

ICRC - Customary International Humanitarian Law

Rule 38. Attacks Against Cultural Property

Rule 38. Each party to the conflict must respect cultural property:

A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.

B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

Cultural property in general

To the extent that cultural property is civilian, it may not be made the object of attack (see Rule 7). It may only be attacked in case it qualifies as a military objective (see Rule 10). The Statute of the International Criminal Court therefore stresses that intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes or historic monuments is a war crime in both international and non-international armed conflicts, “provided they are not military objectives”.^[1]

The obligation to take special care to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments, provided they are not used for military purposes, is set forth in many military manuals.^[2] It is also restated in the legislation of numerous States, under which it is a punishable offence to attack such objects.^[3] Attacks against such objects have been condemned by States, the United Nations and other international organizations, for example, with respect to the conflicts in Afghanistan and Korea, between the Islamic Republic of Iran and Iraq and in the Middle East and the former Yugoslavia.^[4]

While in any attack against a military objective, all feasible precautions must be taken to avoid, and in any event, to minimize incidental damage to civilian objects (see Rule 15), special care is required to avoid damage to some of the most precious civilian objects. This requirement was already recognized in the Lieber Code, the Brussels Declaration and the Oxford Manual and was codified in the Hague Regulations.^[5] The Report of the Commission on Responsibility set up after the First World War identified the “wanton destruction of religious, charitable, educational and historic buildings and monuments” as a violation of the laws and customs of war subject to criminal prosecution.^[6]

The requirement of special care has also been invoked in official statements.^[7] The Plan of Action for the years 2000–2003, adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999, called on all parties to an armed conflict to protect cultural property and places of worship, in addition to respecting the total ban on directing attacks against such objects.^[8]

Property of great importance to the cultural heritage of every people

With respect to property of “great importance to the cultural heritage of every people”, the Hague Convention for the Protection of Cultural Property has sought to reinforce its protection by encouraging the marking of such property with a blue-and-white shield,^[9] but also by limiting the lawfulness of attacks to very exceptional situations where a waiver can be invoked in case of “imperative military necessity”.^[10]

At the time of writing, the Hague Convention was ratified by 111 States. The fundamental principles of protecting and preserving cultural property in the Convention are widely regarded as reflecting customary international law, as stated by the UNESCO General Conference and by States which are not party to the Convention.^[11] The application of the Hague Convention under customary international law to non-international armed conflicts was recognized by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case in 1995.^[12]

Many military manuals specify the obligation to respect and protect property of great importance to the cultural heritage of every people.^[13] These include manuals of States not, or not at the time, party to the Hague Convention.^[14] Under the legislation of numerous States, it is an offence to attack property of great importance to the cultural heritage of every people.^[15]

Waiver in case of imperative military necessity

The Second Protocol to the Hague Convention for the Protection of Cultural Property, adopted by consensus in 1999, brings the Hague Convention up to date in the light of developments in international humanitarian law since 1954. It is significant in this respect that the Second Protocol has maintained the waiver in case of imperative military necessity, as requested by many States during the preparatory meetings, but has sought to clarify its meaning. It provides that a waiver on the basis of imperative military necessity may only be invoked when and for as long as: (1) the cultural property in question has, by its function, been made into a military objective; and (2) there is no feasible alternative to obtain a similar military advantage to that offered by attacking that objective.^[16] The Second Protocol further requires that the existence of such necessity be established at a certain level of command and that in case of an attack, an effective advance warning be given whenever circumstances permit.^[17] During the negotiation of the Second Protocol, this interpretation of the waiver in case of imperative military necessity was uncontroversial.

This rule should not be confused with the prohibition on attacking cultural property contained in Article 53(1) of Additional Protocol I and Article 16 of Additional Protocol II, which do not provide for a waiver in case of imperative military necessity.^[18] As underlined by numerous statements at the Diplomatic Conference leading to the adoption of the Additional Protocols, these articles were meant to cover only a limited amount of very important cultural property, namely that which forms part of the cultural or spiritual heritage of “peoples” (i.e., mankind), while the scope of the Hague Convention is broader and covers property which forms part of the cultural heritage of “every people”.^[19] The property covered by the Additional Protocols must be of such importance that it will be recognized by everyone, even without being marked. At the Diplomatic Conference leading to the adoption of the Additional Protocols, several States indicated that notwithstanding the absence of a waiver, such highly important cultural property could become the object of attack in case it was used, illegally, for military purposes.^[20]

[1] ICC Statute, Article 8(2)(b)(ix) and (e)(iv) (cited in Vol. II, Ch. 12, § 19).

[2] See, e.g., the military manuals of Argentina (*ibid.*, § 40), Australia (*ibid.*, §§ 41–42), Belgium (*ibid.*, §§ 43–44), Burkina Faso (*ibid.*, § 47), Cameroon (*ibid.*, § 49), Congo (*ibid.*, § 53), Dominican Republic (*ibid.*, § 56), Ecuador (*ibid.*, § 57), France (*ibid.*, § 58), Germany (*ibid.*, § 62), Indonesia (*ibid.*, § 65), Israel (*ibid.*, § 67), Republic of Korea (*ibid.*, § 71), Mali (*ibid.*, § 74), Morocco (*ibid.*, § 75), New Zealand (*ibid.*, § 79), Nigeria (*ibid.*, § 81), Russian Federation (*ibid.*, § 84), Senegal (*ibid.*, § 85), Sweden (*ibid.*, § 88), United Kingdom (*ibid.*, §§ 93–94) and United States (*ibid.*, §§ 95–102).

[3] See, e.g., the legislation of Argentina (*ibid.*, § 105), Australia (*ibid.*, § 109), Azerbaijan (*ibid.*, § 110), Bosnia and Herzegovina (*ibid.*, § 113), Bulgaria (*ibid.*, § 114), Canada (*ibid.*, § 117), Chile (*ibid.*, § 118), China (*ibid.*, § 119), Colombia (*ibid.*, § 120), Congo (*ibid.*, § 122), Croatia (*ibid.*, § 124), Dominican Republic (*ibid.*, § 128), Estonia (*ibid.*, § 130), Germany (*ibid.*, § 132), Italy (*ibid.*, § 135), Kyrgyzstan (*ibid.*, § 138), Mali (*ibid.*, § 142), Mexico (*ibid.*, § 143), Netherlands (*ibid.*, §§ 144–145), New Zealand (*ibid.*, § 147), Nicaragua (*ibid.*, § 148), Paraguay (*ibid.*, § 152), Peru (*ibid.*, § 153), Poland (*ibid.*, § 154), Romania (*ibid.*, § 155), Russian Federation (*ibid.*, § 156), Slovenia (*ibid.*, § 158), Spain (*ibid.*, § 160), United Kingdom (*ibid.*, § 167), United States (*ibid.*, § 168), Uruguay (*ibid.*, § 169), Bolivarian Republic of Venezuela (*ibid.*, § 170) and Yugoslavia (*ibid.*, § 171); see also the draft legislation of Burundi (*ibid.*, § 115) and Trinidad and Tobago (*ibid.*, § 165).

[4] See, e.g., the practice of Cape Verde (*ibid.*, § 181), China (*ibid.*, § 183), Croatia (*ibid.*, § 185), France (*ibid.*, § 192), Germany (*ibid.*, § 194), Islamic Republic of Iran (*ibid.*, § 202), Pakistan (*ibid.*, § 215), United Arab Emirates (*ibid.*, § 219) and Yugoslavia (*ibid.*, §§ 237–239); UN Security Council, Res. 1265 (*ibid.*, § 244); UN General Assembly, Res. 47/147, 49/196 and 50/193 (*ibid.*, § 245); UN Commission on Human Rights, Res. 1984/1, 1985/1, 1986/1, 1987/2, 1988/1, 1989/2 and 1986/43 (*ibid.*, § 247), Res. 1994/72 (*ibid.*, § 248) and Res. 1998/70 (*ibid.*, § 249); UNESCO, General Conference, Res. 4.8 (*ibid.*, § 251); OIC, Contact Group on Jammu and Kashmir (*ibid.*, § 260) and Res. 1/5-EX (*ibid.*, § 261); Islamic Summit Conference, Ninth Session, Res. 25/8-C (IS) (*ibid.*, § 266).

[5] Lieber Code, Article 35 (*ibid.*, § 25); Brussels Declaration, Article 17 (*ibid.*, § 26); Oxford Manual, Article 34 (*ibid.*, § 27); Hague Regulations, Article 27 (*ibid.*, §§ 1–2).

[6] Report of the Commission on Responsibility (*ibid.*, § 28).

[7] See, e.g., the statements of Austria (*ibid.*, § 178), Egypt (*ibid.*, § 186), France (*ibid.*, § 189), Israel (*ibid.*, § 205), United Kingdom (*ibid.*, §§ 220 and 222–225), United States (*ibid.*, §§ 226 and 231–233) and Yugoslavia (*ibid.*, § 236).

[8] 27th International Conference of the Red Cross and Red Crescent, Plan of Action for the years 2000–2003 (adopted by consensus) (*ibid.*, § 265).

[9] Hague Convention for the Protection of Cultural Property, Articles 6 and 16.

[10] Hague Convention for the Protection of Cultural Property, Article 4(2) (cited in Vol. II, Ch. 12, § 7).

[11] UNESCO, General Conference, Res. 3.5 (*ibid.*, § 250); United States, *Annotated Supplement to the US Naval Handbook* (*ibid.*, § 103).

[12] ICTY, *Tadić case*, Interlocutory Appeal (*ibid.*, § 268).

[13] See, e.g., the military manuals of Argentina (*ibid.*, § 40), Australia (*ibid.*, §§ 41–42), Benin (*ibid.*, § 45), Canada (*ibid.*, §§ 50–51), Colombia (*ibid.*, § 52), Croatia (*ibid.*, §§ 54–55), France (*ibid.*, §§ 59–61), Germany (*ibid.*, §§ 62–63), Hungary (*ibid.*, § 64), Israel (*ibid.*, § 67), Italy (*ibid.*, §§ 68–69), Kenya (*ibid.*, § 70), Republic of Korea (*ibid.*, § 72), Madagascar (*ibid.*, § 73), Netherlands (*ibid.*, §§ 76–77), New Zealand (*ibid.*, § 79), Philippines (*ibid.*, §§ 82–83), Russian Federation (*ibid.*, § 84), South Africa (*ibid.*, § 86), Spain (*ibid.*, § 87), Sweden (*ibid.*, § 89), Switzerland (*ibid.*, §§ 90–91), Togo (*ibid.*, § 92) and United States (*ibid.*, § 103) and the reported practice of Israel (*ibid.*, § 66).

[14] See, e.g., the military manuals of Benin (*ibid.*, § 45), Colombia (*ibid.*, § 52), Croatia (*ibid.*, § 55), Kenya (*ibid.*, § 70), Republic of Korea (*ibid.*, § 72), New Zealand (*ibid.*, § 79), Philippines (*ibid.*, §§ 82–83), Togo (*ibid.*, § 92), United Kingdom (*ibid.*, §§ 93–94) and United States (*ibid.*, § 103).

[15] See, e.g., the legislation of Armenia (*ibid.*, § 107), Australia (*ibid.*, § 108), Belarus (*ibid.*, § 111), Belgium (*ibid.*, § 112), Bosnia and Herzegovina (*ibid.*, § 113), Canada (*ibid.*, § 116), Colombia (*ibid.*, § 121), Cook Islands (*ibid.*, § 123), Croatia (*ibid.*, § 124), Cuba (*ibid.*, § 125), Cyprus (*ibid.*, § 126), Czech Republic (*ibid.*, § 127), Georgia (*ibid.*, § 131), Hungary (*ibid.*, § 133), Ireland (*ibid.*, § 134), Latvia (*ibid.*, § 139), Lithuania (*ibid.*, § 141), Netherlands (*ibid.*, § 145), New Zealand (*ibid.*, § 146), Niger (*ibid.*, § 150), Norway (*ibid.*, § 151), Poland (*ibid.*, § 154), Romania (*ibid.*, § 155), Russian Federation (*ibid.*, § 156), Slovakia (*ibid.*, § 157), Slovenia (*ibid.*, § 158), Spain (*ibid.*, §§ 159–160), Sweden

(*ibid.*, § 161), Switzerland (*ibid.*, § 162), Tajikistan (*ibid.*, § 164), United Kingdom (*ibid.*, § 166), Yugoslavia (*ibid.*, § 171) and Zimbabwe (*ibid.*, § 172); see also the draft legislation of Argentina (*ibid.*, § 106), El Salvador (*ibid.*, § 129), Jordan (*ibid.*, § 137), Lebanon (*ibid.*, § 140) and Nicaragua (*ibid.*, § 149).

[16] Second Protocol to the Hague Convention for the Protection of Cultural Property, Article 6(a) (*ibid.*, § 21).

[17] Second Protocol to the Hague Convention for the Protection of Cultural Property, Article 6(c) and (d) (*ibid.*, § 21).

[18] Additional Protocol I, Article 53(1) (adopted by consensus) (*ibid.*, § 10); Additional Protocol II, Article 16 (adopted by 35 votes in favour, 15 against and 32 abstentions) (*ibid.*, § 18).

[19] See, e.g., the statements of Australia (*ibid.*, § 175), Canada (*ibid.*, § 180), Federal Republic of Germany (*ibid.*, § 193), Netherlands (*ibid.*, §§ 210–211), United Kingdom (*ibid.*, § 220) and United States (*ibid.*, § 227).

[20] See, e.g., the statements of the Federal Republic of Germany (*ibid.*, § 193), Netherlands (*ibid.*, § 210), United Kingdom (*ibid.*, § 220) and United States (*ibid.*, § 227).

Rule 39. Use of Cultural Property for Military Purposes

Rule 39. The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

This rule is contained in Article 4 of the Hague Convention for the Protection of Cultural Property, a provision applicable to both international and non-international armed conflicts.^[1] The fundamental principles of protecting and preserving cultural property in the Hague Convention are widely regarded as reflecting customary international law, as stated by the UNESCO General Conference and by States which are not party to the Convention.^[2] Its application under customary international law to non-international armed conflicts was recognized by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case.^[3] In addition, this rule is contained in other instruments pertaining also to non-international armed conflicts.^[4]

The prohibition on using property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage unless imperatively required by military necessity is set forth in numerous military manuals.^[5] These include manuals of States not party to the Hague Convention.^[6] In addition, several military manuals state that the use of a privileged building for improper purposes constitutes a war crime.^[7] There are also specific references in State practice to the prohibition on using cultural property in order to shield military operations.^[8]

Waiver in case of imperative military necessity

The Second Protocol to the Hague Convention for the Protection of Cultural Property has clarified the meaning of the waiver in case of imperative military necessity with regard to the use of cultural property. It considers that a waiver on the basis of imperative military necessity 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”.^[9] The Protocol further requires that the existence of such necessity be established at a certain level of command.^[10] At the negotiation of the Second Protocol, this interpretation did not give rise to any controversy.

This rule should not be confused with the prohibition on using cultural property contained in Article 53(2) of Additional Protocol I and Article 16 of Additional Protocol II, which do not provide for a waiver in case of imperative military necessity. As underlined by numerous statements at the Diplomatic Conference leading to the adoption of the Additional Protocols, these articles were meant to cover only a limited amount of very important cultural property, namely that which forms part of the cultural or spiritual heritage of “peoples” (i.e., mankind), while the scope of the Hague Convention is broader and covers property which forms part of the cultural heritage of “every people”.^[11] The property covered by the Additional Protocols must be of such importance that it will be recognized by everyone, even without being marked.

[1] Hague Convention for the Protection of Cultural Property, Article 4 (cited in Vol. II, Ch. 12, § 282) and Article 19 (*ibid.*, § 283).

[2] See, e.g., UNESCO General Conference, Res. 3.5 (*ibid.*, § 347) and United States, *Annotated Supplement to the Naval Handbook* (*ibid.*, § 329).

[3] ICTY, *Tadić* case, Interlocutory Appeal (*ibid.*, § 351).

[4] See, e.g., UN Secretary-General's Bulletin, Section 6.6 (*ibid.*, § 300).

[5] See, e.g., the military manuals of Argentina (*ibid.*, § 301), Australia (*ibid.*, § 302), Canada (*ibid.*, §§ 303–304), Croatia (*ibid.*, § 305), Germany (*ibid.*, §§ 306–307), Israel (*ibid.*, § 308), Italy (*ibid.*, §§ 309–310), Kenya (*ibid.*, § 311), Netherlands (*ibid.*, §§ 312–313), New Zealand (*ibid.*, § 314), Nigeria (*ibid.*, § 316), Russian Federation (*ibid.*, § 317), South Africa (*ibid.*, § 318), Spain (*ibid.*, § 319), Sweden (*ibid.*, § 320), Switzerland (*ibid.*, §§ 321–322) and United States (*ibid.*, §§ 324–329).

[6] See, e.g., the military manuals of Kenya (*ibid.*, § 311), South Africa (*ibid.*, § 318) and United States (*ibid.*, §§ 324–329).

[7] See, e.g., the military manuals of Canada (*ibid.*, § 303), New Zealand (*ibid.*, § 314), Nigeria (*ibid.*, § 315), United Kingdom (*ibid.*, § 323) and United States (*ibid.*, §§ 324–325 and 327).

[8] See, e.g., the military manual of Israel (*ibid.*, § 308); the statements of the United States (*ibid.*, §§ 345–346); OSCE, Europe Spillover Monitoring Mission to Skopje, Press Release (*ibid.*, § 349).

[9] Second Protocol to the Hague Convention for the Protection of Cultural Property, Article 6(b) (*ibid.*, § 291).

[10] Second Protocol to the Hague Convention for the Protection of Cultural Property, Article 6(c) (*ibid.*, § 21).

[11] See, e.g., the statements of Australia (*ibid.*, § 175), Canada (*ibid.*, § 180), Federal Republic of Germany (*ibid.*, § 193), Netherlands (*ibid.*, §§ 210–211), United Kingdom (*ibid.*, § 220) and United States (*ibid.*, § 227).

Rule 40. Respect for Cultural Property

Rule 40. Each party to the conflict must protect cultural property:

A. All seizure of or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.

B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

Seizure of or destruction or wilful damage to cultural property

Article 56 of the Hague Regulations prohibits “all seizure of, and destruction, or intentional damage done to” institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science.^[1] The violation of this provision was included among the violations of the laws and customs of war in the Statute of the International Criminal Tribunal for the Former Yugoslavia over which the Tribunal has jurisdiction.^[2] Under the Statute of the International Criminal Court, destruction of buildings dedicated to religion, education, arts, science or charitable purposes and historic monuments and destruction and seizure that is not imperatively demanded by the necessities of the conflict constitute war crimes in both international and non-international armed conflicts.^[3]

Many military manuals incorporate this provision.^[4] Under the legislation of many States, it is an offence to seize, destroy or wilfully damage cultural property.^[5] After the Second World War, France’s Permanent Military Tribunal at Metz in the *Lingenfelder case* in 1947 and the US Military Tribunal at Nuremberg in the *Von Leeb (The High Command Trial) case* in 1948 and the *Weizsaecker case* in 1949 convicted the accused of seizure and destruction of cultural property.^[6]

Theft, pillage, misappropriation and acts of vandalism

Theft, pillage, misappropriation and acts of vandalism are prohibited in Article 4 of the Hague Convention for the Protection of Cultural Property, a provision applicable to both international and non-international armed conflicts.^[7] The fundamental principles of protecting and preserving cultural property in the Hague Convention are widely regarded as reflecting customary international law, as stated by the UNESCO General Conference and by States which are not party to the Convention.^[8] Its application under customary international law to non-international armed conflicts was recognized by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić case* in 1995.^[9] In addition, this rule is contained in other instruments pertaining also to non-international armed conflicts.^[10]

The obligation to respect cultural property is set forth in numerous military manuals.^[11] Failure to respect cultural property is an offence under the legislation of numerous States.^[12] The rule is also supported by official statements made by States not, or not at the time, party to the Hague Convention.^[13] The prohibition of pillage of cultural property is a specific application of the general prohibition of pillage (see Rule 52). No official contrary practice was found. Violations of this rule have generally been denounced by States.^[14] The United Nations and other international organizations have also condemned such acts. In 1998, for example, the UN Commission on Human Rights expressed its deep concern over reports of the destruction and looting of the cultural and historical heritage of Afghanistan, a State not party to the Hague Convention for the Protection of Cultural Property, and urged all the Afghan parties to protect and safeguard such heritage.^[15] In 2001, there was widespread condemnation, in particular by UNESCO, of the Taliban

regime's decision to destroy a dozen ancient statues belonging to the Afghan National Museum and subsequently to destroy the Buddhas of Bamiyan.^[16]

[1] Hague Regulations, Article 56 (cited in Vol. II, Ch. 12., §§ 355–356).

[2] ICTY Statute, Article 3(d) (*ibid.*, § 366).

[3] ICC Statute, Article 8(2)(b)(ix) (*ibid.*, § 19) and Article 8(2)(b)(xiii) (cited in Vol. II, Ch. 16, § 55), Article 8(2)(e)(iv) (cited in Vol. II, Ch. 12, § 19) and Article 8(2)(e)(xii) (cited in Vol. II, Ch. 16, § 56).

[4] See, e.g., the military manuals of Argentina (cited in Vol. II, Ch. 12, § 371), Australia (*ibid.*, § 372), Canada (*ibid.*, §§ 373–374), Germany (*ibid.*, §§ 375–376), Italy (*ibid.*, § 378), Netherlands (*ibid.*, §§ 379–380), New Zealand (*ibid.*, § 381), Nigeria (*ibid.*, §§ 382–383), Sweden (*ibid.*, § 384), United Kingdom (*ibid.*, § 386) and United States (*ibid.*, §§ 387–388).

[5] See, e.g., the legislation of Bulgaria (*ibid.*, § 389), Estonia (*ibid.*, § 392), Italy (*ibid.*, § 393), Luxembourg (*ibid.*, § 395), Netherlands (*ibid.*, § 396), Nicaragua (*ibid.*, § 397), Poland (*ibid.*, § 399), Portugal (*ibid.*, § 400), Romania (*ibid.*, § 401), Spain (*ibid.*, § 402) and Switzerland (*ibid.*, § 403); see also the draft legislation of El Salvador (*ibid.*, § 391) and Nicaragua (*ibid.*, § 398).

[6] France, Permanent Military Tribunal at Metz, *Lingenfelder case* (*ibid.*, § 405); United States, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case* (*ibid.*, § 406) and *Weizsaecker case* (*ibid.*, § 407).

[7] Hague Convention for the Protection of Cultural Property, Article 4 (*ibid.*, § 357) and Article 19 (*ibid.*, § 358).

[8] See, e.g., UNESCO General Conference Res. 3.5 (*ibid.*, § 419); United States, *Annotated Supplement to the Naval Handbook* (*ibid.*, § 388).

[9] ICTY, *Tadić case*, Interlocutory Appeal (*ibid.*, § 428).

[10] See, e.g., UN Secretary-General's Bulletin, Section 6.6 (*ibid.*, § 370).

[11] See, e.g., the military manuals of Argentina (*ibid.*, § 371), Australia (*ibid.*, § 372), Canada (*ibid.*, §§ 373–374), Germany (*ibid.*, §§ 375–376), Israel (*ibid.*, § 377), Italy (*ibid.*, § 378), Netherlands (*ibid.*, §§ 379–380), New Zealand (*ibid.*, § 381), Nigeria (*ibid.*, §§ 382–383), Sweden (*ibid.*, § 384), Switzerland (*ibid.*, § 385), United Kingdom (*ibid.*, § 386) and United States (*ibid.*, §§ 387–388).

[12] See, e.g., the legislation of Bulgaria (*ibid.*, § 389), China (*ibid.*, § 390), Estonia (*ibid.*, § 392), Italy (*ibid.*, § 393), Lithuania (*ibid.*, § 394), Luxembourg (*ibid.*, § 395), Netherlands (*ibid.*, § 396), Nicaragua (*ibid.*, § 397), Poland (*ibid.*, § 399), Portugal (*ibid.*, § 400), Romania (*ibid.*, § 401), Spain (*ibid.*, § 402), Switzerland (*ibid.*, § 403) and Ukraine (*ibid.*, § 404); see also the draft legislation of El Salvador (*ibid.*, § 391) and Nicaragua (*ibid.*, § 398).

[13] See, e.g., the statements of Azerbaijan (*ibid.*, § 408), China (*ibid.*, §§ 410–411) and United States (*ibid.*, § 414).

[14] See, e.g., the statements of Azerbaijan (*ibid.*, § 408), China (*ibid.*, §§ 410–411), Islamic Republic of Iran (*ibid.*, § 412) and United States (*ibid.*, § 414).

[15] UN Commission on Human Rights, Res. 1998/70 (*ibid.*, § 418).

[16] See, e.g., UNESCO, Press Release No. 2001-27 (*ibid.*, § 421) and Press Release No. 2001-38 (*ibid.*, § 422).

Rule 41. Export and Return of Cultural Property in Occupied Territory

Rule 41. *The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory.*

Summary

State practice establishes this rule as a norm of customary international law applicable in international armed conflicts.

Export of cultural property from occupied territory

The obligation to prevent the exportation of cultural property from occupied territory is set forth in paragraph 1 of the First Protocol to the Hague Convention for the Protection of Cultural Property, to which 88 States are party, including States specially affected by occupation.^[1] This rule is also contained in Article 2(2) of the Convention on the Illicit Trade in Cultural Property, under which States undertake to oppose the illicit import, export and transfer of ownership of cultural property “with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations”.^[2] Article 11 of the Convention states that “the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit”.^[3] The Convention has been ratified by 104 States, 37 of which are not party to the First Protocol to the Hague Convention for the Protection of Cultural Property. Since 88 States are party to the latter, this means that a total of 125 States have adhered to a treaty obligation to respect this rule. In addition, Article 9(1) of the Second Protocol to the Hague Convention requires that an occupying power prohibit and prevent “any illicit export, other removal or transfer of ownership of cultural property”, while Article 21 requires States to suppress these violations.^[4] The inclusion of these rules in the Second Protocol during the negotiations leading to its adoption was uncontroversial. In the London Declaration in 1943, the Allied governments warned that they would regard any transfer of property rights, including of cultural property, as illegal.^[5]

Other practice supporting this rule includes military manuals, national legislation and official statements.^[6] While this practice concerns States party to the First Protocol to the Hague Convention for the Protection of Cultural Property, it can nevertheless be concluded that the prohibition on exporting cultural property is customary because, in addition to support for this rule found in the practice mentioned above, this obligation

is inherent in the obligation to respect cultural property, and particularly in the prohibition on seizing cultural property (see Rule 40). If cultural property may not be seized, then *a fortiori* it may not be exported. No official contrary practice was found.

Return of cultural property exported from occupied territory

Several treaties concluded after the Second World War dealt with the restoration of cultural property exported during occupation. Under the Treaty of Peace between the Allied and Associated Powers and Italy concluded in 1947, Italy was obliged to return cultural property to Yugoslavia and Ethiopia.^[7] Under the Convention on the Settlement of Matters Arising out of the War and the Occupation adopted in 1952, Germany was to set up an agency to search for, recover and restitute cultural property taken from occupied territory during the Second World War.^[8] The obligation to return cultural property which has been illegally exported from occupied territory is set forth in Paragraph 3 of the First Protocol to the Hague Convention for the Protection of Cultural Property, which has been ratified by 88 States.^[9] Paragraph 3 of the First Protocol to the Hague Convention is formulated more generally as applicable to all parties to the Protocol and not only to the occupying power.^[10] However, no practice was found on the obligation of third parties to return cultural property illicitly exported and present on their territory. Hence this rule is formulated more narrowly as applicable, at least, to the occupying power itself, which having failed in its duty to prevent the exportation must remedy this failure by returning the property. According to paragraph 4 of the Protocol, possible holders of the property in good faith must be compensated.^[11] The obligation to return exported cultural property is also recognized in many official statements, including by Germany in relation to its occupation during the Second World War and by Iraq in relation to its occupation of Kuwait.^[12] In the context of the Gulf War, the UN Security Council urged Iraq on several occasions to return to Kuwait all property seized.^[13] In 2000, the UN Secretary-General noted that a substantial quantity of property had been returned since the end of the Gulf War but that many items remained to be returned. He stressed that “priority should be given to the return by Iraq of the Kuwaiti archives ... and museum items”.^[14] While this practice concerns States party to the First Protocol to the Hague Convention for the Protection of Cultural Property, it can nevertheless be concluded that the obligation to return illicitly exported cultural property is customary because, in addition to support for this rule found in the practice mentioned above, it is also inherent in the obligation to respect cultural property, and particularly in the prohibition on seizing and pillaging cultural property (see Rule 40). If cultural property may not be seized or pillaged, then *a fortiori* it may not be held back in case it has been illegally exported. Restitution of illegally exported property would also constitute an appropriate form of reparation (see Rule 150).

No official contrary practice was found.

Retention of cultural property as war reparations

Paragraph 3 of the First Protocol to the Hague Convention for the Protection of Cultural Property specifies that cultural property shall never be retained as war reparations.^[15] In 1997, however, the Russian Federation’s Law on Removed Cultural Property declared cultural property brought into the USSR by way of exercise of its right to “compensatory restitution” pursuant to orders of the Soviet authorities to be federal property of the Russian Federation.^[16] In 1999, the Russian Federation’s Constitutional Court upheld the constitutionality of this law insofar as it dealt with “the rights of Russia to cultural property imported into Russia from former enemy states by way of compensatory restitution”. In the Court’s opinion: The obligation of former enemy states to compensate their victims in the form of common restitution and compensatory restitution is based on the well-established principle of international law recognised well before World War II, concerning international legal responsibility of an aggressor state.^[17] Germany has on several occasions objected to this decision and stated that “thefts and destruction of cultural property by the Nazi regime as well as the removal of cultural property by the Soviet Union during and after the Second World War were breaches of international law”.^[18] It should be stressed, however, that the Russian law applies to acts which occurred before the First Protocol to the Hague Convention for the Protection of Cultural Property entered into force.

[1] First Protocol to the Hague Convention for the Protection of Cultural Property, § 1 (cited in Vol. II, Ch. 12, § 431).

[2] Convention on the Illicit Trade in Cultural Property, Article 2(2) (*ibid.*, § 455).

[3] Convention on the Illicit Trade in Cultural Property, Article 11 (*ibid.*, § 433).

[4] Second Protocol to the Hague Convention for the Protection of Cultural Property, Article 9(1) (*ibid.*, § 434) and Article 21 (*ibid.*, § 435).

[5] London Declaration (*ibid.*, § 437).

- [6] See, e.g., Germany, *Military Manual* (*ibid.*, § 440); Luxembourg, *Law on the Repression of War Crimes* (*ibid.*, § 441); Israel, Military Court of Hebron, judgements under Jordanian law (*ibid.*, § 442); statements of Iraq (*ibid.*, § 443) and Kuwait (*ibid.*, § 468); Islamic Summit Conference, Ninth Session, Res. 25/8-C (IS) (*ibid.*, § 446).
- [7] Treaty of Peace between the Allied and Associated Powers and Italy, Article 12 (*ibid.*, § 472) and Article 37 (*ibid.*, § 450).
- [8] Convention on the Settlement of Matters Arising out of the War and the Occupation, Chapter Five, Article 1, § 1 (*ibid.*, § 452).
- [9] First Protocol to the Hague Convention for the Protection of Cultural Property, § 3 (*ibid.*, § 453).
- [10] See First Protocol to the Hague Convention for the Protection of Cultural Property, § 3, which states that “each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.” (*ibid.*, § 453).
- [11] First Protocol to the Hague Convention for the Protection of Cultural Property, § 4 (*ibid.*, § 453).
- [12] See, e.g., the statements of Germany (*ibid.*, § 460) and Iraq (*ibid.*, §§ 464–465).
- [13] UN Security Council, Res. 686 and 687 (*ibid.*, § 472) and Res. 1284 (*ibid.*, § 473).
- [14] UN Secretary-General, Second report pursuant to paragraph 14 of resolution 1284 (1999) (*ibid.*, § 477).
- [15] First Protocol to the Hague Convention for the Protection of Cultural Property, § 3 (*ibid.*, § 453).
- [16] Russian Federation, *Law on Removed Cultural Property* (*ibid.*, § 458).
- [17] Russian Federation, Constitutional Court, *Law on Removed Cultural Property case* (*ibid.*, § 459).
- [18] See, e.g., the statements of Germany (*ibid.*, §§ 461–462).