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MILITARY NECESSITY AND CULTURAL HERITAGE PROTECTION IN LAWS OF WAR: HISTORICAL OVERVIEW

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Summary: The article examines the development of the concept of military necessity in relation to cultural property. Starting from 18th century and Emmerich de Vattel it continues to codifications of International Humanitarian Law in 19th century and finally focuses on 1954 Hague Convention and its 1999 Second Protocol. The article underlines the most significant trends in the development and aims to illustrate increasing respect for cultural property during the conflict. In its final section it presents more current issues related to cultural property protection and armed conflict: inclusion of human rights protection and matter of dual-use objects. Both questions are introduced in decision of the International Criminal Tribunal for the Former Yugoslavia in *Prlić et al.* case that investigates destruction of Stari Most in Mostar. The decision shows that some new elements have to be considered in assessment of military necessity related to cultural property.

Keywords: military necessity, cultural property, cultural heritage, International Humanitarian Law, armed conflict.

1 Introduction

The article introduces development of the concept of military necessity in relation to cultural heritage. It examines existing International Humanitarian Law (IHL) documents dealing with cultural property protection during armed conflict and aims to present the development in the protection while highlighting some trends. Starting from the 18th century it continues to codifications of the IHL in 19th century and scrutinizes in detail the most important convention focused exclusively on protection of cultural property during armed conflict – 1954 Hague Convention and its Second Protocol. The article focuses on notions of general protection, special protection and enhanced protection under the Convention and Second Protocol. Finally it presents some emerging trends related to understanding of military necessity while taking into account more recent developments in cultural heritage protection and shift from the term 'cultural property' to 'cultural heritage'. The mentioned phenomenon is introduced

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on the example of *Prlić et al.* case before International Criminal Tribunal for the Former Yugoslavia that examines destruction of Stari Most in Mostar. It shows that bare assessment of military necessity does not have to be enough to justify attack against cultural property and other values have to be considered as well.

2 Military necessity

Destruction is inevitable consequence of armed conflict. However, with humanization of warfare efforts to mitigate such impact have appeared. One of the categories of property that enjoys higher level of protection during armed conflict is cultural property. The very idea of protection of certain types of property that we would described as cultural property nowadays during war is not something new or geographically restricted. As Toman[1] pointed out the certain level of respects towards some types of cultural property is something common to many different cultures and can be identified from early stages of human history.

Principles governing armed conflict that evolved mostly in 19th century and are recognized as customary law nowadays brought clear limits to modern warfare. The purpose of war is to defeat enemy however not every military action committed with this purpose is allowed. Among others the principle of military necessity is seen as one of the most important. Nevertheless, the principles are closely interconnected and while examining one of them the limits established by other has to be reflected as well.

Military necessity has been authoritatively defined by American Military Tribunal in so called *Hostage Case* (which was part of "Subsequent Proceedings" in Nuremberg) in 1948 as follows: Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money.[2]

The definition stresses crucial feature of principle of military necessity: finding balance between needs of belligerents and protection of both combatants and civilian population. Law of armed conflict can be seen as compromise between demands of military necessity and humanitarian considerations.[3] Parties to conflict do not have full freedom of action but on the other hand the law still provides reasonable space for conduct of hostilities. Military necessity does not justify violations of laws of armed conflict and conversely the use of force which

1 TOMAN, Jiri. *Protection of Cultural Property in the Event of Armed Conflict.* New York: Routledge, 2016, pp. 3–6.

2 *The Hostages Trial, Trial of Wilhelm List and Others*, Case No. 47. United States Military Tribunal, Nuremberg, 1947–48, p. 66.

3 DINSTEIN, Yoram. Military Necessity. In PETERS, Anne, WOLFRUM, Rüdiger (eds). *Max Planck Encyclopedia of Public International Law*. Oxford: Oxford University Press, 2013, p. 711.

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is not necessary is unlawful.[4] The doctrine of *kriegsraison* elaborated in Prussia during the end of 19th century that permitted violations of laws and customs of war in order to achieve military victory has been rejected – military necessity cannot serve as base for unrestricted warfare even under extreme circumstances.[5] By its nature the principle is interconnected with principles of humanity and proportionality.

The doctrine of military necessity is related to both *jus ad bellum* and *jus in bello*. However, in modern International law the issue of military necessity in *jus ad bellum* is restricted to use of force in self-defense or as part of system of collective security established by Charter of United Nations. Military necessity in *jus in bello* is more elusive and aims to balance needs to achieve military victory and needs of humanity. Compared to principle of proportionality military necessity operates at macro level (determines whether the armed attack is legitimate) while proportionality examines amount of force that can be used.[6]

The destruction of cultural property during armed conflict can appear as result of different actions.[7] Cultural property can be directly targeted during military operations or the destruction can emerge as mere collateral damage. Property can be also damaged or destroyed during the conflict outside military operations from various reasons. All those three modalities are related to doctrine of military necessity however. Traditional International Humanitarian Law (IHL) is more focused on the first and second option whereas the third one became more relevant in last decades when number of attacks against cultural property was committed by armed non-state actors.

3 Military necessity and cultural property in laws of war

3.1 From de Vattel to 19th century

One of the first authors who introduced concept of military necessity more comprehensively and also related it to cultural property was Emer de Vattel. In his well-known work *The Law of Nations* he based his attitude on earlier concepts developed by Hugo Grotius. In *The Law of Nations* de Vattel scrutinizes legal status of property belonging to enemy. He recognizes right to booty of victor but also discusses question whether it is lawful to destroy enemy´s property.

4 PICTET, Jean. Development and Principles of International Humanitarian Law. In BLANK, Laurie, R., NOONE, Gregory, P. (eds). *International Law and Armed Conflict*. New York: Wolters Kluwer, 2019, p. 41.

5 SOLIS, Gary, D. *The Law of Armed Conflict*. New York: Cambridge University Press, 2016, p. 285.

6 FORREST, Craig. The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts. *California Western International Law Journal*, 2007, Vol. 37, No. 2, pp. 177–219.

7 O´KEEFE, Roger. Protection of Cultural Property under International Criminal Law. *Melbourne Journal of International Law*, 2010, Vol. 11, No. 2, pp. 339–392.

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He argues that property of unjust enemy can be destroyed "in order to weaken or punish him".[8] Nevertheless he stresses that such measures should be pursued with moderation and in conformity with the main objective – military victory. He condemns practices such as cutting down fruit-trees or tearing up wines as barbarity with no real purpose.[9] Similarly he rejects ravaging and burning of towns and villages as long as those acts are not justified by necessity. He presents two cases of necessity that authorizes such horrors: 1) necessity to punish unjust and barbarous nation, 2) necessity to ravage country and make it uninhabitable in order to create barrier to protect borders from enemy.[10]

Vattel recognizes special status of cultural property: in his work he speaks about "edifices which do honour to human society"[11] such as temples, tombs, public buildings and all works of remarkable beauty. They do not contribute to increase enemy´s strength and there is no advantage achieved by destroying them. However, the presented rule is not absolute: in situation when destruction of cultural property is necessary in order to carry on operations of war or to advance works in siege sovereign of country or his general can make such decision.[12] Additionally he argues that it is difficult to spare even the finest edifices while town is bombarded. Rules presented by de Vattel became highly influential and served as base for codifications of IHL in following centuries.

Instructions for the Government of Armies of the United States in the Field from 1863 known as Lieber Code was the first formal set of rules laid down by state in order to determine manner in which state should conduct hostilities, treat combatants, civilians and their property. One of the most significant elements of Lieber Code is its concept of military necessity. In its Article 14 it defines military necessity as follows: "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."[13]

The following article specifies the concept in both *jus ad bellum* and *jus in bello* context. The introduced measures are 'indispensable' not just convenient or expedient. The Article 15 provides number of examples of measures applicable against enemy and its property. Nevertheless, the Article 16 returns to limiting role of the concept of military necessity: "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 way, nor of the wanton devastation

8 VATTEL, Emmerich de. *Law of Nations or the Principles of Natural Law*. Philadelphia: T. & J. W. Johnson, Law Booksellers, 1839, p. 366.
9 Ibid.
10 Ibid. p. 367.
11 Ibid.
12 Ibid. p. 368.
13 Lieber Code. Art. 14.

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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."[14]

Importantly Lieber Code also contains rules establishing legal status of cultural property during armed conflict. It states that: "Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded."[15]

The Article does not include waiver of military necessity for protection of cultural property and thus we can assume that Lieber Code protects cultural property at all times, even when military necessity requires the destruction.[16] However the requirement that cultural property "must be secured against all avoidable injury" more resembles respect[17] for cultural property as later defined in Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) and thus does not exclude option of destruction of cultural property when military necessity requires so. The Article 15 of Lieber Code generally allows "all destruction of property"[18] in case it is inevitable so cultural property is not excluded.

Similarly the concept of military necessity is approached in another document that shaped modern IHL – Brussels Declaration from 1874. Although the Declaration finally was not ratified it deeply influenced future codifications of laws of war. The Article 13 (g) forbids "Any destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war."[19] The following articles discuss protection of cultural property during sieges and bombardments. The Article 17 states: "In such cases all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand."[20]

Duty to spare protected property *as far as possible* clearly recalls the Article 13(g) of the Declaration and creates waiver of protection in situation when military necessity requires it. Belligerent thus can attack and destroy cultural property when military necessity requires it. The wording of the Brussels Declaration

14 Ibid. Art. 16.
15 Ibid. Art. 34.
16 EHLERT, Caroline. *Prosecuting the destruction of cultural property in international criminal law*. Leiden: Brill – Nijhoff, 2014, p. 20.
17 1954 Hague Convention. Art. 4.
18 Lieber Code. Art. 15.
19 Brussels Declaration. Art. 13(g).
20 Ibid. Art. 17.

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was later repeated in The Laws and Customs of War on Land created by Institute of International Law in 1880 and known as the Oxford Manual. The Article 32(b) prohibits destruction of public or private property as long as the "destruction is not demanded by an imperative necessity of war".[21] The Article 34 then repeats the Article 17 of the Brussels Declaration with slight modification: the protected cultural property has to be spared "if it can be done".[22]

The International Peace Conferences of 1899 and 1907 played pioneering role in development of the protection of cultural property during armed conflict. The Articles 27 and 56 of the Regulations of 1907 annexed to Convention No. IV deal with cultural property. The provisions of the articles are regarded as part of customary law nowadays. General framework is established by the Article 23(g) that forbids "To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".[23] The Articles 27 and 56 provide special rules for cultural property protection during the conflict. The Article 27 states: "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 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."[24]

Once again, the protection is not absolute but limited by reservation of military necessity expressed by words 'as far as possible'. As Toman points out the protection is territorially restricted to immediate zone of combat.[25] The commanders of besieging forces have duty to take such protective measures in case two conditions are met: 1) buildings are not used for military purposes, 2) buildings are indicated with distinctive and visible signs. However, the protection is narrow: in case the buildings are used for military purposes belligerent party can attack them without even considering proportionality of such attack and gained military advantage.[26] The term 'military purposes' is not defined in the Regulations but is generally agreed that it includes even use of the buildings as offices and quarters for soldiers or as signalling and observation posts to assist artillery.[27]

21 Oxford Manual. Art. 32(b).

22 Ibid. Art. 34.

23 1907 Hague Regulations. Art. 23(g).

24 Ibid. Art. 27.

25 TOMAN, Jiri. *Protection of Cultural Property in the Event of Armed Conflict*. New York: Routledge, 2016, p. 10.

26 EHLERT, Caroline. *Prosecuting the destruction of cultural property in international criminal law*. Leiden: Brill – Nijhoff, 2014, p. 31.

27 EDMONDS, James, Edward, OPPENHEIM, L. *Land warfare: an exposition of the laws and usages of war on land, for the guidance of officers of His Majesty's Army*. London: HMSO, 1911, para. 136.

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Nevertheless, the attitude of the Article 56 is different. It applies to situation of military occupation of hostile territory when legitimate power passed into hands of occupant. The occupant is responsible for ensuring public order and safety in territory under his control and has to respect laws of occupied areas.[28] In such situation the concept of military necessity cannot justify destruction of cultural property as the Article 56 states: "All seizure of, destruction or wilful 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."[29]

The wilful destruction of cultural property during the occupation would be mere act of revenge and cruelty that can be seen as barbarous. In other words all destruction of and damage to protected buildings unconnected to military operations is forbidden under the Article 56.[30] It is crucial that the Regulations make difference in protection with regard to the two situations: ongoing hostilities and occupation.

3.2 Development after 1945

The inter-war period did not bring any significant development in the area. Nevertheless, the WWII with its unprecedented level of destruction of property during military operations that resulted in doom of whole historic cities and many wonders of European culture has shown need for new system of protection. The 1949 Geneva Conventions represent important codification of IHL however they do not address issues of cultural property and the concept of military necessity. The IV Geneva Convention prohibits in its Article 53 destruction of property belonging to private persons by occupying power except for cases when it is required by military necessity.[31] The provision covers cultural property as well but the attitude is general and does not recognize special nature of cultural property.

The real turn in protection of cultural property during armed conflict represented adoption of Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention). It is the first convention dealing specifically with protection of cultural property during armed conflict and providing comprehensive background. The Convention was drafted in cooperation with UNESCO which ensured that it will represent contribution to its mandate. The 1954 Hague Convention introduces several crucial new elements.

In its Article 1 it clearly defines cultural property and in the Article 2 establishes concept of protection of cultural property. Under the 1954 Hague Conven-

28 1907 Hague Regulations. Art. 43.

29 Ibid. Art. 56.

30 O´KEEFE, Roger. *The Protection of Cultural Property in Armed Conflict*. Cambridge: Cambridge University Press, 2010, p. 31.

31 Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (IV Geneva Convention). Art. 53.

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tion protection of cultural property comprises of safeguarding of and respect for cultural property.[32] The two aspects – safeguarding of and respect for – are separate but deeply interconnected in fact. Safeguarding consists positive measures (actions to be taken to ensure material conditions for the protection of cultural property) while respect on the other hand has negative character – it represents obligation not to commit prohibited acts.[33] Safeguarding can be seen at set of measures adopted during peacetime to secure cultural property against foreseeable effect of armed conflict.[34] Respect for cultural property applies in the event of armed conflict to cultural property located within the own territory of Contracting party but also within territory of other Contracting party. The parties are obliged 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."[35]

The meaning of the paragraph is twofold. It bans the use of cultural property in way that is likely to expose it to destruction or damage during the armed conflict. Additionally, it prohibits any acts of hostility against the property. Those two measures should secure protection of the property during the hostilities. However, the mentioned obligations are not absolute. The paragraph 2 of the Article introduces waiver of the obligations in cases where military necessity imperatively requires it.[36] As Toman notes the waiver guarantees relative freedom of the parties.[37]

The following two paragraphs (paras. 3, 4) of the Article 4 establish obligations that cannot be waived, not even for reason of imperative military necessity. The paragraph 3 binds parties to prohibit, prevent and stop any form of theft, pillage, misappropriation or act of vandalism directed against cultural property.[38] The requisition of movable cultural property situated within the territory of another contracting party is prohibited as well. The paragraph 4 bans any acts of reprisals directed against cultural property.[39]

The Articles 6 and 7 of the 1954 Hague Convention aim to ensure more practical aspects of the protection and are closely related to concept of military necessity. The Article 6 establishes optional marking of cultural property with

32 1954 Hague Convention. Art. 2.
33 TOMAN, Jiri. *Protection of Cultural Property in the Event of Armed Conflict*. New York: Routledge, 2016, p. 57.
34 1954 Hague Convention. Art. 3.
35 Ibid. Art. 4(1).
36 Ibid. Art. 4(2).
37 TOMAN, Jiri. *Protection of Cultural Property in the Event of Armed Conflict*. New York: Routledge, 2016, p. 70.
38 1954 Hague Convention. Art. 4(3).
39 Ibid. Art. 4(4).

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distinctive emblem.[40] Nevertheless the marking is not compulsory and absence of the emblem cannot justify attacks against the property however might lessen responsibility in some cases since it makes it more complicated to distinguish it.[41]

The Article 7 proposes military measures that should help to achieve more effective protection of cultural property during the ongoing hostilities. There are two sets of provisions: the first one is legislative and the second one administrative. The Article 7(1) invites parties to include into their military regulations or instructions during peacetime provisions that ensure observance of the Convention and "foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples."[42] The following paragraph proposes establishment of special personnel during peacetime who will secure respect for cultural property and co-operate with civilian authorities responsible for safeguarding.[43] Although this task might seem easy to accomplish experience from different countries prove the assumption wrong. Even developed countries with long military tradition have failed to secure cultural property in recent conflicts which was partly caused by lack of personnel with relevant education and failure to educate armed forces about the significance of the matter.[44]

Additionally, to general protection the 1954 Hague Convention introduces concept of special protection. The idea behind the concept is to provide higher level of protection to the most significant cultural property. Cultural property eligible for special protection is defined in restrictive way – the protection is granted to movable and immovable items of very great importance only. On the other hand, the threshold of the protection is high which has consequences for concept of military necessity as well. Under the Article 8 of the Convention there are three categories of cultural property to which special protection is given: 1) A limited number of refuges intended to shelter movable cultural property in the event of armed conflict, 2) Centres containing monuments, 3) Other immovable cultural property of very great importance.[45] Compared to concept of general protection that applied to property of 'great importance' the property eligible for special protection has to be of 'very great importance'.

The three categories of property of 'very great importance' may be placed under special protection if two conditions are fulfilled. The first one is related to location of the property. The special protection may be granted only if the property is "situated at an adequate distance from any large industrial center or

40 Ibid. Art. 6.

41 TOMAN, Jiri. *Protection of Cultural Property in the Event of Armed Conflict*. New York: Routledge, 2016, p. 90.

42 1954 Hague Convention. Art. 7(1).

43 Ibid. Art. 7(2).

44 RADCLIFFE, Julian. The UK´s Training and Awareness Programme. In RUSH, Laurie (ed). *Archaeology, Cultural Property, and the Military*. Woodbridge: Boydell & Brewer, 2012, pp. 28–33.

45 1954 Hague Convention. Art. 8(1).

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from any important military objective constituting a vulnerable point".[46] The Article 8 (1) provides several examples of such 'important military objectives': an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication. The requirement of 'adequate distance' is not absolute nevertheless. Even cultural property that is located close to important military objective as defined above can be placed under the special protection as long as the party declares that it shall not be used during the conflict or the transport will be diverted in case of port, railway station or aerodrome.[47] Such diversion has to be prepared during peacetime.

However, for practical application of the provision the notion of 'adequate distance' appears to be crucial. The term itself is not defined in the Convention and seems relatively vague. Toman proposes that it has to be interpreted in "light of specific situation"[48] and there is no general criterion how to determine exact distance. Also, O´Keefe[49] presents that it is necessary to adopt case-by-case attitude while regarding specific conditions of every locality since there is no way how establish any general rule. Number of authors concluded that uncertainty about the 'adequate distance' requirement deterred parties from requesting special protection and caused failure of the whole concept of special protection.[50]

The second condition that has to be met in order to grant special protection is that the cultural property is not used for military purposes. The condition takes into consideration the objection that the cultural property cannot have absolute immunity irrespective circumstances. The meaning of the condition is partly specified in the following paragraphs. The Article 8(3) states that: "A center containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried on within the center."[51]

Later the Article 8 specifies that guarding of cultural property by armed custodians or presence of police forces responsible for maintaining order is not considered as use for military purposes.[52] The Article clearly distinguishes between 'use' and 'purpose' of cultural property. The 'use' depends on will of the party

46 Ibid.

47 Ibid. Art. 8(5).

48 TOMAN, Jiri. *Protection of Cultural Property in the Event of Armed Conflict*. New York: Routledge, 2016, p. 101.

49 O´KEEFE, Roger. *The Protection of Cultural Property in Armed Conflict*. Cambridge: Cambridge University Press, 2010, pp. 144–146.

50 According to UNESCO report only five states applied for special protection to their property.

51 1954 Hague Convention. Art. 8(3).

52 Ibid. Art. 8(4).

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and it is important to underline that the most of cultural property can be used for military purposes by its nature. This leads us to problem of defining military objective. The Article 8(3) can be viewed as definition of military objective for the purposes of the Convention however it was not until Additional Protocol I to Geneva Conventions of 1977 (API) where the issue was comprehensively defined. The Article 52 of the API states:

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make 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.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.[53]

The API bases its attitude on distinction between civilian objects and military objectives. It does not exclude the option that civilian object can become military objective when it meets conditions of the second paragraph of the Article 52. However, in case of doubts whether the object constitutes military objective or not the protection of civilian population takes priority. Additionally, the Article 53 of the API provides special rules for cultural objects and places of worship. The mentioned Article refers to 1954 Hague Convention and clarifies rules governing use of cultural property for military purposes. It prohibits

a. to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
b. to use such objects in support of the military effort;
c. to make such objects the object of reprisals.[54]

Interestingly it seems like the Article 53 aims to establish absolute immunity of cultural property. It bans use of cultural property in support of military effort and thus such objects cannot become military objectives. It also prohibits acts of hostility directed against cultural property –it is worth mentioning that term 'act of hostility' has far wider meaning than 'attack'. The term 'attack' is defined in the Article 49 of the API and means "acts of violence against the adversary, whether

53 Additional Protocol I. Art. 52.

54 Ibid. Art. 53. The requirement is repeated in the Article 16 of the Additional Protocol II as well.

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in offence or in defence."[55] The 'acts of hostility' can be any act arising from the conflict which has or can have substantial detrimental effect on the protected objects.[56] The higher level of protection is also expressed in words 'acts of hostility *directed*'. There is no request for actual damage to cultural property and the provision can be seen more as preventive measure.

The concept of immunity of cultural property under the Article 53 of the API is similar to the one under the Article 9 of the 1954 Hague Convention that applies to property under special protection. Under the Article 9 the parties has to ensure immunity of cultural property under the special protection "by refraining, from the time of entry in the International Register, from any act of hostility directed against such property"[57] and also by refraining "from any use of such property or its surroundings for military purposes."[58] There is only one exception – in cases presented in the Article 8(5) of the Convention the property or its surroundings can be used for military purposes during peacetime. The concept of special protection aims to protect the most valuable cultural property and the violations of the immunity are thus seen as extremely serious. The fact that approach chosen for special protection in the 1954 Hague Convention was later repeated in the API where is applies to all cultural property with no requirement of its special value looks curious. It can be seen as evidence of increasing importance of cultural property protection during the armed conflict and general recognition of higher standard of protection. The practical consequence of such step is even more significant: Geneva Conventions and their Additional Protocols are recognized as part of customary law and thus are binding on all subjects of international law. After the failure of the concept of special protection under the 1954 Hague Convention the API has shown way how to achieve same objective by different means.

The Article 11 of the 1954 Hague Convention is often considered as the most controversial provision of the whole treaty. Withdrawal of immunity of cultural property under special protection is highly sensitive topic indeed and fully exposes the dilemma behind cultural property protection during the conflict. The compromise between military needs of belligerents and protection of cultural property results in possibility to attack even cultural property under special protection if certain conditions are met.

The Article 11 introduces two situations when cultural property under special protection can be targeted. The first one is described in the paragraph 1 of the Article 11 and is based on reciprocity. The provision states that if one of the parties violates obligations under the Article 9 of the Convention in respect of

55 Ibid. Art. 49(1).

56 WENGER, Claude, F. et al. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Leiden: Brill, 1987, para. 2070.

57 1954 Hague Convention. Art. 9.

58 Ibid.

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cultural property under special protection (meaning commits any act of hostility against such property or, except for cases provided in the Article 8(5), makes any use of such property or its surroundings for military purposes) the opposing party is, as long as the violation persists, released from obligation to ensure immunity of the property. However, the request is optional and the paragraph states that "whenever possible, the latter Party shall first request the cessation of such violation within a reasonable time."[59] It is hard to say what is reasonable time and as Toman points out it is always short time period that is, once again, determined by circumstances specific to each case.[60]

The second option of withdrawal of immunity of cultural property under special protection under the Article 11(2) is the more controversial and problematic one. It states that except for cases mentioned in the previously discussed Article the immunity 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."[61] The expression aims to make the provision very limitative. The text refers to *exceptional cases* thus such actions should be something truly rare. Compared to provision regarding military necessity under general protection that refers to 'imperative military necessity" the wording 'unavoidable military necessity' seems to be stricter. On the other hand the word 'unavoidable' is not defined in the Convention and as Nahlik notes it is not legal term so it is hard to determine exact legal consequences of such wording.[62] It is questionable whether 'unavoidable' constitutes higher level of protection than 'imperative'. According to dictionary definition the meaning of 'unavoidable' is "something that cannot be avoided or prevented".[63] One proposed solution understands 'unavoidable' as something objective, impersonal and independent of any decision whereas 'imperative' has subjective character and depends on will.[64] Thus 'imperative military necessity' can be viewed as result of party´s consideration (where other options do exist) whereas 'unavoidable military necessity' as consequence of objective circumstances. Nevertheless, even in the latter case the final decision about targeting cultural property depends on party´s consideration whether it is unavoidable or not.

Another check that aims to increase level of protection is determination of authority responsible for withdrawal of immunity. It is required that the neces-

59 Ibid. Art. 11(1).

60 TOMAN, Jiri. *Protection of Cultural Property in the Event of Armed Conflict*. New York: Routledge, 2016, p. 144.

61 1954 Hague Convention. Art. 11(2).

62 NAHLIK, Stanisław, E. La protection internationale des biens culturels en cas de conflit armé. *Recueil des cours de l´Académie de droit international*, 1967, Vol. 120, II, p. 132.

63 Collins English Dictionary. *Definition of 'unavoidable'*. (online). Available: <https://www.collinsdictionary.com/dictionary/english/unavoidable> Accessed: 02.05.2021

64 TOMAN, Jiri. *Protection of Cultural Property in the Event of Armed Conflict*. New York: Routledge, 2016, pp. 145–146.

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sity "can be established only by the officer commanding a force the equivalent of a division in size or larger."[65] However there still persists the question whether even such officer has competence to determine value of cultural property in question and establish proportionality between gained military advantage and loss for humanity. There are two ways how to bring this issue closer to reality: training and penalties.[66] Training consists education of military officers which should help them to understand their responsibility for preservation of cultural property. Although the experience shows[67] that sanctions are both difficult and ineffectual the officers should be at least informed about possible consequences of their wrongful decisions.

Finally lifting of the immunity is temporary ("only for such time as that necessity continues") and requires notification "reasonable time in advance" but only in cases when circumstances do permit so.[68] Additionally the paragraph 3 of the Article 11 requires the party withdrawing the immunity to inform Commissioner-General for cultural property in writing and stating the reasons.[69]

The period of 1980s and early 1990s has shown that real impact of the 1954 Hague Convention was very limited. As O´Keefe[70] points out the Convention suffered from neglect which was inevitable result of some of its concepts that appeared to be failures. Iraq – Iran war and civil war in Yugoslavia fully presented those provisions of the Conventions are unable to provide real protection to cultural property during war. There were three[71] main problems identified: concept of special protection that has never become functional in fact, unclear extent of concept of military necessity and lack of sanctions for violations of the Convention. The effort of UNESCO and international community resulted in adoption of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague (Second Protocol) in 1999 that aimed to improve the most problematic issues of the 1954 Hague Convention.

65 1954 Hague Convention. Art. 11(2).

66 TOMAN, Jiri. *Protection of Cultural Property in the Event of Armed Conflict*. New York: Routledge, 2016, p. 147.

67 One of the most notorious examples was case of shelling of Dubrovnik Old Town during confict in former Yugoslavia. The events were examined by the ICTY in cases *Strugar* and *Jokić*. Both defendants admitted they were aware of protected status of the Old Town nevertheless they decided to attack the city.

68 1954 Hague Convention. Art. 11(2).

69 Ibid. Art. 11(3).

70 O´KEEFE, Roger. *The Protection of Cultural Property in Armed Conflict*. Cambridge: Cambridge University Press, 2010, p. 236.

71 TECHERA, Erika, J. Protection of Cultural Heritage in Times of Armed Conflict: the International Legal Framework Revisited. *Macquarie Journal of International and Comparative Environmental Law*, 2007, Vol. 4, pp. 1–20.

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The Second Protocol supplements the Convention in relations between the parties[72] and in case of incompatibility between provisions of the Convention and the Second Protocol, the provisions of the Second Protocol take precedence (based on principle *lex posterior derogate priori*).

The first important area relevant for concept of military necessity where the Second Protocol brings significant changes is concept of general protection. It clarifies term 'safeguarding' adding new preparatory measures taken in peacetime and introduces number of new provisions related to military necessity under the term 'respect' for cultural property. The provisions of the Article 6 of the Second Protocol complement the Article 4 of the Convention. The changes result in clearer and stricter rules for application of imperative military necessity concept. The new provisions are based on concept of military objective introduced in the API and establish duties both to the attacker and defending party. The attacker has to fulfil two conjunctive conditions:

i. that cultural property has, by its function, been made into a military objective; and
ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;[73]

Only "when and as long as"[74] those conditions are met the attacking party can direct act of hostility against cultural property while invoking imperative military necessity. Compared to the original provisions of the Article 4(2) of the Convention the Article 6 is very limiting. Act of hostility can be directed against cultural property only during the time period when the two mentioned conditions are fulfilled. The first condition recalls the concept of military objective as introduced in the Article 52(2) of the API. The function of cultural property is what matters, not its inherent nature and thus the mere location of cultural property cannot justify the attack.[75] The second condition forces the attacker to choose from 'the lesser of two evils'[76] thus he has to avoid attack on cultural property when there is possible alternative. This provision clarifies requirement of *imperative* military necessity. Chamberlain discusses how to approach the issue when there is choice between civilian casualties and destruction of cultural prop-

72 Second Protocol. Art. 2.
73 Ibid. Art. 6(a).
74 Ibid.
75 CHAMBERLAIN, Kevin. Military necessity under the 1999 Second Protocol. In WOUDENBERG, Nout van, LIJNZAAD, Liesbeth (eds). *Protecting cultural property in armed conflict: an insight into the 1999 second protocol to the Hague Covention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*. Leiden: Brill, 2010, pp. 43–49.
76 TOMAN, Jiri. *Cultural Property in War: Improvement in Protection*. Paris: UNESCO Publishing, 2009, p. 117.

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erty and concludes that protection of human lives has priority.[77] The following paragraph of the Article 6 concerns defending party: 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;[78]

The defending party has control of cultural property and decides whether to expose it to destruction or damage when there is no other alternative in order to obtain similar military advantage. Following two paragraphs further strengthen the protection. The decision to invoke imperative military necessity shall be taken only 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;".[79] Similar provision existed in the Convention with regard to special protection however for case of general protection it is significant improvement. The final paragraph of the Article 6 binds attacking party to give "effective advance warning"[80] in case circumstances permit it.

The concept of military necessity is closely related to other measures under IHL – namely precautions in attack and precautions against the effects of hostilities. The Article 7 of the Second Protocol is almost identical to the Article 57 of the API however protected subject is shifted from general protection of civilians and civilian property to cultural property. In fact the Article 57 of the API applies to cultural property as well since it covers all civilian objects and the Article 7 of the Second Protocol only reaffirms already existing rules.[81] Each party has duty to

a. do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention;
b. take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected under Article 4 of the Convention;
c. refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated; and

77 CHAMBERLAIN, Kevin. Military necessity under the 1999 Second Protocol. In WOUDENBERG, Nout van, LIJNZAAD, Liesbeth (eds). *Protecting cultural property in armed conflict: an insight into the 1999 second protocol to the Hague Covention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*. Leiden: Brill, 2010, pp. 43–49.

78 Second Protocol. Art. 6(b).

79 Ibid. Art. 6(c).

80 Ibid. Art. 6(d).

81 TOMAN, Jiri. *Cultural Property in War: Improvement in Protection*. Paris: UNESCO Publishing, 2009, p. 126.

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d. cancel or suspend an attack if it becomes apparent:
   i. that the objective is cultural property protected under Article 4 of the Convention
   ii. that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.[82]

Additionally, the Article 8 of the Second Protocol establishes two obligations in order to protect cultural property against the effects of hostilities. Parties shall to the maximum feasible effect

a. remove movable cultural property from the vicinity of military objectives or provide for adequate in situ protection;
b. avoid locating military objectives near cultural property.[83]

Once again the discussed Article is inspired by the Article 58 of the API and modified for needs of cultural property protection. Although the Article 58 of the API covers cultural property as well drafters of the Second Protocol decided to reaffirm existing rules. The most significant modification that increases level of protection is fact that the Article 8 protects cultural property against effects of hostilities not just effects of attacks as the Article 58 of the API does.

The second most important innovation of the Second Protocol was creation of concept of enhanced protection. Enhanced protection aims to complement general protection and in fact also replace defunct concept of special protection. Special protection was always weak point of the 1954 Hague Convention and only five countries requested registration. The reason behind this failure were mostly practical difficulties in application of the Article 8 of the Convention, especially with regard to cultural property located in the middle of large cities or close to urban or industrial centres.[84] The concept of special protection was designed to protect very limited number of refuges where cultural property is stored and thus it is not surprise that it appeared insufficient to provide more comprehensive protection. To be placed under enhanced protection cultural property has to meet three conditions:

a. it is cultural heritage of the greatest importance for humanity;
b. it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;

82 Second Protocol. Art. 7.

83 Ibid. Art. 8.

84 TOMAN, Jiri. The road to the 1999 Second Protocol. In WOUDENBERG, Nout van, LIJNZAAD, Liesbeth (eds). *Protecting cultural property in armed conflict: an insight into the 1999 second protocol to the Hague Covention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*. Leiden: Brill, 2010, pp. 1–19.

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c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.[85]

The wording refers to cultural heritage without defining it. Shift from 'cultural property' to 'cultural heritage' is more important that it might seem like. First of all it could be viewed as reference to UNESCO World Heritage Convention[86] but it also brings new, more complex, attitude towards the protection.[87] The words 'greatest importance for humanity' intends to distinguish it from cultural property under general protection ('great importance') and special protection ('very great importance'). The Guidelines for the Implementation of the Second Protocol links significance of the protected property with several criteria:

- it is an exceptional cultural property bearing testimony to one or more periods of the development of humankind at the national, regional or global level;
- it represents a masterpiece of human creativity;
- it bears an exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;
- it exhibits an important interchange of human achievements, over a span of time or within a cultural area of the world on developments in arts and sciences;
- it has a central significance to the cultural identity of societies concerned.[88]

As van Woudenberg[89] points out the term 'greatest importance for humanity' also implies uniqueness meaning that there is no other comparable cultural property of same significance. The importance of the protected cultural property has to be recognized on national level as well – in fact the highest possible level of protection has to be ensured by national legislation as the paragraph b requires. For purposes of military necessity exception the last paragraph of the Article is the most important however. It contains two conditions in fact. The first one is that cultural property "is not used for military purposes or to shield military sites". The requirement ensures that cultural property does not constitute military objective. Additionally, the second condition replaces one of the problem-

85 Second Protocol. Art. 10.

86 Convention Concerning the Protection of the World Cultural and Natural Heritage.

87 PROTT, Lyndel, O´KEEFE, Patrick. Cultural Heritage or Cultural Property? *International Journal of Cultural Property*, 1992, Vol. 1, No. 2, pp. 307–320.

88 Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. Art. 33.

89 WOUDENBERG, Nout van. Enhanced Protection: A new form of protection under the 1999 Second Protocol. In WOUDENBERG, Nout van, LIJNZAAD, Liesbeth (eds). *Protecting cultural property in armed conflict: an insight into the 1999 second protocol to the Hague Covention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*. Leiden: Brill, 2010, pp. 51–58.

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atic concepts of special protection – adequate distance. Instead declaration is made by party which has control over the cultural property that it will not be used for military purposes. Thus there are two aspects to consider: purpose and use of the cultural property.

The concept of immunity of cultural property under enhanced protection establishes two obligations: 1) to refrain from making such property object of attack, 2) to refrain from any use of the property or its immediate surroundings in support of military action.[90]

The Second Protocol approaches military necessity in relation to cultural property under enhanced protection differently compared to attitude of 1954 Hague Convention in relation to special protection. The Article 13 of the Second Protocol uses wording "loss of enhanced protection" and even does not mention term 'military necessity'. For purposes of the examined issue the paragraph 1(b) of the Article 13 is relevant: the property under enhanced protection losses the protection "if, and for as long as, the property has, by its use, become a military objective."[91] There are two significant limitations. The first one is temporal – loss of the protection is restricted to time period during which the property constitutes military objective. Secondly the property can become military objective only by its *use* and not by its nature, location or purpose as the property under general protection.

The following paragraph of the Article 13 brings more conditions that limit possibility to attack the property under enhanced protection. Even under the circumstances under the paragraph 1(b) the property may be object of attack only if "the attack is the only feasible means of terminating the use of the property referred to in sub-paragraph 1(b);".[92] As pointed out by O´Keefe that means that in case enhanced protection is not suspended or cancelled it can be lost only in relation to attacks and immunity of the property under enhanced protection is absolute regarding demolitions and use of the property to support military action.[93] Military necessity can never justify such acts. Additionally, the decision-maker has to make preliminary effort to avoid the attack and be *bona fide* that the attack is the only *feasible* option in the situation.[94] The attacker is also obliged to take "all feasible precautions" regarding means and methods of the attack chosen to achieve two objectives: 1) terminate such use and avoid damage to cultural property, 2) terminate such use and at least minimize the damage.[95]

90 Second Protocol. Art. 12.
91 Ibid. Art. 13(1)(b).
92 Ibid. Art. 13(2)(a).
93 O´KEEFE, Roger. *The Protection of Cultural Property in Armed Conflict*. Cambridge: Cambridge University Press, 2010, p. 273.
94 TOMAN, Jiri. *Cultural Property in War: Improvement in Protection*. Paris: UNESCO Publishing, 2009, p. 231.
95 Second Protocol. Art. 13(2)(b).

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Finally there is set of obligations that have to be met with only one prejudice: if circumstances do not permit so due to requirement of immediate self-defense.

i. the attack is ordered at the highest operational level of command;
ii effective advance warning is issued to the opposing forces requiring the termination of the use referred to in sub-paragraph 1(b); and
iii. reasonable time is given to the opposing forces to redress the situation.[96]

The requirement that the order has to be given by person at the highest operational level of command at least theoretically increases level of protection since such person should be more aware of value of the targeted property. The following two conditions provide time to defending party to change the situation in order to avoid the attack against cultural property. Since the property can be attacked only as long as it constitutes military objective by its use the decision of the defending party to stop such use can prevent the attack.

Importantly the Article 14 of the Second Protocol allows suspending or cancelling enhanced protection under certain circumstances in two cases. In both cases the decision has to be made by the Committee. In the first case the property does not meet anymore requirements of the Article 10 of the Second Protocol. For the purposes of military necessity issue the most significant obstacle is that the property is used for military purposes or to shield military site. In the second case the protection can be suspended or even cancelled if the property is used to support military actions which constitutes serious violation of the Article 12 of the Second Protocol.

4 Stari Most in Mostar destruction and new questions arising

The existing treaties seem to provide sufficient background to answer the question whether it is permissible to attack cultural property while recalling military necessity. However, theory is always one thing whereas practice the other. The *Prlić et al.* case that investigates destruction of Stari Most in Mostar during civil war in former Yugoslavia is not just interesting case law contribution to discussion about military necessity and cultural property protection but also introduces two significant questions that are not reflected in existing legislation.

The first issue is related to special nature of cultural property. The attitude towards cultural property protection underwent crucial development in last decades which can be expressed in shift from the term cultural property to the term cultural heritage. The term cultural heritage is much wider and includes more elements – most notably intangible cultural heritage and natural heritage. Even more importantly it recognizes *human dimension*[97] of cultural herit-

96 Ibid. Art. 13(2)(c).

97 Report of the Special Rapporteur in the field of cultural rights. 2016. UN Docs. A/HRC/31/59. Art. 47.

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age and relates it to human rights, especially cultural rights, identity of groups and individuals, continuity and development processes of the society.[98] The new approach towards cultural heritage can be described as holistic while including "something that has been developed, built or created, interpreted and re-interpreted in history, and transmitted from generation to generation" [99] which has consequences for its protection.

Stari Most in Mostar was not only outstanding example of Ottoman architecture but had symbolic meaning too. Connecting two banks of Neretva river inhabited by different ethnic and religious groups it represented unity and connection between the inhabitants of the city. The destruction of the bridge in 1993 that caused international outcry became one of symbols of the conflict in Yugoslavia and expression of its ethnic background.

The bridge collapsed after heavy shelling by Bosnian Croat military forces in November 1993. Surprisingly the accused were charged with wanton destruction of cities, towns or villages or devastation not justified by military necessity (wanton destruction) under Article 3(b) of the Statute of the ICTY and not under Article 3(d) of the Statute that was used in other cases when destruction of cultural heritage has been involved.

The Trial Chamber found that the bridge was essential to the Army of Bosnia and Herzegovina (ABiH) for combat activities of its units on front line, evacuations, sending of troops, food and material and that ABiH was holding position in its immediate vicinity. On this basis the Trial Chamber concluded that the bridge was military objective because the Bosnian Croat forces had military interest in its destruction.[100] On the other hand the Tribunal notes that the destruction of the bridge had significant psychological impact on Muslim population of Mostar and left residents of Donja Mahala (Muslim enclave on right bank) in total isolation.[101]

The Trial Chamber concludes that despite the destruction of the bridge might have been justified by military necessity the impact of the act on local Muslim civilian population was disproportionate to concrete and direct military advantage anticipated from the destruction.[102] The Tribunal also highlighted that the purpose of the act of destruction was undermining morale of local Muslim population[103] and thus constitutes crime of wanton destruction.[104] As we can observe military necessity that could justify the destruction of the bridge is outweighed

98 Ibid. Art. 7.

99 Report of the independent expert in the field of cultural rights, Farida Shaheed. 2011. UN Docs. A/HRC/17/38. Art. 5.

100 *Prosecutor v. Prlić et al.* Trial Judgment, Volume 3. IT-04-74-T. para. 1582.

101 Ibid. Para. 1583.

102 Ibid. Para. 1584.

103 Ibid. Para. 1585.

104 Ibid. Para. 1587.

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by protection of civilian population and its relation to the bridge. This brings new element into the consideration of military necessity and proportionality of the attack and presents that the specific values related to cultural heritage have to be taken into account.

As pointed out by Cotter[105] the case brings one more relevant question. The bridge is by its nature dual-use object. In the moment it was used for military purposes but also served to civilian population. The definition of military objective provided by API is not helpful at all in this case since it anticipates two kinds of objects only: the property that constitutes military objective and civilian objects which is all property that is not military objective. Explanation of this issue requires a bit different attitude.

Shue and Wippman identified three ways how to assess legality of attack on dual-use object under IHL.[106] They use terms limited proportionality, enhanced proportionality and protective proportionality. Limited proportionality follows wording and approach of the Article 52(2) of the API. The Article speaks about objects that make effective contribution to military action however does not reflect the possibility that the same object might make important contribution to civil life too. And since the Article 52(2) does not say anything about the civilian contributions they are not included into evaluation of situation.

Enhanced proportionality explains the attitude used by the ICTY in the case. The evaluation is based on calculus whether gained military advantage is not disproportionate to expected loss of civilian function. The authors note that not only immediate collateral consequences to civilian life have to be considered but also long-term effects. They point out that in case of some dual-use facilities the long-term effect may result in excessive incidental harm to civilians. In case of Stari Most the ICTY obviously shared this opinion and recognized the destruction of the bridge as act whose long-term effect is not proportionate to gained military advantage.

5 Conclusion

There is no doubt that cultural property enjoys during conflict higher level of protection compared to general civilian property both under customary law and existing conventions. Starting from early 19th century codifications there was obvious effort to limit military necessity that allows attacking cultural property and provide clear rules. Protection of cultural property during the conflict is viewed as matter significant to whole humanity and duty of civilized nations. The

105 COTTER, Maurice. Military Necessity, Proportionality and Dual-Use Objects at the ICTY: A Close Reading of the Prlić et al. Proceedings on the Destruction of the Old Bridge of Mostar. *Journal of Conflict & Security Law*, 2018, Vol. 23, No. 2, pp. 283–305.

106 SHUE, Henry, WIPPMAN, David. Limiting Attacks on Dual Use Facilities Performing Indispensable Civilian Functions. *Cornell International Law Journal*, 2002, Vol. 35, No. 3, pp. 559–579.

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1954 Hague Convention brought comprehensive system of protection and recognized different categories of cultural property based on its value. It also introduced rules restricting military necessity exception for different categories of the property. The rules were later reaffirmed in Additional Protocols to Geneva Conventions. Nevertheless, it became obvious that the 1954 Hague Convention, especially the concept of special protection, does not provide effective protection during the conflict. The Second Protocol to the Convention struggles to solve the problem by introducing the concept of enhanced protection and clarifying rules regarding military necessity under the general protection.

The rapid development of cultural property protection in last decades brought another element of the issue – connection with human rights protection. Term cultural property is replaced by cultural heritage and the objects are not seen as mere property anymore but something related to cultural rights and human dignity. The matter is presented in *Prlić et al.* case when the destruction of Stari Most in Mostar was found excessive despite the bridge constituted military objective. The ICTY concluded that the psychological impact of the action was disproportionate to achieved military advantage. The special value related to cultural property and its *human element* is something that will have to be acknowledged in future while assessing military necessity. Another arising issue illustrated by *Prlić et al.* case is the matter of dual-use objects. Neither customary nor conventional law does not provide sufficient concept how to assess military necessity in such cases. The case of Stari Most in Mostar presents that the matter can be highly complex and individual evaluation of every case in necessary.

List of references

Additional Protocol I to Geneva Conventions of 1977 (API).

CHAMBERLAIN, Kevin. Military necessity under the 1999 Second Protocol. In WOUDENBERG, Nout van, LIJNZAAD, Liesbeth (eds). *Protecting cultural property in armed conflict: an insight into the 1999 second protocol to the Hague Covention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*. Leiden: Brill, 2010, pp. 43–49.

Collins English Dictionary. *Definition of 'unavoidable'*. (online). Available: <https://www.collinsdictionary.com/dictionary/english/unavoidable> Accessed: 02.05.2021

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1907 Hague Regulations).

Convention Concerning the Protection of the World Cultural and Natural Heritage.

Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention).

COTTER, Maurice. Military Necessity, Proportionality and Dual-Use Objects at the ICTY: A Close Reading of the Prlić et al. Proceedings on the Destruction of the Old Bridge of Mostar. *Journal of Conflict & Security Law*, 2018, Vol. 23, No. 2, pp. 283–305.

Declaration concerning the laws and customs of war (Brussels Declaration).

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

DINSTEIN, Yoram. Military Necessity. In PETERS, Anne, WOLFRUM, Rüdiger (eds). *Max Planck Encyclopedia of Public International Law*. Oxford: Oxford University Press, 2013, pp. 710–717.

EDMONDS, James, Edward, OPPENHEIM, L. *Land warfare: an exposition of the laws and usages of war on land, for the guidance of officers of His Majesty's Army*. London: HMSO, 1911.

EHLERT, Caroline. *Prosecuting the destruction of cultural property in international criminal law*. Leiden: Brill – Nijhoff, 2014.

FORREST, Craig. The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts. *California Western International Law Journal*, 2007, Vol. 37, No. 2, pp. 177–219.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (IV Geneva Convention).

Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

Instructions for the Government of Armies of the United States in the Field (Lieber Code).

NAHLIK, Stanisław, E. La protection internationale des biens culturels en cas de conflit armé. *Recueil des cours de l´Académie de droit international*, 1967, Vol. 120, II, p. 132.

O´KEEFE, Roger. Protection of Cultural Property under International Criminal Law. *Melbourne Journal of International Law*, 2010, Vol. 11, No. 2, pp. 339–392.

O´KEEFE, Roger. *The Protection of Cultural Property in Armed Conflict*. Cambridge: Cambridge University Press, 2010.

PICTET, Jean. Development and Principles of International Humanitarian Law. In BLANK, Laurie, R., NOONE, Gregory, P. (eds). *International Law and Armed Conflict*. New York: Wolters Kluwer, 2019, pp. 39–60.

Prosecutor v. Prlić et al. Trial Judgment, Volume 3. IT-04-74-T.

PROTT, Lyndel, O´KEEFE, Patrick. Cultural Heritage or Cultural Property? *International Journal of Cultural Property*, 1992, Vol. 1, No. 2, pp. 307–320.

RADCLIFFE, Julian. The UK´s Training and Awareness Programme. In RUSH, Laurie (ed). *Archaeology, Cultural Property, and the Military*. Woodbridge: Boydell & Brewer, 2012, pp. 28–33.

Report of the independent expert in the field of cultural rights, Farida Shaheed. 2011. UN Docs. A/HRC/17/38.

Report of the Special Rapporteur in the field of cultural rights. 2016. UN Docs. A/HRC/31/59.

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague (Second Protocol).

SHUE, Henry, WIPPMAN, David. Limiting Attacks on Dual Use Facilities Performing Indispensable Civilian Functions. *Cornell International Law Journal*, 2002, Vol. 35, No. 3, pp. 559–579.

SOLIS, Gary, D. *The Law of Armed Conflict*. New York: Cambridge University Press, 2016.

TECHERA, Erika, J. Protection of Cultural Heritage in Times of Armed Conflict: the International Legal Framework Revisited. *Macquarie Journal of International and Comparative Environmental Law*, 2007, Vol. 4, pp. 1–20.

The Hostages Trial, Trial of Wilhelm List and Others, Case No. 47. United States Military Tribunal, Nuremberg, 1947–48.

The Laws and Customs of War on Land (Oxford Manual).

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

TOMAN, Jiri. *Cultural Property in War: Improvement in Protection*. Paris: UNESCO Publishing, 2009.

TOMAN, Jiri. *Protection of Cultural Property in the Event of Armed Conflict*. New York: Routledge, 2016.

TOMAN, Jiri. The road to the 1999 Second Protocol. In WOUDENBERG, Nout van, LIJNZAAD, Liesbeth (eds). *Protecting cultural property in armed conflict: an insight into the 1999 second protocol to the Hague Covention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*. Leiden: Brill, 2010, pp. 1–19.

VATTEL, Emmerich de. *Law of Nations or the Principles of Natural Law*. Philadelphia: T. & J. W. Johnson, Law Booksellers, 1839.

WENGER, Claude, F. et al. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Leiden: Brill, 1987.

WOUDENBERG, Nout van. Enhanced Protection: A new form of protection under the 1999 Second Protocol. In WOUDENBERG, Nout van, LIJNZAAD, Liesbeth (eds). *Protecting cultural property in armed conflict: an insight into the 1999 second protocol to the Hague Covention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*. Leiden: Brill, 2010, pp. 51–58.

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