Enhancing individual criminal responsibility for offences involving cultural property – the road to the Rome Statute and the 1999 Second Protocol

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Damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world1

1. Introduction

Although the need to give protection to cultural property during armed conflict has traditionally been recognized, it has taken time to create specific obligations in this regard for the parties to armed conflicts. The establishment of individual criminal responsibility for offences involving cultural property is even more recent, with the Rome Statute of the International Criminal Court and the Second Protocol to the 1954 Hague Convention establishing important benchmarks. This article explores the development of the international legal norms on the protection of cultural property in times of armed conflict, with a focus on the penal provisions therein.

2. 1899 and 1907 Hague Regulations

The 18992 and 19073 Hague Regulations respecting the laws and customs of war on land (henceforth: the Hague Regulations – annexed to the 1899 and 1907 Hague Convention respecting the laws and customs of war on land, respectively incorporate specific provisions on the protection of cultural property. Article 27 of the Hague Regulations provides that “[i]n sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or

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2 Adopted 29 July 1899.
3 Adopted 18 October 1907.
charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes […].” 4 As such, this Article can be seen as a major first step in the international codification of the duty to protect cultural property in the conduct of hostilities. At the same time, this provision is rather general in scope, not establishing a clear prohibition and leaving much room for interpretation, given the phrase “as far as possible” and the broad reference to “military purposes”.

The 1907 Hague Regulations also contain a provision on the protection of cultural property in situations of military authority over the territory of the hostile state. According to Article 56

“[a]ll seizure of, destruction or wilful damage done to institutions [dedicated to religion, charity and education, the arts and sciences] […], historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.” 5

This provision is noticeable because it specifically calls for legal proceedings in response to acts contrary to this prohibition. At the same time, the Regulations do not further stipulate any obligation for state parties to incorporate this prohibition in their domestic legislation.

Notwithstanding the – albeit rudimentary – provisions in the Hague Regulations, it was clear from the two World Wars that parties to armed conflict showed great disregard for cultural property, and extensive damage to some. While the subsequent Nuremberg Charter of the International Military Tribunal contained an article on war crimes that included “plunder of public or private property”, 6 this article was considered to constitute “only a very imperfect and incomplete penal sanction when compared with the manifold means by which attacks may be and have been made on the cultural heritage of the international community.” 7

4 Article 27 of the 1899 Hague Regulations contains similar language.
5 Article 56 of the 1899 Hague Regulations contains similar language.
6 Article 6(b) of the Nuremberg Charter (8 August 1945):

The Tribunal established by the Agreement referred to in Article I hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

(a) crimes against peace: […]

(b) war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) crimes against humanity: […]