of war in bombing the aircraft because of military objectives." *Id.* The role of proportionality, it is implied, is used extra-legally in then deciding whether to actually bomb the aircraft. *Id.* Thus Forsyth concludes that "the concern about proportional military gains as opposed to the loss of the temple at Ur won out in a decision not to bomb the area." *Id.*

155. Regulations of Hague Convention, *supra* note 141, arts. 11-16. The Regulations provide for the system of Registration of cultural property in the form of an International Register of Cultural Property under Special Protection, including its format, requests for registration, objections to registration, registration itself and cancellation of registration. The ability to register improvised refuges is also accommodated. *Id; see also* TOMAN, *supra* note 1, at 97-98, 113-37; CHAMBERLAIN, *supra* note 121, at 115-24.

there at the commencement of hostilities, and its placing before that time is optional.[156] States Parties ensure the immunity of cultural property under special protection by refraining from any act of hostility directed against such property and by refraining from using the property or its surroundings for military purposes.[157]

In granting an enhanced protection regime to only a limited range of cultural property, it could be imagined that this property of very great importance would be shielded by the Convention from an exemption on the basis of military necessity. This, unfortunately, is not the case. Article 11(2) introduces an explicit exception on the grounds of military necessity; though, in granting some cultural heritage a heightened degree of protection, an attempt was made to impose a higher threshold for the invocation of the exception.[158] Thus, apart from cases where the defending party has breached its obligation with respect to the special protection regime, a state may withdraw the immunity of cultural property only in "*exceptional* cases of *unavoidable* military necessity."[159] The Convention not only qualifies this recourse to military necessity by elevating the threshold to cases that are *exceptional* and *unavoidable*, but also mandates that the decision to invoke the exception may only be made by an officer commanding a force equivalent of a division in size or larger; that, whenever circumstances permit, the opposing belligerent be notified a reasonable amount of time in advance of the decision to withdraw immunity; and that the withdrawal of immunity last only as long as is necessary.[160]

Article 11 is one of the most controversial provisions of the Convention and polarized debate during negotiations.[161] The desire to achieve the broadest possible ratification of the emerging Convention

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156. Hague Convention on Cultural Property 1954, *supra* note 6, art. 10.

157. *Id.* art. 9.

158. *Id.* art. 11(2); *see also* TOMAN, *supra* note 1, at 145-46 (discussing attempts to impose a higher threshold for the invocation of the exception in order to afford greater protection for cultural heritage).

159. Hague Convention on Cultural Property 1954, *supra* note 6, art. 11(2).

160. *Id.* art. 11(2)-(3). Article 11(3) also requires the State Party withdrawing immunity to inform the Commissioner-General for Cultural Property of the decision, in writing, giving reasons. *Id.* This was intended to allow the reasons to be scrutinized and to act as a disincentive to withdrawing immunity. *See generally* TOMAN, *supra* note 1, at 147-48.

161. TOMAN, *supra* note 1, at 144.

allowed the drafting of the Article in a manner that favored a number of powerful states, such as the United Kingdom and United States.[162] The emergent higher threshold for invocation of the exception assumes that the use of the terms "unavoidable" and "exceptional" are easily distinguishable from that of "imperative," allowing the principle of proportionality to be differentially applied. This is questionable, the more so since the decision to invoke the exception is reserved for military officers. While an attempt was made to ensure that only senior officers have the ability to make such a judgment, it nonetheless ensures that the exception has the function of legitimizing military actions on conditions determined by the military. [163]

This regime of special protection was criticized for being too narrow in its scope, particularly in the limitation that cultural property must be situated an adequate distance from any large industrial center or military objective.[164] The Regime did not really differ in the extent of protection from that applied under the general protection regime and was subject to a wide and overriding exception of military necessity.[165] As a result, few States Parties registered any property under this regime.[166]

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162. BOYLAN, *supra* note 125, at 57; TOMAN, *supra* note 1, at 145.

163. This recourse to the waiver on the grounds of unavoidable military necessity applies only when evading the conditions imposed under the *special protection* regime, and should not be seen as removing the property from the cultural property protection regime altogether. As such, following the removal of immunity for cultural property under special protection, the "lower" threshold of imperative military necessity should continue to apply. For example, if an officer commanding a division determines that it is an *unavoidable* military necessity that an historical town center be occupied, and notifies the opposing belligerent of this, the town center would lose its status as cultural property under the doctrine of special protection. Nevertheless, when troops enter the town center, they are under the obligation to respect the cultural property, although, should it become an imperative military necessity to damage some of the property, a lower ranking officer or non-commissioned officer might have the authority to make such a decision.

164. von Schorlemer, *supra* note 129, at 49.

165. *Id.*

166. CHAMBERLAIN, *supra* note 121, at 192.

D. The 1999 Protocol to the 1954 Hague Convention

Following the destruction of cultural property during the conflicts in Somalia, Iraq, Kuwait and in the former Yugoslavia, it became evident that the Convention, together with the 1949 Geneva Convention and its Protocols, did not provide a sufficiently rigorous and broadly acceptable protection regime. The presence of the military necessity waiver was also viewed as weakening the protection regime, particularly as those states that had campaigned for its inclusion during the Conference subsequently failed to ratify the Convention.[167] This difficulty was noted in the 1993 Boylan report, which proposed that the Convention should be reviewed and, in particular, strongly recommended that States Parties should waive the military necessity exception altogether.[168]

The Second Protocol to the Hague Convention was a response to these concerns and acts as a supplement to the existing Convention.[169] The Second Protocol clarifies the peace time duties of states,[170] particularly with regard to dissemination of information about the Con-

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167. This is particularly true with the United States and the United Kingdom. BOYLAN, *supra* note 125, at 57.

168. *Id.* at 57. Similarly, in 1996, the Final Communiqué on Cultural Heritage Protection in Wartime and in State of Emergency adopted by a NATO Partnership for Peace Conference recommended a review of the use of the term "military necessity" and a clarification as to when it might be invoked. *See* von Schorlemer, *supra* note 129, at 50.

169. As such, the Protocol is only open to states that are party to the 1954 Convention, or those that ratify or accede to both the 1954 Convention and the Second Protocol at the same time.

170. Second Protocol to the Hague Convention, *supra* note 124. The lack of examples of peace-time measures that a state could take in the Convention was addressed in the Second Protocol, which provides that "[p]reparatory measures taken in time of peace . . . shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property." *Id.* art. 5. These measures are illustrative, and not mandatory. Nevertheless, where appropriate, a State Party should implement such measures, and a failure to do so may contribute to the extent of damage caused during the armed conflict.

vention.[171] It introduces an enhanced protection regime for cultural property of "greatest importance to humanity" and, while not acting on the Boylan recommendation of eliminating the military necessity exception, does make a number of amendments to the provisions in an attempt to give further body to the concept of military necessity.[172]

The attempt to balance military interests with the protection of cultural property is reflected in the fleshing out of some of the principles of the 1954 Convention in the Second Protocol. In addressing the duties of the state to safeguard cultural property against hostilities, the Second Protocol mandates that a State Party should, "*to the maximum extent feasible* . . . remove movable cultural property from the vicinity of military objectives or provide for adequate *in situ* protection," and should also "avoid locating military object[s] near cultural property."[173] Similarly, an opposing belligerent state is also required to act by taking a number of precautions against attacking what may be cultural property.[174] The State Party shall "*do everything feasible* to verify that the objectives to be attacked are not cultural property protected under . . . the Convention; [and shall] take all *feasible* precautions in the choice of means and methods of attack with a view to avoiding . . . [or] minimizing[] incidental damage."[175] So long as an attack could cause incidental damage to cultural property, such attack should not be undertaken if the damage could be "*excessive* in relation to the concrete and direct military advantage anticipated."[176] Necessity and advantage are not synonymous. The margin of latitude allowed in

171. The Second Protocol further strengthens the provisions relating to the dissemination of information on the Convention and the incorporation of its provisions in military training and operations by providing that not only should states "disseminate this Protocol as widely as possible, both in time of peace and in time of armed conflict" but also that "any military or civilian authorities who, in time of armed conflict, assume responsibilities with respect to the application of the Protocol should be fully acquainted with the text thereof." *Id.* art. 30. To this end the Parties shall, *inter alia*, "incorporate guidelines and instructions in their military regulations" and "develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes." *Id.*

172. Second Protocol to the Hague Convention, *supra* note 124, art. 6.

173. *Id.* art. 8 (first emphasis added).

174. *See id.* art. 7 (listing these precautions).

175. *Id.* art. 7(a), (b) (emphasis added).

176. *Id.* art. 7(d) (emphasis added).

these provisions is viewed in the context of achieving a military advantage and simply endorses acts or omissions which favor military convenience, rather than necessity, over the protection of cultural property. It thus reduces military necessity to military advantage, which has a corresponding effect on the application of the principle of proportionality so as to weigh humanitarian considerations against military advantage rather than necessity.

This approach is most clearly evident in the Article that addresses the military necessity exception itself.[177] Article 6(a) of the Second Protocol attempts to clarify the circumstances under which a state can invoke the exception of military necessity in order to act in a hostile manner against cultural property. This Article provides that a State Party can only do so if the "cultural property has, by its function, been made into a military objective" and "there is no feasible alternative available to obtain a similar military advantage."[178] These provisions give content to the existing waiver in Article 4(2) of the Convention that allows an act of hostility on the basis of an imperative military necessity.[179] Unfortunately, the complicated drafting of this Article has only served to further legitimize the invocation of the military necessity exception by introducing notions such as military advantage into the balance between the interest of military necessity and protection of the cultural property.

Much of the complication in the drafting of Article 6 is owed to the negotiation and adoption of the 1977 Additional Protocols to the 1949 Geneva Conventions.[180] In particular, a definition was introduced for the term "military objective," that was utilized in the drafting of the Second Protocol in an attempt to introduce some clarity into the interpretation and application of the exception of military necessity.[181] "Military objective" is defined to mean "an object which by its

177. *See id.* art. 6.

178. *Id.* art. 6(a).

179. Hague Convention on Cultural Property 1954, *supra* note 6, art. 4(2).

180. *See* Protocol Additional to the Geneva Conventions, *supra* note 69. Military necessity also arises in Articles 54(5) and 62(1) of the Protocol Additional to the Geneva Conventions. *Id.* arts. 54(5), 62(1).

181. *Id.* art. 52(2); Second Protocol to the Hague Convention, *supra* note 124, art. 1(f). The real difficulty is the repetition of the word "use," so that its use for a military objective amounts to the use of an object which, by "its nature, location, purpose or use makes an effective contribution to military action." Protocol Addi-

nature, location, purpose, or use makes 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."[182] This definition is utilized in the formulae to determine when the exception of military necessity may be invoked.[183] That is, if, by its "function," cultural property has been made into a military objective, (meaning that it makes a contribution to military action merely by its location, nature, purpose, or use), its destruction may have a military advantage, and there is no feasible alternative to achieve this military advantage, then the military action will be deemed justified as imperative military necessity.[184] The concept of a military advantage looms large within this formula, and appears to offer no limitation on the grounds upon which the exception can be raised. The use of the term "function" may limit the waiver of military necessity to consider only the *use* – and not the location, nature, or purpose – of cultural property in creating a military advantage.[185] A great deal of our cultural property derives from past military activity, but the nature, purpose, and even the location of an old fort, for example, would not qualify it as a military objective unless it was currently being *used* for military purposes.[186] As such, the use of the term military objective should be narrowly construed. However, this does little to overcome the introduction of the military advantage concept into the formula. Article 6(d) provides that advance warning of an attack against cultural property should be given when circumstances permit.[187] But because military advantage is a priority and advance warn-

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tional to the Geneva Conventions, *supra* note 69, art 52(2). The use of the word "use" may have the effect of eliminating the other three possibilities; that is the nature, location or purpose of the cultural heritage will not be sufficient to amount to its use as a military objective. For example, the nature of the HMS Victory, as a commissioned warship of the British navy would not mean that it is in use for a military objective, and therefore is protected under the Convention.

182. Second Protocol to the Hague Convention, *supra* note 124, art. 1(f).

183. *Id.* art. 6(a).

184. *Id.* arts. 1(f), 6(a).

185. Keane, *supra* note 97, at 32; Second Protocol to the Hague Convention, *supra* note 124, art. 13(1)(b).

186. CHAMBERLAIN, *supra* note 121, at 183-84.

187. *See* Second Protocol to the Hague Convention, *supra* note 124, art. 6(d).

ing will detract from this advantage, it is likely that circumstances will not exist for such an advance warning to occur.

A waiver to the use of cultural property for military purposes may be invoked only when there is no feasible alternative to obtain a similar military advantage.[188] Unlike the case where a State Party wishes to act in a hostile manner towards cultural property, this waiver is not dependant on any prior action of the other belligerent. Quite simply, cultural property may be used when it achieves a military advantage, and this is equated with an imperative military necessity.

Article 6 introduces two further criteria which limit when a military necessity exception may be invoked. First, the decision to invoke the exception "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."[189] It has been argued that this introduces a level of objectivity because senior officers are expected to act more objectively than more junior officers.[190] Given that this allows for decisions to be made which take into account the overall military advantage of acting in a hostile manner, rather than having to do so because of an immediate threat, such "objectivity" may provide little protection. Furthermore, because no guidance is given as to what circumstances will allow a more junior officer to make such decisions, Article 6 provides little additional benefit for the protection of the cultural property.

One scholar has argued that the elaboration of the concept of military necessity in Article 6 has effectively eliminated it from consideration because it will "virtually never be invoked to justify an attack on cultural property . . . as there are almost always alternatives to circumvent the property."[191] This might be true if circumventing the cultural property is regarded as the main or central theme within the Article. However, the circumvention is only used to the extent that an

188. *Id.* art. 6(b).

189. *Id.* art. 6(c).

190. CHAMBERLAIN, *supra* note 121, at 186. This approach reflects that of O'Brien, who required that "[t]he decision to take action in virtue of military necessity must be made by a commander whose authority and responsibility are proportionate to the seriousness of the action taken." O'Brien, *supra* note 26, at 154.

191. CHAMBERLAIN, *supra* note 121, at 184.

alternative is available to "*obtain a similar military advantage.*"[192] This greatly reduces the number of alternatives a military commander needs to consider before launching an attack against cultural property.

E. The Enhanced Protection Regime

The Second Protocol introduces the concept of cultural property under enhanced protection. The use of the waiver of immunity on grounds of unavoidable military necessity in relation to cultural property under special protection in the Convention was unsatisfactory, primarily because it was difficult to distinguish this attempt at constructing a higher threshold from that implied by imperative military necessity.[193] While the term "military necessity" does not actually appear within the Articles dealing with enhanced protection, the concept is imbedded in the resulting regime that allows an opposing belligerent state to ignore the status of enhanced protection. The form this concept takes, however, is to prescribe the circumstances when cultural property under enhanced protection can be attacked rather than leaving this to a State Party under the guise of military necessity, and by canceling or suspending the enhanced protection so as to allow the invocation of military necessity as a waiver to the ordinary obligations.[194] The Second Protocol also narrows the scope of such a removal of immunity by linking it to the other belligerent state's breach of its duties under the Protocol, which the waiver of immunity of cultural property under special protection did not necessarily require.[195]

To be protected under the enhanced protection regime, the cultural property must not only be of the greatest cultural importance to humanity and already be protected by adequate national legal and administrative measures, but must also not be "used for *military purposes* or

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192. Second Protocol to the Hague Convention, *supra* note 124, art. 6(a)(ii) (emphasis added).

193. *See supra* notes 147-152 and accompanying text.

194. Second Protocol to the Hague Convention, *supra* note 124, art. 13.

195. *Compare id.* art. 13(a) ("Cultural property under enhanced protection shall only lose such protection: (a) if such protection is suspended or cancelled in accordance with Article 14."), *with* Hague Convention on Cultural Property 1954, *supra* note 6, art. 11(2) ("[I]mmunity 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.").

to shield military sites."[196] Furthermore, the state wishing for a grant of enhanced protection must make a declaration "confirming that it will not be so used."[197] Upon having its property added to the list of cultural property under enhanced protection, "[t]he Parties to a conflict shall ensure the immunity of such property by refraining from making it the object of attack or from any use of the property or its immediate surroundings in support of military action."[198]

Unfortunately, at this point of determining the consequences of a breach of these obligations, the Protocol becomes rather convoluted. Article 14(1) provides that should cultural heritage no longer meet the criteria in Article 10(c) of not being used for "*military purposes* or to shield military sites," the enhanced protection status may be suspended or cancelled.[199] Article 14(2) then provides that a similar fate will follow in the case of a *serious violation* of the duty under Article 12 not to use the cultural property under enhanced protection in support of "*military action*."[200] A difficulty arises in reconciling the terms "for *military purposes*" and "in support of *military action*," (neither of which is defined in the Protocol), since in the former case a *mere breach* will lead to cancellation or suspension while in the latter case only a *serious violation* will have such an affect.[201] Chamberlain contends that there is "probably no substantive difference" between these obligations.[202] If so, then there must correspondingly be no difference between "a serious violation" and the inability of the state to meet the criteria for enhanced protection because of its use of the cultural property "for *military purposes*." Given the context and the content of the

196. Second Protocol to the Hague Convention, *supra* note 124, art. 10 (emphasis added).

197. *Id.* art. 10(c).

198. *Id.* art. 12.

199. *Id.* art. 14(1) (emphasis added).

200. *Id.* art. 14(2) (emphasis added). This Article follows the obligation in Article 53(b) of the Protocol Additional to the Geneva Conventions, which uses the phrase "in support of military effort." Protocol Additional to the Geneva Conventions, *supra* note 69, art. 53(b). However, as Chamberlain notes, the phrase "in support of military action" is arguably a narrower phrase and requires a higher degree of association between the use of the cultural property and the actual military activity. CHAMBERLAIN, *supra* note 121, at 201.

201. *Compare* Second Protocol to the Hague Convention, *supra* note 124, art. 14(1) *with* art. 14(2).

202. CHAMBERLAIN, *supra* note 121, at 201.

provisions relating to enhanced protection, it is submitted that the latter breach would, in any event, be regarded as a serious breach of a State Party's obligations. The consequence of a cancellation of suspension is that the cultural property will lose its enhanced protection, and then be subject to the ordinary rules to respect cultural property and the possibility of waving these rules on the grounds of military necessity, as discussed above.

While Article 14 is concerned with the cancellation or suspension of enhanced protective status, Article 13 is entitled "loss of enhanced protection," and is primarily concerned with the raising of the military necessity exception in relation to cultural property that had been protected under the original regime.[203] Article 13 begins by reiterating that cultural property may lose its enhanced protection status if such protection has been suspended or cancelled in accordance with Article 14, that is, if it is being used for a "*military purpose*" or in support of "*military action.*"[204] It adds, however, a second ground for the loss of enhanced protection: if, and for as long as, the property has, by its use, become a *military objective.*[205]

The introduction of the term "*military objective*" causes further confusion. While the term "*military objective*" is defined, the terms "*military action*" and "*military purpose*" are not. Admittedly, the Article does limit the definition of a *military objective* only to its use, rather than its nature, location, purpose, or use (as defined in Article 1 of the Protocol). This does not, however help to reconcile these three terms. Any tendency to regard these as synonymous is rejected in Article 13(2) since this Article concerns the circumstances when such property may be attacked if it has, by its use, become a *military objective.*[206] The Article does not apply in the case of suspension or cancellation because of the property's use for "*military purposes*" or in support of "*military action,*" which will subject the property to the exception on grounds of military necessity as provided for in Article 6.

Article 13(2) provides a set of criteria with which a State Party wishing to attack cultural property would have to comply before the

203. Second Protocol to the Hague Convention, *supra* note 124, art. 13-14.

204. *Id.* art. 13(1)(a).

205. *Id.* art. 13(1)(b).

206. *Id.* art. 13(2).

property's enhanced status is actually suspended or cancelled. The cultural property may only be attacked if

> the attack is the only feasible means of terminating the use of the property . . . [and] all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property; [furthermore], unless circumstances do not permit, due to requirements of immediate self-defense: the attack is ordered at the highest operational level of command; effective advance warning is issued to the opposing forces requiring the termination of . . . [such use of the cultural property]; and reasonable time is given to the opposing forces to redress the situation.[207]

While it may be said that these criteria limit the actions a state can take against cultural property being used as a military objective, it is not the case that there must be an imperative military necessity, nor indeed any necessary military advantage, to justify an attack. The only justification needed is to terminate the use of the cultural property as a military objective. The effect of Article 13 is to require a substantially lower bar to an attack on cultural property under enhanced protection that is used to achieve a military objective than is the case for other cultural property so used.[208] In one sense, enhanced protection acts to punish a State Party that has used such important cultural property to achieve a military purpose.

The attempt in the Second Protocol to give some structure to the invocation of a military necessity exception has only elevated attacks on cultural property to a level that takes into account military advantages, military purposes and military objectives. The overriding emphasis is on the objectives and requirements of the military. Toman declares the inclusion of a military necessity exception as necessary in order to ensure that military operations are not so curtailed that they

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207. *Id.*

208. *Compare id.* art. 13 (enhanced protection allowing an attack on cultural property which, by its function, has been made into a military objective where no feasible alternative exists *to terminate such use of the property*, without consideration of military advantage thereby obtained), *with id.* art. 6(b) (allowing an attack against cultural property which, by its function, has been made into a military objective where no feasible alternative exists *to obtain a similar military advantage*).

become impossible.[209] This interpretation would be "detrimental to humanitarian law itself as this would lead to the violation of these rules."[210] However, including a military necessity exception produces the same result and also allows the destructive party to raise this explicit exception as a defense and justification. This rule makes recourse to military necessity as a justification a great deal easier than would be the case if no exception were expressly allowed.[211] The elimination of any military necessity justification clause would have the further benefit of requiring proof of impossibility to be a burden borne by the destructive party.

V. CONCLUSION

It is unfortunate that the principles reflected in the 1954 Hague Convention include the principle of military necessity as a justification for the waiving of protective measures for cultural property. Military necessity, in its conventional form, acts to legitimize destructive actions and to privilege military considerations at the cost of humanitarian values. This result is particularly so when the military necessity justification is invoked simply when cultural property is used by an opposing belligerent or when its destruction is deemed to achieve a military advantage. The result is that cultural property in conflict ridden but archaeologically-rich states such as Iraq and Afghanistan is in considerable danger. Until such time as this fundamental flaw in the protective regime is addressed, the manifestations of our shared collective past will succumb to the present conflicts which divide us.

209. TOMAN, *supra* note 1, at 75.

210. *Id.*

211. For example, Forsyth has interpreted the military necessity exceptions to imply that "if the destruction of a site would advance a belligerent's cause to the degree that destruction outweighs the preservation of the site, then the cultural property is not protected." Forsyth, *supra* note 4, at 97.