

No. 291E

20.02.2005

BOFAXE



Protecting the Old Minaret of Samarra

Replies and Comments

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Focus

ICTY, Prosecutor v. Blaškić, Judgment, 3 March 2000, para. 185.

ICTY, Prosecutor v. Jokic, Judgment, 18 March 2004, para. 50

"Additional Protocols I (art. 53) and II (art. 16) of 1977 to the Geneva Conventions of 1949 reiterate the obligation to protect cultural property and expand the scope of the prohibition by, *inter alia*, outlawing "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." According to the Additional Protocols, therefore, it is prohibited to direct attacks against this kind of protected property, whether or not the attacks result in actual damage. This immunity is clearly *additional* to the protection attached to civilian objects."

On 24 January 2005 the Press Agency Reuters published an article in which it mentioned that the old minaret of Samarra in Iraq is being used by the American armed forces as a sniper post because it offers the highest vantage point in the city.

At the moment it is not clear whether an armed conflict, whether international or non-international, is raging in Iraq. Due to space constraints, the matter cannot be discussed here in detail. Should the conflict be of international nature, then the entirety of the rules relating to international humanitarian law would be applicable.

Based on this assumption, several issues are raised in this context since cultural objects are protected *indirectly* and *directly*. First, the indirect protection stems from the general protection offered to civilian objects which, in pursuance of the principle of distinction, cannot be usually targeted during a military operation. This is codified in article 48 API and forms part of customary international law. Objects that are normally used for civilian purposes can nevertheless become military objects if used for military purposes. In the case of religious buildings, the protection offered is higher inasmuch as article 52(3) API declares that "in case of doubt whether [such] an object is being used to make an effective contribution to military action, it shall be presumed not to be so used". Hence, precautions need to be taken at the highest level of command. "Those who plan or decide upon the attack" must check whether the building is indeed used for military purposes as well as be certain that the object is making an *effective* and not only a *potential* contribution to military action.

Second, cultural objects are protected as such. This "immunity is clearly *additional* to the protection attached to civilian objects" (ICTY, *Jokic*, para. 50). According to article 53(2) AP I it is prohibited to use historical monuments and places of worship in support of the military effort. Yet, this ban is only relevant if the said object "constitute[s] the cultural or spiritual heritage of peoples", a condition fulfilled by the spiralling minaret of Samarra of the great mosque that was built in 850 AD. Unfortunately, one must admit that API is not applicable to the said armed conflict since neither the U.S. nor Iraq has ratified API. However, a similar prohibition is found in article 4 of the 1954 Hague Convention for the Protection of Cultural Property that declares that cultural property should not be used "for purposes which are likely to expose it to destruction or damage". Undoubtedly, the positioning of snipers on the minaret is likely to cause the opponent to attack it in order to remove the threat. Again, the U.S. has not ratified the 1954 Hague Convention. However, besides the fact that the U.S. has pledged to uphold its principle, it is commonly agreed that article 4 reflects the state of customary international law.

According to customary law, article 27 of the Hague Regulations, article 4 of the Hague Convention on Cultural Property and article 53 AP I, cultural objects must be spared as far as possible. However, if used at the time for military purposes, cultural objects lose their protection. This means that by using a monument for military purposes, the American armed forces have in fact removed its protected status. In this regard, article 4(2) of the Hague Convention on Cultural Property explicitly declares that protection can be waived "only in cases where military necessity imperatively requires such a waiver".

In the *Blaškić* case, the ICTY confirmed that religious buildings is protected as long as the sites "were not being used for military purposes at the time of the acts" and were not "in the immediate vicinity of military objectives" (para. 185). The Conventions and the Court, thereby, subject the direct protection of cultural property to the rather vague parameters of military necessity. By placing soldiers on the minaret the U.S. has turned the minaret into a possible military target. If attacked, the opponent would need to prove that it acted under "imperative military necessity".

Should this requirement be fulfilled, the right to attack is still not unlimited. The principle of proportionality as spelled out in article 51 API and as laid down in customary international law precludes any attack that may result in an excessive "loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof". One would then need to balance the value of the minaret of Samarra as a legitimate military target to its value as a civilian object and the value of the civilians who would be killed and injured in the attack.

Responsibility

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BOFAXE are supported by the German Red Cross. The writer is solely responsible for the content.