



United Nations  
Educational, Scientific and  
Cultural Organization

Organisation  
des Nations Unies  
pour l'éducation,  
la science et la culture

Organización  
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Организация  
Объединенных Наций по  
вопросам образования,  
науки и культуры

منظمة الأمم المتحدة  
للتربية والعلم والثقافة

联合国教育、  
科学及文化组织

March 2012  
Original: English

**Report on the obligations of the Parties to implement Chapter 4  
(Criminal Responsibility and Jurisdiction) of the Second Protocol**

1. The fifth meeting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict (UNESCO Headquarters, 22-24 November 2010) requested the Secretariat “to provide a report on the obligation of the Parties to implement Chapter 4 of the Second Protocol in their national legislation as addressed in paragraph 39 of the Guidelines for the Implementation of the Second Protocol”.
2. Pursuant to this request, the Secretariat has prepared the current report on the obligation of the Parties to implement Chapter 4 (Criminal responsibility and jurisdiction) of the Second Protocol in their national legislation as addressed in paragraph 39 of the Guidelines for the Implementation of the Second Protocol (“the Guidelines”). The current report is intended to inform the Committee members and observers on the content of obligations under Chapter 4 of the Second Protocol.
3. With respect to compliance with Article 10(b) and Article 12 of the Second Protocol, paragraph 39 of the Guidelines deals with domestic legal and administrative measures recognizing the exceptional cultural and historic value of cultural property proposed for the granting of enhanced protection and the ensuring of the highest level of protection for such property.
4. The part related to the Committee’s request is encompassed by the third bullet point of paragraph 39, which reads as follows:

39. “. . . In evaluating whether cultural property is protected by adequate domestic legal and administrative measures . . . the Committee considers, in particular, national measures intended for:

. . .

- appropriate criminal legislation providing for the repression of, and jurisdiction over, offenses committed against cultural property under enhanced protection within the meaning of, and in accordance with, Chapter 4 of the Second Protocol.”

5. While paragraph 39 of the Guidelines explicitly addresses only cultural property under enhanced protection, the “serious violations” regime also encompasses violations committed against cultural property which does not benefit from enhanced protection. As such, the entire category of “serious violations” is examined in this report, identifying, as appropriate, relevant differences for cultural property under enhanced protection.

#### Obligation of national criminalization for Serious Violations

6. Under Article 15(2) of the Second Protocol, the Parties are required to adopt appropriate measures under their domestic law to establish criminal offenses for serious violations and adopt appropriate penalties for such violations.

#### **A. Serious Violations**

7. The following acts, committed intentionally by any person(s) and in violation of the Second Protocol, are serious violations of the Second Protocol:

Where the cultural property is *under enhanced protection*:

- a. making such cultural property under enhanced protection the object of attack;
  - b. using such cultural property under enhanced protection or its immediate surroundings in support of military action;
- or, irrespective of whether or not the cultural property is *under enhanced protection*:
- c. committing extensive destruction to, or appropriation of, such cultural property protected under the Convention or Second Protocol;
  - d. making such cultural property protected under the Convention or Second Protocol the object of attack;
  - e. committing theft, pillage or misappropriation of, or acts of vandalism directed against, such cultural property protected under the Convention.

#### **B. Scope of responsibility for serious violations**

- 8. Individuals directly and intentionally participating in offenses are to be held criminally responsible.
- 9. Article 15(2) of the Second Protocol explicitly obliges the Parties to extend individual criminal responsibility to persons other than those who directly commit the act, in accordance with general principles of law and international law. The Second Protocol, however, does not elaborate on the applicable criminal responsibility for such individuals and leaves this issue to be guided by general principles of law and international law. It should also be noted that allowing for the maximum possible scope in national legislation for serious violations of the Second Protocol will enable the Parties to best protect cultural property through penal measures.

#### **C. Appropriate punishment**

- 10. Under Article 15(2) of the Second Protocol, Parties must adopt appropriate penalties for serious violations. While the Second Protocol does not define “appropriate penalties,” the Statutes and case-law of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), and the Statute of the International Criminal Court (“ICC”) may be considered as an example of the state of international law.
- 11. The statutes of the ICTY and of the ICC confer jurisdiction over war crime offences, a number of which are offenses against cultural property.<sup>1</sup> For such offenses against cultural property constituting War Crimes, these statutes limit the appropriate penalty to imprisonment, though permit, in addition to imprisonment, the levying of fines and/or forfeiture and/or return of property.<sup>2</sup>
- 12. Because criminal penalties for serious violations of the Second Protocol must be appropriate, and in some cases fines and forfeiture alone are insufficient, an appropriate penalty regime should allow for the imposition of imprisonment.

### Maximum length of imprisonment

13. In regard to the degree of penalty, the length of imprisonment is generally not specified in the statutes of the international tribunals and courts, with the exception of the ICC Statute. The statutory maximum penalty of an offense committed in violation of the ICC Statute, which includes offenses relevant to the destruction and misappropriation of cultural property, is imprisonment for a term of 30 years, or, where justified by the extreme gravity of the crime and individual circumstances of the accused, life imprisonment.<sup>3</sup>

### Appropriate length of imprisonment

14. In determining appropriate punishment, the following factors should be taken into consideration: the gravity of the offense, mitigating and aggravating circumstances, the values safeguarded by treating the act as a serious crime (such as human dignity, right to physical and/or moral integrity, right to own property), the extent of harm caused, as well as the personality of the offender, his or her background and personal situation, and his or her conduct following the offense.
15. With consideration of these factors, *inter alia*, an appropriate penalty for a serious violation of the Second Protocol is expected to be on par with the penalties for offenses of a similar gravity under the criminal law of the State Party.

### **D. Statutory limitations for serious violations**

16. The Second Protocol imposes no explicit obligations on Parties regarding statutes of limitation for serious violations of the Second Protocol.
17. Two international instruments directly addressing the non-applicability of statutory limitations are the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,<sup>4</sup> and the Council of Europe: European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes.<sup>5</sup> These two conventions respectively claim 54 and 9 ratifications and/or accessions.<sup>6, 7</sup>
18. Article 29 of the ICC Statute declares that “crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”<sup>8</sup> It should be noted that the offenses described in Article 15(1)(d), which fall under Article 8 of the ICC Statute, are War Crimes. Such offenses may not, therefore, be subject to any statute of limitations of States Parties party to the ICC Statute, with regard to a prosecution by the ICC.

### **E. Required jurisdiction for serious violations**

19. Based on Article 16(1), the Parties are required to enact national legislation that will permit the exercise of jurisdiction for serious offences of the Second Protocol when the serious violation is committed in the territory of the State Party (territoriality), when the alleged offender is a national of the State Party (nationality) or when the alleged offender is present in the territory of the State Party and has allegedly committed an offense set forth in Article 15(1)(a) to (c).

20. This will allow a Party to exercise jurisdiction where an alleged perpetrator of a serious violation under the Second Protocol is present in the territory of the Party, irrespective of the alleged perpetrator's nationality or where the offense occurred.
21. There is no obligation under the Second Protocol for Parties to make legislative provision for trial in absentia pursuant to universal jurisdiction.
22. The Parties are not limited to exercising jurisdiction in only those circumstances required by the Second Protocol. In accordance with Article 16(2)(a), the Parties are entitled to impose individual criminal responsibility and exercise jurisdiction under applicable national and international law. The Second Protocol also does not affect the exercise of jurisdiction under customary international law.

#### **F. Prosecution of Serious Violations of Articles 15(1)(a) to 15(1)(c)**

23. Under Article 17(1) of the Second Protocol, the Parties are obligated to extradite or prosecute alleged offenders of Articles 15(1)(a) to 15(1)(c). If the Party does not extradite the alleged offender, then it must submit the case to its competent authorities for prosecution without exception and without undue delay.
24. Pursuant to Article 17(2) of the Second Protocol, the Parties are to guarantee fair treatment and a fair trial in accordance with domestic law and international law to any person (civilians and combatants),<sup>9</sup> and in no case provide a guarantee less favorable to an individual than is provided by international law.

#### **G. Other Violations**

##### Obligation of suppression for "other violations"

25. Based on Article 21 of the Second Protocol, Parties are required to establish legislative, administrative or disciplinary measures necessary to suppress any other intentional violation.
26. Other violations consist of any use of cultural property in violation of the Convention or this Protocol and any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or this Protocol.

#### **H. Scope of responsibility for other violations**

27. The scope of responsibility for other violations of the Second Protocol should be appropriately proportionate to the gravity of the violations as defined in Article 21 of the Second Protocol.

#### **I. Measures regarding other violations**

28. In order to take measures to suppress other violations of the Second Protocol, the Parties are entitled to enact legislative, administrative, or disciplinary measures.
29. Article 21 of the Second Protocol is applicable without prejudice to Article 28 of the Convention.

<sup>1</sup> Articles 3 and 5 of the ICTY Statute address, *inter alia*, crimes against property:

Article 3

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

...

- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

...

Article 5

Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

...

- (h) persecutions on political, racial and religious grounds;

ICTY Statute, arts. 3, 5. Similarly, Article 8 of the ICC Statute states:

Article 8

War Crimes

...

2. For the purpose of this Statute, "war crimes" means:

...

- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

...

- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

...

- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

...

- (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

ICC Statute, art. 8(2)(b)(ix), (2)(e)(iv).

<sup>2</sup> See ICTY Statute, arts. 24(1) and (3):

Article 24

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. . . .

...

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct . . . to their rightful owners"

See also ICC Statute, art. 77:

Article 77

Applicable penalties

1. [T]he Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

- (a) Imprisonment for a specified number of years . . . ; or

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(b) A term of life imprisonment . . . .

2. In addition to imprisonment, the Court may order:

(a) A fine . . . . ;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime . . . .

<sup>3</sup> ICC Statute, art. 77(1)(a).

<sup>4</sup> 26 Nov 1968, 8 ILM 68, 70, art. 1, *available at* <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-6.en.pdf> [hereafter U.N. Convention on the Non-Applicability of Statutory Limitations]

<sup>5</sup> 1974, ETS N° 82, art. 1.

<sup>6</sup> See Chart of signatures and ratifications of the U.N. Convention on the Non-Applicability of Statutory Limitations, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-6&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en) (last visited on 11 July 2011)

<sup>7</sup> See Chart of signatures and ratifications of the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, COUNCIL OF EUROPE, <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=082&CM=1&DF=&CL=ENG> (last visited 1 Feb 2011).

<sup>8</sup> ICC Statute, art. 29:

Article 29

Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

<sup>9</sup> *e.g.*, see United Nations International Covenant on Civil and Political Rights, 19 Dec 1966, 6 ILM 368, 372-3, arts. 14-15:

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

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6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
  7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.