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THE HAGUE CULTURAL PROPERTY CONVENTION

SEPTEMBER 16, 2008.—Ordered to be printed

Mr. BIDEN, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 106–1(A)]

The Committee on Foreign Relations, to which was referred the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, concluded at the Hague on May 14, 1954 (Treaty Doc. 106–1(A)), having considered the same, reports favorably thereon with four understandings and one declaration, as indicated in the resolution of advice and consent, and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolution of advice and consent.

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I. PURPOSE

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the "1954 Hague Cultural Property Convention" or the "Convention") is designed to preserve cultural heritage and protect cultural property from destruction or damage in the event of an armed conflict.

II. BACKGROUND

Though wars have been fought for millennia, it was only within the last two hundred years that the law of armed conflict began to address seriously the preservation of cultural property. Histori-

cally, if the war was just, virtually any destruction of property accomplished along the way was considered acceptable. The old adage "to the victor go the spoils" was a common excuse for egregious cases of theft and destruction of cultural objects during armed conflicts and subsequent occupations. Yet, philosophers, historians, and leaders have long raised objections to this view, generally arguing that the pointless destruction of cultural property in the absence of military necessity is at best idiotic and at worst immoral. Polybius, an ancient Greek historian, urged respect for religious sites, and stated that "to do wanton damage to temples, statues and all such works with absolutely no prospect of any advantage in the war to our own cause or detriment to that of the enemy must be characterized as the work of a frenzied mind at the height of its fury."[1] Cicero argued in prosecuting Gaius Verres for the pillage of Sicily while he was the governor and "the wielder of supreme military and civil power," that the theft of cultural objects was not just greedy, but immoral and unscrupulous.[2] Swiss philosopher Emer de Vattel in 1758 urged the protection of objects, stating that "we ought to spare those edifices which do honor to human society, and do not contribute to increase the enemy's strength,—such as temples, tombs, public buildings and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one's self an enemy to mankind . . . ."[3]

In the 1800s, the protection of cultural property was formally incorporated into a code of military conduct. The Lieber Code of 1863, which was developed by Francis Lieber at the request of President Lincoln during the Civil War, explicitly provides that "[c]lassical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes . . . must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded."[4] The Lieber Code also states that cultural property may be transported in order to protect it from injury.[5] The Lieber Code led to the inclusion of similar and expanded provisions on the protection of cultural property in the 1899 and 1907 Hague Conventions,[6] to which the United States is

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[1] *See* Polybius, THE HISTORIES 31 (W.R. Paton trans., G.P. Putnam's Sons (Loeb Classical Library 1922)); Polybius (*c.*200-*c.*1118 BC), a Hellenistic historican, wrote of "Rome's rise to Mediterranean dominion and of the world in which that happened." OXFORD CLASSICAL DICTIONARY 1209–11 (Hornblower and Spawforth eds., 3d ed. 1996).

[2] *See* Cicero, THE VERRINE ORATIONS 289–299 (L.H.G. Greenwood trans., Harvard Univ. Press 1928). Cicero was only thirty-six years of age when, in the year 70 BC, he prosecuted Gaius Verres in the court of *Repetundae* for an accusation brought by the Sicilians against their former governor for a systematic and ruthless spoliation of the province. *See also* Margaret M. Miles, *Cicero's Prosecution of Gaius Verres: A Roman View of the Ethics of Acquisition of Art,* 11 INT'L J. CULTURAL PROP. 28, 30–31 (2002).

[3] Emer de Vattel (1714–1767), THE LAW OF NATIONS OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 571 (Kapossy and Whatmore eds. 2008) (1758).

[4] Lieber Code, Section II, Article 35.

[5] *Id.* at Article 36. *See also* Hays Parks, *Protection of Cultural Property From the Effects of War* in THE LAW OF CULTURAL PROPERTY AND NATURAL HERITAGE: PROTECTION, TRANSFER AND ACCESS § 3:03 (1999) (noting that the Lieber Code's provisions"form the basis for the law relating to the protection of cultural property to this day," but that Articles 35 and 36 are only part of the legacy. Articles 14, 15, 16, 31, 34, 37, 38, 44, 45, and 46 should also be reviewed; the Lieber Code "recognized all private property, including perhaps especially cultural property (as so identified in articles 35 and 36), whether public or private, as protected from intentional damage or seizure absent 'military necessity' . . . .").

[6] *See* Article 23, 25, 27, and 56 of the Regulations annexed to the 1899 Hague Convention respecting the Laws and Customs of War on Land, done at The Hague on July 29, 1899; Articles 23(g), 25, 27, and 56 of the Regulations annexed to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, done at the Hague on October 18, 1907.

a Party.[7] After World War I, which saw the destruction of significant cultural property, such as the medieval Cathedral in Rheims, the burning of Louvain, and the historic town of Arras, further efforts were made to strengthen the protection of cultural property during times of armed conflict, but those efforts met with little success.[8] Not until after World War II and the enormous destruction of cultural property that occurred during the war was real progress made, leading to the conclusion of the 1954 Hague Cultural Property Convention. This Convention constitutes the first comprehensive treaty for the protection of cultural property during armed conflict.

The United States participated actively in the negotiation and drafting of the 1954 Hague Cultural Property Convention, and was one of the first to sign.[9] For some time, the United States has been a world leader in promoting and protecting cultural property. Congress has passed numerous laws designed to preserve historic and cultural sites,[10] and since the civil war the U.S. armed forces have consistently recognized in their rules of conduct appropriate protections for cultural property during armed conflicts.[11] General Dwight D. Eisenhower, for example, took pains to protect cultural property in Europe during World War II, and the Department of Defense has sent special teams to protect cultural property at risk during the course of more recent conflicts. The Department of Defense has carefully studied the Convention, and its impact on military practice, and has found it to be fully consistent with good military doctrine and practice as conducted by U.S. forces. As noted in the Secretary of State's Letter of Submittal, "[i]n large measure, the practices required by the Convention to protect cultural property were based upon the practices of U.S. military forces during World War II" and since the Convention's entry into force, "U.S. military forces have not only followed but exceeded its terms in the conduct of military operations."[12]

The principles underlying the 1954 Hague Cultural Property Convention are grounded in the Regulations to the 1899 and 1907 Hague Conventions. Nevertheless, the 1954 Hague Cultural Property Convention goes a step further by, among other things, defining the term "cultural property;" providing for the protection of cultural property during not only armed conflict, but also military occupation; providing for preparations in peacetime for safeguarding

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[7] The 1899 Hague Convention respecting the Laws and Customs of War on Land, done at The Hague on July 29, 1899, entered into force for the United States on April 9, 1902. Shortly thereafter, however, the United States joined the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, done at The Hague on October 18, 1907, which entered into force for the United States on January 26, 1910, and in accordance with Article 4 of the 1907 Hague Convention, superseded the 1899 Hague Convention as among Parties to both conventions.

[8] For a discussion of efforts made between World War I and World War II, *see* Parks, *supra* note 5, at § 3:06 (noting, for example, that progress was made at the 1922–1923 Hague Conference on incorporating articles bearing on the protection of cultural property in the Hague Air Rules of 1923, but that these rules were never adopted by any nation and similarly, subsequent efforts at the League of Nations in this area were not terribly successful).

[9] The United States signed the 1954 Hague Cultural Property Convention on May 14, 1954, the same day it was concluded.

[10] *See, e.g.,* The American Antiquities Act of 1906, 16 U.S.C. § 433; The Historic Sites Act of 1935, 16 U.S.C. §§ 462–67; The National Historic Preservation Act of 1966, 16 U.S.C. § 470; The Archeological Resources Protection Act, 16 U.S.C. §§ 470. *See generally* Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States,* 75 B.U.S. Rev. 559 (1995).

[11] The U.S. Army codified the obligation to protect cultural property in Articles 34–36 of General Order No. 100 (1863), which was regarded as a reflection of the customary practice of nations.

[12] *See* Letter of Submittal from the Secretary of State, Treaty Doc. 106–1 at p. VII.

of cultural property against the foreseeable effects of armed conflicts; establishing an emblem for use in the protection of cultural property; and establishing a regime for the special protection of a highly limited category of cultural property included on an International Register established by the Convention.

The protection of cultural property under the Convention is not absolute. If cultural property is used for military purposes, or in the event of imperative military necessity, the protection afforded by the Convention is waived. Moreover, the primary responsibility for the protection of cultural property rests with the Party controlling that property, to ensure that the property is properly identified and that it is not used for an unlawful purpose. In sum, the Convention does not prevent military commanders from doing what is necessary to accomplish their missions. Protections are lost if the cultural objects are put to military use, and legitimate military actions may be taken even if collateral damage is caused to cultural property.[13]

The 1954 Hague Cultural Property Convention entered into force on August 7, 1956, and there are currently 118 parties, including Israel, the Russian Federation, and every NATO Member State except the United States, Iceland, and the United Kingdom, which has announced its intention to ratify the Convention.[14] In 2001 the American Bar Association adopted a position supporting ratification of the Convention, which was recently reaffirmed, and the committee has received testimony and letters in support of the Convention from the Archaeological Institute of America, the Lawyers' Committee for Cultural Heritage Preservation, the United States Committee of the Blue Shield, the American Anthropological Association, the American Association of Museums, the American Institute for Conservation of Historic and Artistic Works, the American Schools of Oriental Research, the Association of Moving Image Archivists, the College Art Association, the National Trust for Historic Preservation, the Society for American Archeology, the Society for Historical Archeology, the Society of American Archivists, the United States Committee of the International Council on Monuments and Sites, and the World Monuments Fund.

In a letter to the committee dated August 15, 2007, Deputy Secretary of State John D. Negroponte and Deputy Secretary of Defense Gordon England wrote to express their strong support for the Convention and urge the Senate to act promptly.

III. Major Provisions

A detailed section-by-section analysis of the Convention may be found in the Letter of Submittal from the Secretary of State to the President, which is reprinted in full in Treaty Document 106–1. A summary of key provisions is set forth below.

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[13] *See, e.g.,* Article 4(2) and Article 8, as further discussed in Section III of this report.

[14] *See* UK statement at http://www.culture.gov.uk/reference_library/consultations/1183.aspx. The United Kingdom's Department for Culture, Media and Sport published draft legislation earlier this year (available at http://www.culture.gov.uk/images/publications/culturalproperty armedconflictsdraftbill.pdf) and there are preparations being made for the introduction of legislation in the next Legislative Session starting in December.

Protection of Cultural Property from the Effects of an Armed Conflict

Chapter I of the Convention (Articles 1–7) sets forth general provisions regarding the protection of cultural property.

Article 1 defines cultural property as (1) moveable or immovable property of great importance to the cultural heritage of every people, which includes monuments of architecture, art or history, archeological sites, groups of buildings of historical or artistic interest, works of art, manuscripts, books and other objects of artistic, historical or archeological interest, as well as scientific collections and important collections of books or archives; (2) buildings whose main and effective purpose is to preserve or exhibit movable cultural property, such as museums, large libraries, and depositories of archives; and (3) centers containing a large amount of cultural property.

Article 3 provides that Parties must prepare in peacetime for the safeguarding of cultural property situated within their territory against the "foreseeable effects of an armed conflict" by taking measures they consider to be appropriate. Article 7 requires Parties to, among other things, establish in peacetime within their armed forces certain personnel "whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it." The U.S. Army currently maintains such personnel in its civil affairs reserve force.[15] In addition, Marine Corps reserve civil affairs personnel receive training to perform such functions, if needed.[16]

Article 4 requires Parties to respect cultural property by refraining from using such property or its surroundings for purposes that 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. Consistent with customary international law, however, these protections for cultural property are not absolute. In accordance with Article 4(2), for example, the protection afforded by the obligation set forth in Article 4(1) to respect cultural property is waived in the event of imperative military necessity.

Cultural Property Granted Special Protection

Chapter II of the Convention (Articles 8–11) sets forth provisions on special protection for limited categories of cultural property. These include specially designated refuges for moveable cultural property, and centers containing monuments and other immovable cultural property of "very great importance." To enjoy such special protection, the property must be entered onto the International Register of Cultural Property under Special Protection established by the Convention. According to the Department of Defense, the Vatican is one of only a limited number of listings on the Register.

Article 8, among other things, sets forth criteria for compliance by the Party claiming special protection. In particular, centers containing immovable cultural property that is specially protected may not be used for military purposes, including the movement or stationing of military personnel, the movement or production of war

[15] *See* Section-by-Section Analysis in the Letter of Submittal from the Secretary of State, Treaty Doc. 106–1 at p. 5.

[16] *Ibid.*

materiel, or other activities directly connected with military operations. Article 9 provides that Parties are to refrain from any act of hostility directed against registered cultural property that is specially protected and, with certain exceptions, from any use of such property or its surroundings for military purposes. Article 11 sets forth certain limitations on the special protection provided for registered cultural property. Paragraph 1 of Article 11 provides that Parties to the Convention shall be released from the obligation in Article 9 to ensure the immunity of cultural property under special protection if that property or its surroundings are used for military purposes, so long as such improper use persists. Paragraph 2 provides, in addition, that immunity shall be withdrawn from cultural property under special protection "in exceptional cases of unavoidable military necessity" for such time as that necessity continues.

Transporting Cultural Property

Chapter III of the Convention (Articles 12–14) addresses the transport of cultural property. Under Article 12, transport exclusively engaged in the transfer of cultural property, whether within a territory or to another territory may, at the request of the Party concerned, take place under special protection in accordance with procedures contained in Chapter III of the annexed regulations. Article 13 authorizes exceptions in urgent cases to the procedures referred to in Article 12. Article 14 grants immunity to cultural property in transit from seizure, although nothing in this provision limits the right of Parties to visit and search during the course of such transit.

Protection for Personnel Engaged in the Protection of Cultural Property

Chapter IV of the Convention (Article 15) requires that personnel engaged in the protection of cultural property be respected, and that they be allowed to carry out their duties, consistent with the interests of security, if they fall into the hands of the opposing Party.

Emblem for Use in the Protection of Cultural Property

Chapter V of the Convention (Articles 16 and 17) provides a description and procedures for use of the distinctive emblem, which may be used for marking cultural property to facilitate its recognition pursuant to Article 6. Article 17 details criteria for use of the emblem.

Scope of Application

Chapter VI of the Convention (Articles 18 and 19) defines the scope of the Convention's application. Article 18 specifies that, in addition to the relevant peacetime applications, the Convention applies during declared war or any other armed conflict between two or more Parties. It also applies during times of occupation of the territory of a Party, even if that occupation meets with no armed resistance. Article 19 provides that the provisions of the Convention relating to respect for cultural property shall also apply to any non-international armed conflict in the territory of a Party.

Mechanisms for Facilitating Implementation

Chapter VII of the Convention (Articles 20–28) facilitates implementation of the Convention. Articles 21 and 22 address the role of Protecting Powers, which are responsible for safeguarding the interests of the Parties to a conflict. Article 23 provides that the Parties may call upon the United Nations Educational, Scientific and Cultural Organization for assistance in implementing the Convention. Article 24 provides for special agreements among Parties to enhance the protection of cultural property. Article 25 requires Parties to disseminate the Convention, particularly among their armed forces and personnel engaged in the protection of cultural property. Article 27 provides for meetings of Parties to consider problems of implementation or proposals for revision of the Convention. Article 28 requires each Party to undertake all steps necessary, within the framework of its ordinary criminal jurisdiction, to impose penal or disciplinary sanctions on persons who violate the Convention.

Regulations

The Convention has attached to it Regulations that set forth procedures for the implementation and operation of the Convention and are considered, as stated in Article 20, an integral part of the Convention. The Regulations are divided up into four chapters, which respectively address: (1) the framework to be established by Parties in order to exercise a degree of control over cultural property for the sake of its protection; (2) procedures for dealing with cultural property under special protection, including the procedures for managing, and making an application for entry onto, the International Register of Cultural Property Under Special Protection; (3) procedures for transporting cultural property pursuant to Article 12 of the Convention; and (4) procedures governing the use of the distinctive emblem established in Article 16 of the Convention. In accordance with Article 39 of the Convention, the Convention and the Regulations are subject to the same amendment procedure, which requires a States Party to formally accept an amendment formally before it can enter into force for that State Party.

IV. Entry Into Force

In accordance with Article 33, the Convention will enter into force for the United States three months after the date on which the United States deposits its instrument of ratification.

V. Implementing Legislation

No implementing legislation is required for this Convention. The United States already complies in practice with the norms contained in this Convention. In response to the committee's questions, the Department of Defense stated that if the United States were to ratify this treaty, existing Department of Defense and Military Department directives and publications that refer to treaties to which the United States is a party would be updated to reflect that the United States is a party to this Convention, but no new Department of Defense directives or regulations would be needed and there would be no additional costs associated with implementing the Convention.

VI. Committee Action

The committee held a public hearing on the Convention on April 15, 2008. Testimony was received from Mr. John B. Bellinger, Legal Adviser at the Department of State; Mr. Charles A. Allen, Deputy General Counsel for International Affairs at the Department of Defense; and Brigadier General Michelle D. Johnson, Deputy Director for the War on Terrorism and Global Effects, J-5 Strategic Plans and Policy Directorate, Joint Staff. The transcript for this hearing is attached as an annex to Executive Report 110–22.

On July 29, 2008, the committee considered the Convention and ordered it favorably reported by voice vote, with a quorum present and without objection.

VII. Committee Recommendation and Comments

The Committee on Foreign Relations believes that cultural property can enhance the growth of civilization, enrich the lives of all peoples, and inspire a mutual respect and appreciation among nations. Nevertheless, the protection of cultural property cannot be absolute during the course of an armed conflict. As stated by General Eisenhower to U.S. forces on December 29, 1943: "[i]f we have to choose between destroying a famous building and sacrificing our own men, then our men's lives count infinitely more and the building must go. But the choice is not always so clear-cut as that. In many cases the monuments can be spared without any detriment to operational needs." The 1954 Hague Cultural Property Convention strikes this careful balance and its ratification, which requires no change in U.S. law or practice, would allow the United States to continue its long-standing leadership in the promotion and protection of cultural property. Accordingly, the committee urges the Senate to act promptly to give advice and consent to ratification of the Convention, as set forth in this report and the accompanying resolution of advice and consent.

RESOLUTION

The committee has included in the resolution of advice and consent four understandings and one declaration.

First Understanding

As noted above in Section III of this report, Chapter II sets forth provisions on special protection for a highly limited category of cultural property that is regarded as being of "very great importance" and is entered onto the International Register of Cultural Property under Special Protection. The proposed understanding makes clear that the level of protection required for such cultural property is one that is consistent with existing customary international law.

Second Understanding

The proposed understanding makes clear that the actions of any military commander, military personnel, or any other person responsible for planning, authorizing, or executing military action or other activities covered by this Convention, can only be assessed in light of information that was reasonably available at the time.

Third Understanding

The proposed understanding makes clear that the rules established by the Convention only apply to conventional weapons, and do not affect existing rules of international law governing other types of weapons, such as nuclear weapons. According to the executive branch, such a statement reflects the intent of those States that negotiated the Convention.[17]

Fourth Understanding

Article 4(1) of the Convention requires Parties "to respect cultural property situated within their own territory as well as within the territory of other [Parties] by refraining 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 . . . ." The proposed understanding makes clear that the primary responsibility for the protection of cultural objects rests with the Party controlling that property, to ensure that it is properly identified and that it is not used for an unlawful purpose.

Declaration

The proposed declaration relates to the self-executing nature of the Convention and is included in light of the recent Supreme Court decision, *Medellín* v. *Texas,* 128 S.Ct. 1346 (2008), which has highlighted the importance of clarity regarding the self-executing nature of treaty provisions. A further discussion of the committee's views on this matter can be found in Section VIII of Executive Report 110–12. In brief, the Protocol is self-executing, in the sense that it operates of its own force as domestically enforceable federal law, but the Protocol does not confer private rights enforceable in U.S. courts.

VIII. Resolution of Advice and Consent to Ratification

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO UNDERSTANDINGS AND A DECLARATION

The Senate advises and consents to the ratification of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, concluded on May 14, 1954 (Treaty Doc. 106–1(A)), subject to the understandings of section 2 and the declaration of section 3.

SECTION 2. UNDERSTANDINGS

The advice and consent of the Senate under section 1 is subject to the following understandings, which shall be included in the instrument of ratification:

(1) It is the understanding of the United States of America that "special protection," as defined in Chapter II of the Convention, codifies customary international law in that it, first, prohibits the use of any cultural property to shield any legitimate military targets from attack and, second, allows all property to be attacked using any lawful and proportionate means,

[17] *See* Section-by-Section Analysis in the Letter of Submittal from the Secretary of State, Treaty Doc. 106–1 at p. 8.

if required by military necessity and notwithstanding possible collateral damage to such property.

(2) It is the understanding of the United States of America that any decision by any military commander, military personnel, or any other person responsible for planning, authorizing, or executing military action or other activities covered by this Convention shall only be judged on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken.

(3) It is the understanding of the United States of America that the rules established by the Convention apply only to conventional weapons, and are without prejudice to the rules of international law governing other types of weapons, including nuclear weapons.

(4) It is the understanding of the United States of America that, as is true for all civilian objects, the primary responsibility for the protection of cultural objects rests with the Party controlling that property, to ensure that it is properly identified and that it is not used for an unlawful purpose.

SECTION 3. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

With the exception of the provisions that obligate the United States to impose sanctions on persons who commit or order to be committed a breach of the Convention, this Convention is self-executing. This Convention does not confer private rights enforceable in United States courts.

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