1. Introduction

In the following, the Protocol to the 1954 Hague Convention (probably soon to be called the first Protocol) will be discussed. It is a little-known, yet far-reaching instrument that merits more attention than it has so far received. I intend to explore the substantive content of the Protocol that deals with the seizure of artefacts exported illegally from occupied territory. The role of the State on whose territory such goods are found will be analysed, as well as the problems the obligations in the Protocol cause in a national jurisdiction. Also the more general issues surrounding the implementation of this Protocol will be addressed. A domestic court case in the Netherlands triggered the drafting of implementing legislation in 2007, some fifty years after ratification. More in general, this Protocol raises issues that suggest it is time this Sleeping Beauty be awoken.

2. The (first) Protocol to the 1954 Hague Convention

The Protocol to the 1954 Hague Convention was drafted at the same time as the Convention itself. It had initially not been the intention to create a separate instrument to cover the matter of the illegal exportation in cultural property originating from occupied territories. The separation of the Protocol and the Convention took place in the final phase of the negotiations when it became clear that the provisions on the seizure of immovable property would become a major stumbling block for the future Convention. At the eleventh hour it was decided to separate what are now the Convention and the (first) Protocol. It has hardly been a sophisticated separation – the Protocol bears the scars of a rough cut: it is editorially not really a self-standing instrument. For instance, O’Keefe notes that the provisions of the

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Protocol are not called articles, but are merely numbered paragraphs. Part III of the Protocol contains the Final Clauses and is twice as long as the substantive provisions in Parts I and II. Remarkably, the Protocol does not establish a formal link with the Convention, the Protocol is a distinct document and yet it barely looks like that – the close relation with the Convention is still very visible. It is probably a theoretical question, but one wonders whether it would be possible to become a Party to the Protocol without becoming a Party to the Convention.

As these are separate legal instruments, the Convention and the Protocol require separate steps to express consent to be bound. When the United States finally became a party to the 1954 Hague Convention, the then Legal Advisor of the State Department John Bellinger III, mentioned that the United States acceded “because nobody could remember why we were not a Party”. Yet, the much welcomed US accession was limited to the Convention, and it was hardly noticed that the first Protocol was excluded. Today, while the Convention to date has had 123 ratifications, the Protocol is less endowed with a mere 100 ratifications.

The subject matter of the Protocol is the protection of movable cultural objects during occupation, in particular against illegal exportation from occupied territory. These obligations are a reflection of Article 4(3) of the 1954 Hague Convention which obliges the High Contracting Parties to “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.” Moreover, High Contracting Parties “shall refrain from requisitioning moveable cultural property situated in the territory of another High Contracting Party.” Thus the framework is clear, the Occupying Power itself may not take cultural property, and is obliged to protect it against the dangers created by armed conflict. In addition to the role of the Occupying State, other States will have obligations under the Protocol: most notably the State where the protected cultural goods appear.

It should be kept in mind that the law of occupation, and hence the rules on the protection of cultural property during occupation, is only applicable during international armed conflict. The majority of contemporary armed conflicts are non-international, thus limiting the potential impact of these rules.

The 1954 Convention itself also contains a specific provision on occupation in Article 5. This requires the Occupying State to co-operate with the competent authorities of the Occupied State in order to protect cultural property. Also, the Occupying State may be required to take action to protect cultural property if the national authorities are unable to do so. Though the provision does not state this specifically, one gets the impression that Article 5 has been drafted with immovable

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4 The United States expressed consent to be bound on 13 March 2009.
5 November 2009.
6 November 2009.