

How does international law protect Ukrainian cultural heritage in war? Is it protected differently than other civilian objects?

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In line with the principle of distinction, the cornerstone of international humanitarian law, attacks may only be directed against military objectives; thus, in principle, all civilian objects enjoy protection during hostilities. Objects and sites of cultural, religious or historical importance benefit from additional protection on the basis of treaty and customary international law.

While the Geneva Conventions of 1949 do not include a specific provision for cultural property, Article 53 of their Additional Protocol I of 1977 (binding on both Ukraine and Russia) refers to 'historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples', which must not be used in support of the military effort (e.g. as barracks, or by including them in a defence position), or made the object of acts of hostility (such as attacks) or reprisals.

In addition, both Russia and Ukraine are party to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict which applies to 'movable or immovable property of great importance to the cultural heritage of every people', as well as buildings and centers containing them, such as museums or libraries. It is for the State party to identify what cultural property is of sufficient importance in order to fall under this Convention. As there is no age or value threshold either, many cultural objects may fall under this system of protection. The cultural properties situated in Ukraine that fall under the protection of the Hague Convention include many more monuments and sites than the six listed under the World Heritage list; it also includes works of arts and other movable cultural objects. In order to assist the identification of what constitutes cultural property under the Convention, Ukraine has affixed the distinctive Blue Shield emblem on monuments and sites. However, the bearing of the Blue Shield is not mandatory for an object to benefit from the general protection provided by the Convention.

Article 4 of the Hague Convention requires its States Parties to respect the cultural property located on the territories of States Parties. This means that States parties must prohibit, prevent and put an end to any theft, pillage, misappropriation and vandalism directed against cultural property, and refrain from reprisals against it. But even more importantly, it also means that States Parties must refrain from exposing cultural property and its immediate surroundings to destruction or damage (such as by using it in support of the military effort), and from any acts of hostility directed against such property.

Civilian objects, including cultural properties, can become legitimate military objectives if they contribute effectively to military action by their nature, location, purpose, or use (such as if troops are stationed in a museum), and if the capture, neutralization or destruction of the cultural property in question offers a definite military advantage (and is not simply a matter of military convenience). In light of Article 6 of the Second Protocol to the Hague Convention (1999), a waiver of 'imperative military necessity' to direct an act of hostility against cultural property may then be invoked, provided that such cultural property has been made into a military objective by its function, and that there is no feasible alternative to obtain a similar military advantage to that offered by that act of hostility. While the Second Protocol of 1999 has been ratified by Ukraine but not Russia, its clarification of imperative military necessity should be applicable with regard to acts of both parties to the conflict given that it is regarded as informing the Convention, rather than adding to it. That means that an act of hostility against Ukrainian cultural property would be treated as unlawful unless it was conducted in accordance with Article 6 of the Second Protocol. Additionally, it is not possible to plead military necessity for attacking cultural property if doing so would not confer lawful advantage - for example, to spread terror among the civilian population which is the subject of a separate prohibition in Article 51(2) of Additional Protocol I.

While the waiver of imperative military necessity may not be invoked with regard to cultural properties under the enhanced system of protection of the Second Protocol, Ukraine does not have any property listed under that system. It could however request that some of its cultural properties are listed under the enhanced system of protection as a matter of emergency, even if hostilities already began, as per Article 11.9 of the Second Protocol.

In accordance with the principle of proportionality, even when a waiver of imperative military necessity may be invoked, precautions must be taken in attack to avoid disproportionate damage, including in urban settings. While urban warfare raises concerns with regard to the proximity of Ukrainian museums and churches to likely strategic targets, the prohibition of targeting under Article 4 does not depend on the cultural property's location vis-à-vis military objectives.

It should also be noted that cultural heritage is not only protected under the law of armed conflict but that it is also part of the human rights to participate in cultural life and an essential component of cultural identity. This means that both Russia and Ukraine, as party to the International Covenant on Economic, Social and Cultural Rights, must ensure the realization of the right to access and enjoy cultural heritage with regard to those under their jurisdiction, including those under their effective control.

Finally, attacks against cultural heritage can amount to war crimes and could be prosecuted before the International Criminal Court (Art 8(2)(b)(ix)). Such attacks may also be considered a crime against humanity when they amount to persecution, if they are "committed as part of a widespread or systematic attack [...] against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...], or other grounds that are universally recognized as impermissible under international law" (ICC Statute, Art. 7(1)(h)). And while attacks against cultural heritage may not amount to genocide, they may demonstrate the intent to commit genocide.

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