US Obligations Underlying the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Protocol II[1]

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I. Introduction & Background

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention); the 1977 Protocol to the 1949 Geneva Conventions (Geneva Conventions Protocol I); and the 1999 Second Protocol to the 1954 Hague Convention (Hague Convention Protocol II) advance the protection of cultural property in armed conflict.

The United States of America (US) has ratified the 1954 Hague Convention but has not yet ratified either the Geneva Conventions Protocol I or Hague Convention Protocol II. Many of the provisions in the Geneva Conventions Protocol I are considered international customary law, however. The 1977 Geneva Conventions Protocol I influenced the later Hague Convention Protocol II, which opened for signature in 1999.[3] As a result, some provisions in the Hague Convention Protocol II might be considered international customary law. This article will analyze if the US has any obligations under the Hague Convention Protocol II, Article 6 *Respect for Cultural Property*, which restricts the invocation of military necessity.

II. Military Necessity

General Eisenhower famously said in World War II, "Nothing can stand against the argument of military necessity. That is an accepted principle."[4] Military necessity justifies departures from

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[3] *See* International Committee of the Red Cross, Treaties, State Parties and Commentaries, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&do cumentId=F0628265ED4F2118412567BB003E0B0C (last visited March 19, 2017).

[4] U.S. Department of Defense, Law of War Manual, 275 (2016)(citing General Dwight D. Eisenhower, Commander-in-Chief, U.S. Army, Memorandum Regarding the Protection of Historical Monuments in Italy, (Dec. 29, 1943)).

what is normally allowed when the principle is incorporated into the Law of War as is the case in the 1954 Hague Convention and the Hague Convention Protocol II.[5] Neither the Hague Convention Protocol II, Article 6, nor the 1954 Hague Convention, Article 4 that it references, permit attacks or hostilities against cultural property or use of cultural property that is likely to subject it to harm unless there is imperative military necessity.

Concerns with the concept of military necessity, and how to deal with it, have evolved over time. These concerns, and attempts to manage them, are manifested in the Hague Convention Protocol II, Article 6.

III. Restrictions on Military Necessity

A. Hague Convention Protocol II, Article 6(a)(i)

The first requirement to invoke military necessity when directing an act of hostility against cultural property under Article 6(a)(i) is "that cultural property has, by its function, been made into a military objective . . . ." The definition of a military objective in Geneva Conventions Protocol I,[6] the DOD Law of War Manual,[7] and Hague Convention Protocol II[8] are similar with the following key elements: (1) an object; (2) that by its nature, location, purpose, or use; (3) makes an effective contribution to military action; (4) and whose total or partial destruction, capture, or neutralization; (5) in the circumstances ruling at the time; (6) offers a definite military advantage.

However, while these definitions for a military objective focus on an object's "nature, location, purpose, or use" Article 6(a)(i) states that the "function" of the cultural property must have made it into a military objective. Jiří Toman, in his commentary to the Hague Convention Protocol II, noted that the term "function" is a compromise between those that disputed that cultural property could ever inherently be a military objective (i.e., by its nature, location, or purpose) and others that were unwilling to restrict the definition of military objective to the object's use.[9]

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[5] *Id*. at 52-7, 275-7.
[6] Protocol (I) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 52(2), Jun. 8, 1977, 1125 UNTS 3 [hereinafter Geneva Conventions Protocol I].
[7] U.S. Department of Defense, *supra* note 4, at 206.
[8] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural property in the Event of Armed Conflict, Art. 1(f), March 26, 1999, 2253 U.S.T. 212 [hereinafter Hague Convention Protocol II].
[9] Jiří Toman, CULTURAL PROPERTY IN WAR: IMPROVEMENT IN PROTECTION, COMMENTARY ON THE 1999 SECOND PROTOCOL TO THE HAGUE CONVENTION OF 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT, 107-9 (2009).

B. Hague Convention Protocol II, Article 6(a)(ii) and (b)

Article 6(a)(ii)[10] and (b)[11] have similar language to invoke military necessity to direct hostilities against or use cultural property in a manner that is likely to expose it to destruction or damage requiring that there must be "no feasible alternative[s]" or not "another feasible method" "to obtain a similar military advantage". Consequently, the key terms involving feasibility and military advantage will be analyzed together.

1. Geneva Conventions Protocol I, Article 57(3)

Toman wrote that Geneva Conventions Protocol I, Article 57(3) was the model for the Hague Convention Protocol II, Article 6(a)(ii) and (b) feasibility and military advantage requirements.[12] Geneva Conventions Protocol I, Article 57(3) states, "When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." Both Articles 57(3) and 6 contemplate alternative options for obtaining a similar military advantage that would result in less harm to protected objects. However, the strength of the language in Geneva Conventions Protocol I, Article 57(3) is more permissive than the language in Hague Convention Protocol II, Article 6(a)(ii) and (b), which includes phrases such as, "no feasible alternative" and "no choice is possible" for "another feasible method". Moreover, Geneva Conventions Protocol I, Article 57(3) is titled *Precautions in Attack* while Hague Convention Protocol II, Article 6 is titled *Respect for Cultural Property*. This change in title is more notable given that nearly every provision from Geneva Conventions Protocol I, Article 57 was incorporated and divided into either Hague Convention Protocol II, Article 6, *Respect for Cultural Property*, or Article 7, *Precautions in Attack*.

The DOD Law of War Manual, however, notes that the requirement of choosing a less damaging alternative in Geneva Conventions Protocol I, Article 57(3) is not international customary law[13] nor is it an absolute obligation.[14] Given that Article 57 is more permissive than

[10] ("[T]here is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective. . . .").
[11] ("[A] waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage . . . .").
[12] Toman, *supra* note 9, at 117-8.
[13] U.S. Department of Defense, *supra* note 4, at 240.
[14] International Committee of the Red Cross, Customary IHL Database, Rule 21, *Target Selection*. https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul (last visited March 19, 2017)[hereinafter ICRC, Customary IHL Database].

Hague Convention Protocol II, Article 6(a)(ii) or (b), it is unlikely that the US would consider Article 6(a)(ii) or (b) international customary law or an absolute obligation either.

There are alternative views. For example, the International Committee of the Red Cross' Customary International Humanitarian Law database includes the Hague Convention Protocol II, Article 6 restrictions in the explanation to Rule 38, *Attacks against Cultural Property*, and Rule 39, *Use of Cultural Property for Military Purposes*, explaining that the Hague Convention Protocol II "brings the Hague Convention up to date in the light of developments in international humanitarian law since 1954" and that the Article 6 restrictions "clarify [the 1954 Hague Convention's] meaning" of imperative military necessity.[15]

2. Interpretation

If, however, Hague Convention Protocol II, Article 6(a)(ii) and (b) are analyzed independently of Geneva Conventions Protocol I, Article 57(3), the US' understanding of the term "feasibility" is useful for informing the US' potential interpretation of Article 6(a)(ii) and (b). The DOD Law of War Manual clarifies that synonyms to the term "feasibility" have included "[t]he words 'practicable,' 'reasonable,' 'due,' and 'necessary'."[16] Consequently, the US probably interprets "feasibility" provisions as qualifying whatever obligations it modifies.

Another key term in Hague Convention Protocol II, Article 6(a)(ii) and (b) is "military advantage". The DOD Law of War Manual explains the term "military advantage" in regards to timing and scope. In regard to timing, the DOD LOW Manual notes that the advantage need not be immediate.[17] For scope of the military advantage, the DOD LOW Manual specifies that the advantage is not restricted to any part, such as the current mission, but can apply to a broader impact, such as the overall war strategy.[18]

C. Authorization Required to Invoke Military Necessity

Hague Convention Protocol II, Article 6(c) requires that "the decision to invoke imperative military necessity 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 . . . ." However, Geneva Conventions Protocol I, Article 57(2)(a) merely requires an authorization from "those who plan or decide upon an attack" for precautions that were similar to

[15] *Id*. at Rule 38, *Attacks against Cultural Property*, and Rule 39, *Use of Cultural Property for Military Purposes*.
[16] U.S. Department of Defense, *supra* note 4, at 189-90.
[17] *Id*. at 211-12.
[18] *Id.*

those included in Hague Convention Protocol II, Article 7, not Article 6. The 1954 Hague Convention did not specify an authorization level for general cultural property, and the DOD Law of War Manual just uses a generic term of "commander" rather than specifying an authorization level.[19]

In practice, the authorization requirement in Hague Convention Protocol II, Article 6(c) is probably followed under current targeting processes in general.[20] However, the term "attacks" applies to offensive as well as defensive "acts of violence against the adversary". [21] Defensive attacks, in practice, do not require as high an authorization to protect troops as there is generally less time.[22] These issues might be mitigated by the Hague Convention Protocol II, Article 6(c) clause "as circumstances permit".

D. Effective Advance Warning

Hague Convention Protocol II, Article 6(d) requires that "in case of an attack . . . an effective advance warning shall be given whenever circumstances permit." Advance warning requirements have been required in Geneva Conventions Protocol I, Article 57(2)(c), and the ICRC considers this requirement to be part of international customary law.[23] The DOD Law of War Manual recognizes that feasible precautions in conducting attacks to reduce the harm to protected objects includes advance warning if circumstances permit.[24]

IV. US Obligations under Hague Convention Protocol II, Article 6?

The US' acceptance of obligations under Hague Convention Protocol II, Article 6 would probably depend on interpretation of the provisions. The US probably already generally follows Article 6 under interpretations provided in the DOD LOW Manual, but would likely dispute more rigorous interpretations of Article 6 and, as discussed above, would likely take issue with Article 6(a)(ii) and (b) given the Law of War Manual's handling of Geneva Conventions Protocol I, Article 57(3).

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[19] *But see*, Joint Chiefs of Staff, JOINT PUBLICATION 3-60, JOINT TARGETING (2013)(specifying authorization levels in targeting processes for special targets).
[20] *Id*. Telephone Conversation with Geoffrey Korn, Professor of Law and Presidential Research Fellow at South Texas College of Law Houston (March 7, 2017).
[21] Geneva Conventions Protocol I, Art. 49(1).
[22] Telephone Conversation with Geoffrey Korn, Professor of Law and Presidential Research Fellow at South Texas College of Law Houston (March 7, 2017).
[23] ICRC, Customary IHL Database, *supra* note 14, at Rule 20, *Advance Warning*.
[24] U.S. Department of Defense, *supra* note 4, at 237.