

# BOFAXE

## Taking Care of Other People's History?

### Purging Identity Under the Pretense of Protective Measures

— In October 2022, Russian military vehicles pulled up in Kherson, then occupied by the Russian armed forces to surround and secure two buildings. This raid was not a counter-resistance operation but initiated what experts called the largest collective art theft since World War II. Together with Ukrainian helpers, Russian forces removed at least 11,000 out of 14,000 exhibits from two Kherson museums and relocated them to Russian-occupied territories between November 1st and 3rd, 2022. 10,000 exhibits were brought to Crimea, and another 1,000 to Henichesk on Ukraine's Coast.

The perceivably shocked reactions (e.g., The Atlantic, Human Rights Watch, The Kyiv Independent) are not made up of thin air. The removal fits well into the narrative that Russia's aggression on Ukraine also attacks an independent and distinguishable Ukrainian identity. Meanwhile, new light was shed on the events when open-source investigations uncovered the involvement, identity and background of Ukrainians working with the Russian forces.

Ukraine and Human Rights Watch consider Russia's actions to violate international law as "pillage and unlawful appropriation, requisitioning or seizure". This blogpost assesses the Law of Armed Conflict on cultural property and seeks to dissect Russia's explanation, namely to only temporarily protect the exhibits against shelling and looting by the Ukrainian armed forces, which seemingly aligns with the 1954 Convention's objective to protect (para. 3 of the Preamble).

#### The 1954 Hague Convention & the Prohibition of Theft and Pillaging

Protecting cultural property in armed conflict was developed in the 19th century (see Seršić, pp. 5 ff.). The matter has since been picked up in multiple instruments. Cultural property must be spared from attacks (Arts. 27, 56 Hague 1907; Art. 53 AP I) while attacks against cultural property qualify as grave breaches of international humanitarian law (IHL) (Art. 85(4)(d) AP I). Accordingly, attacks on these objects may constitute War Crimes under Art. 8(2)(b)(ix), (e)(iv) Rome Statute, and arguably (OTP's Policy on Cultural Heritage, para. 73 ff.) Crimes Against Humanity under Art. 7(1)(h) Rome Statute. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter: Hague 1954), negotiated in cooperation with the then newly-founded UNESCO, contains the subject's most extensive codification. Both Ukraine and Russia are parties to this Convention and its First Protocol, while only Ukraine acceded to the Second Protocol.

As a general rule, Art. 4(3) Hague 1954 prohibits any theft, pillaging, misappropriation, requisition, and vandalism against cultural property. Theft and pillage are also prohibited under Art. 47 Hague 1907, Art. 33(2) Geneva IV, and customary IHL. *Prima facie*, one could ponder whether removing exhibits constitutes a misappropriation or requisition under Art. 4(3) Hague 1954. However, this exact provision was contained in the rejected Draft-Art. 4(2) Hague 1954 (UNESCO Doc. CBC/3, p. 6).

The protection of cultural property is primarily entrusted to the State in which the property is located, Art. 5(1),(2) Hague 1954. An occupying power shall, under Art. 5 Hague 1954, merely support the occupied State. Exceptionally, para. 2 allows the occupying force to take measures herself, subject to necessity, inability of the territorial state, and in (close) cooperation with the latter. Art. 5(2) Hague 1954 is thus no *carte blanche* for any benevolent action but contains prerequisites and imposes limits on their discretion.

Considering the spirit of Art. 4(3) Hague 1954, questions arise whether removing property can be encompassed as a measure under Art. 5(2) Hague 1954 at all. Contrary to para. 1, the wording of para. 2 only legitimizes preservatory actions by the occupying power as opposed to safeguarding measures. This should not limit protective measures but prevent occupying powers from taking actions prejudicial to monuments' national character (Toman, p. 84; Chamberlain, p. 34). In light of the ordinary meaning, one can intuitively consider "[moving] cultural property away from the shifting frontline" a safeguarding measure (O'Keefe, p. 136). This interpretation is supported by the drafting history, during which representatives invoked the necessity of removing cultural property and agreed that the prohibition of acquisition under Art. 4(3) Hague 1954 shall not inhibit States' abilities under Art. 5(2) Hague 1954 (Toman, p. 71).

#### Art. 5(2) Hague 1954: Necessity, Cooperation and Again Necessity?

First, Russia would need to demonstrate that preserving measures were necessary at all. Ostensibly, para. 2 deems a measure necessary when cultural property *already is* "damaged by military operations", *i.e.*, entailing such "that would safeguard cultural property from further damage" (Chamberlain, p. 34). A fortiori, cultural property that is in danger but yet to be damaged should be afforded protection as well (Colwell-Chanthaphonh/Piper, p. 231).

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After all, a protective provision that only enables action after the damage has occurred defeats its purpose. Consequently, assessing whether protection was necessary requires a prognosis.

On-site Russian officials claimed a risk of Ukrainian looting and shelling surrounding the impending retaking of Kherson which occurred a few days later. In line with the ICJ's reasoning in its *Corfu Channel* case (p. 18), in the absence of publicly available facts that would indicate a risk of Ukrainian looting and shelling, it is on Russia to disclose the basis of her assessment or to assume responsibility for her actions. The Ukrainian armed forces do not have a record of attacking cultural property. Also, the Russian forces withdrew from Kherson without a fight a few days later, which, owing to the logistics of such a withdrawal, was likely decided by the time of the removal. Considering, however, the predictive nature of such an assessment, information available may arguably not entirely disprove a risk from the Russian perspective. Hence, the need for protection may not be ruled out. Yet, a low-level threat may only serve as a basis for light measures.

Before we look at the necessity of the actual preserving measures taken, let us examine Russia's cooperation with Ukraine, or rather the lack thereof: Under Art. 5(2) Hague 1954, the necessary measures shall be taken "as far as possible, and in close cooperation" with the authorities. The formulation "as far as possible" is, however, not to be understood as limiting the obligation to cooperate (e.g., O'Keefe, p. 137). The available information does not indicate any coordination with the Ukrainian Ministry of Culture. The only act that could be considered cooperation occurred with the Ukrainian museum director and staff. Nevertheless, deeming this cooperation with Ukrainian authorities appears rather absurd. The then-acting director was put in charge by the Russian occupiers after the long-time director refused to cooperate with the occupying forces and other collaborative Ukrainian members of staff went to Russia or Russian-occupied territories. This cannot qualify as cooperation with Ukrainian authorities and in fact, it could be questioned whether the installation of a pro-Russian museum director would not suffice to attribute their actions to Russia under CIL as reflected in Art. 8 Draft Articles on the Responsibility of States. However, in the absence of conclusive evidence to that end, the only thing that appears to be clear is the lack of cooperation required by Art. 5(2) Hague 1954.

In any case, the specific measures taken by the Russian forces – removing the exhibits days before they abandoned Kherson without a fight – were unnecessary to preserve the cultural property. The Convention also contains other obligations and means that aim to protect without necessitating removal. States are for example prohibited from setting up military targets in the vicinity of and directing hostilities against cultural property (Art. 4(1) Hague 1954), which can be facilitated by marking the property (Art. 6 Hague 1954). In addition, the omitted cooperation with the Ukrainian authorities could have served Russia's declared goal. As outlined by the UNESCO Military Manual (para. 200), it also remains an option to request technical assistance or guidance from UNESCO, see Art. 23(1) Hague 1954. Russian officials provided no indication as to why these measures would have proven futile from the outset. Conversely, if the international community was to accept abstract notions of a threat to legitimize the removal of cultural property, the necessity enshrined in Art. 5(2) Hague 1954 would be foiled.

#### Conclusion

Apart from the information we relied on, there are plenty of suspicious aspects surrounding Russian operations in Kherson that already indicate ulterior motives behind its operations. For example, the museum's CCTV footage of the removal was deleted, and the secret service FSB was allegedly involved in the operation. It is safe to assume that the full scale of Russian operations in Kherson will only surface in the years to come. What is already certain, however, is that invoking "protection" to justify bringing cultural property under Russian control alludes to other instances of Russian lawfare. Beyond emptying museums, Russian forces allegedly dragged bronze statues from parks, and "evacuated" the 200-year-old remains of Grigory Potemkin. Attacks on cultural objects, be they military attacks on the Transfiguration Cathedral, or removing cultural artifacts, touch upon the *raison d'être* of the 1954 Hague Convention. By erasing and removing Ukrainian cultural objects, Russia is attempting to erode the cultural foundations of an independent Ukraine. Even beyond Ukrainian interests, it is in the interest of the international community to protect cultural heritage. Para 2 of the Preamble of Hague 1954 states that any damage to one State's culture affects all mankind, since it contributes to the culture of the world – a formulation, by the way, which was added following a proposition of the USSR (Toman, p. 40).