Chapter 5

Great expectations?
Towards an effective application of the regime of
enhanced protection in the Second Protocol to the
Hague Convention on the Protection of Cultural Property
in the Event of Armed Conflict

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1. By way of introduction: Freeing Dr Jekyll

In my professional experience, classic literature is often a valuable resource in understanding and explaining the significance and complexities of a legal instrument. In the case of the system of norms for the international protection of cultural property in the event of armed conflict, I have found a most appropriate literary reference in The Strange Case of Dr Jekyll and Mr Hyde.1

The major tensions inherent in the 1954 Hague Convention are reminiscent of the inner struggle of Robert Stevenson’s famous character. Over the course of the past century, a good number of Doctors Jekyll have devoted themselves to raising awareness of the importance of protecting cultural property in times of armed conflict, and to promoting legal instruments setting limits to military action that may pose a threat to cultural property. At the same time, these efforts have been undermined by caveats and exceptions that permit overstepping those same limits. These caveats and exceptions could be seen as an omnipresent Mr Hyde.2

The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict – the 1954 Hague Convention for short – bears poignant witness to these tensions. This is the instrument that, for the first time in history, was designed as an international safeguard protecting cultural property per se. It recognised the value of cultural property as the common heritage of humanity, and did not regard it as just a corollary of the overall protection that international humanitarian law

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1 Robert Louis Stevenson, The Strange Case of Dr Jekyll and Mr Hyde, 1886.

2 This should of course not be construed as an indictment of any particular country or organisation. As Stevenson’s portrayal of Dr Jekyll's twisted counterpart suggests, results may not always directly reflect intentions. Specifically, those placing the attainment of a military objective before the protection of cultural heritage are not necessarily opposed to such protection. Nonetheless, the end result is that cultural heritage becomes vulnerable to destruction.
provides in an international conflict. Yet this same Convention in too many cases provides only nominal protection in practice, because it allows the destruction of cultural property when ‘imperative military necessity’, defined largely on the basis of subjective considerations, so dictates.3

Almost half a century after the adoption of the 1954 Hague Convention, those committed to the protection of cultural heritage, who viewed this instrument with a mixture of satisfaction and resignation, found renewed hope in the negotiations held once more in The Hague that led in 1999 to the Second Protocol to the Convention. One major source of hope was the regime of enhanced protection for cultural property whose destruction would be a loss to humanity – a loss that the international community by then seemed simply unwilling to accept.

The Second Protocol seemed to allow Dr Jekyll to triumph in his combat with his alter ego Mr Hyde. To all intents and purposes, it gave the cultural heritage a sanctuary from destruction in armed conflicts. Military necessity that would justify such destruction is subjected to strict and clear procedures, detailed in Chapter 3 of the Protocol. Those claiming military necessity have to consider their actions very carefully, since they may incur criminal responsibility under Chapter 4 if they are found not to have followed the proper procedures. Churches, monuments and architectural masterpieces of great importance to humanity thus acquire an aura that almost puts them on the same level as persons, and almost endows them with their own form of human rights.

Yet four years after the Second Protocol’s entry into force, the regime of enhanced protection has still to prove its effectiveness. In particular, its operation may be hindered if, as is happening, the institutions responsible for implementing the Protocol appear indifferent to the ways and means of identifying cultural property that qualifies for inclusion under this regime. There is, in other words, a growing uneasiness that the expectations generated by enhanced protection may have been too great, and that Mr Hyde is as much with us as ever.

As we commemorate the tenth anniversary of the Second Protocol’s adoption, this article attempts to address this uneasiness by advancing some ideas on how to set the regime of enhanced protection to work and thus reach another milestone on the ‘long and winding road’ towards protecting cultural property in the event of armed conflict.4

3 See Art. 4.2. of the Hague Convention, which provides that the obligation of respect for cultural property in armed conflict ‘may be waived only in cases where military necessity imperatively requires such a waiver’. The Convention does not complement this major exception to its core provisions with any clear and objective definition of ‘military necessity’, or even with a set of criteria circumscribing the cases to which it may apply.

4 The expression ‘long and winding road’ was first used by the author in 2005 to describe the challenges in setting up an effective criminal jurisdiction to combat the destruction of cultural property in armed conflict. See ‘Un camino largo y escarpado (y a veces frustrante): la búsqueda de una jurisdicción penal efectiva por actos contra los bienes culturales en caso de conflicto armado’, presented at the Regional Seminar organised by the Government of Argentina with the support of UNESCO and the ICRC, Buenos Aires, 2-3 March 2005.