



HANDBOOK ON THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

EDITION 2015



CDEF Centre de Doctrine
d'Emploi des Forces
DDo Division Doctrine



PFT. 5.3.2 (EMP 50.655)

FOREWORD

This publication was prepared by the Forces Employment Doctrine Center (CDEF) of the French Army. The proponent of this handbook is the Director of the Center who authorized and managed its distribution, as part of his mission to develop the tactical doctrine of the (French) Land Forces.

As with joint and multinational doctrine, a team of experienced officers was responsible for the concept behind and the drafting of this handbook. **It is a doctrine document and not a legal instrument.** Like any doctrine publication, its contents provide guidelines for land forces in training and operations, but it is not intended to set standards. The application of this document seeks to reconcile theoretical imperatives with the reality of operations and the constraints inherent to each particular situation.

Doctrine is a guide that maintains freedom of action for the combined arms commander in charge of the organization of forces in operations, and of the design, planning and execution of missions.

This publication will be updated on a regular basis, according to developments in multinational and joint doctrines, to advances in tactical reflection and to changes in land forces organization and equipment. Lessons learned by French and foreign forces will also be taken on board.

Note: The authorized version of this publication is available on line on the CDEF intranet network ([http://.cdef.terre.defense.gouv.fr/Référentiel doctrinal](http://.cdef.terre.defense.gouv.fr/Référentiel%20doctrinal)).

DOCTRINE IS DYNAMIC

IT IS ALSO FED BY YOUR RESPONSES AND SUGGESTIONS

Users of this document can also be actors in it.

Contact the editor directly to provide further details or corrections;

Tel: 00 33 821 753 52 68



MINISTÈRE DE LA DÉFENSE



CENTRE DE DOCTRINE
D'EMPLOI DES FORCES

Paris, 30 June 2014

EMP 50.655 dealing with the protection of cultural property entitled “Mémento sur la protection des biens culturels en cas de conflit armé” was approved on 30 January 2014 under no. 500597/DEF/CDEF/DDO/BSEO/NP.

In conjunction with FT 03 “Employment of Land Forces in Joint Operations”, the last component of the fundamental doctrine documents of Land Forces, and in line with the recently issued DIA-01, the purpose of this publication is to aid the understanding of a military commander’s responsibility to protect cultural property during armed conflict.

While the aim of military action is often neutralizing the adversary, it must nonetheless strictly adhere to the legal framework recalled in the Forces Employment Doctrine (DIA-01 no.128/DEF/CICDE/NP, 12 June 2014) and also seek a strategic desired end state. This always has a comprehensive scope, including respect for the populations at stake during conflicts, and, subsequently, safeguarding the cultural heritage they care for.

This study is unique in the (French) Army doctrinal corpus and has no equivalent within NATO. It has been developed in partnership with UNESCO, the United Nations Educational, Scientific and Cultural Organization and ICRC, the International Committee of the Red Cross. It is thus the only authorized reference document for land forces.

This study defines the basic concepts and the system for protecting cultural property. It describes the control procedure for effectively applying the Hague Convention on the protection of cultural property, dated 14 May 1954, as well as holding military commanders criminally responsible. Last, it concludes by recalling the specific rules on measures to be taken for prohibiting and preventing the import, export and illicit trafficking of cultural property.

Brigadier General Jean-François PARLANTI



SUMMARY OF AMENDMENTS

1. This table lists all of the amendments readers have suggested and sent to the CDEF, regardless of their location or ranking.
2. Amendments validated by the CDEF are written in **red** in the table below, in chronological order of when they were taken into account.
3. Those amendments taken into account appear in purple in the new version.
4. The serial number at the bottom of the cover page of the original is corrected (**in bold, red Roman letters**) and **“amended day/month/ year”** is added.
5. The digital copy of the amended text replaces the previous version in all databases.

N°	Amendment	Author	Last updated
1	Update of legal references on pages 7 and 27	DAJ	20 April 2015
2	Taking into account of the subject and not the state of ratification of Additional Protocol 2 to the 1954 Convention on page 7	DAJ	30 April 2015
3	Numbering the document PFT 5.2.2 (formerly EMP 50.655) in compliance with the new naming rules in force at the CDEF	CDEF	6 July 2015
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			

PREFACE BY MRS. IRINA BOKOVA, DIRECTOR-GENERAL OF UNESCO

Culture on the frontline of modern conflicts – May 2014

The publication of this handbook for French Army officers comes at a particularly appropriate time, as it marks the 60th anniversary of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The United Nations Educational, Scientific and Cultural Organization (UNESCO) is keen to welcome this initiative. It demonstrates that France is fully committed to a field central to modern armed conflicts.

As war takes on new forms, culture is on the frontline. It is also a key element in peace-building. Contrary to common belief, cultural heritage is not a collateral victim of armed conflict; it is often a deliberate target for belligerents who use the destruction of culture as a means of fostering escalating violence. During the 1990s, we saw this occur in South-East Europe: in Kosovo, in Bosnia-Herzegovina, in Sarajevo and in Dubrovnik. It began with arson attacks on libraries and the tearing down of street signs. We have since it since in Afghanistan, in Iraq, in Libya and in Mali, where cultural sites – statues of Buddha, museums and mausoleums – have been systematically ransacked. In Syria today, on top of the humanitarian emergency, a cultural tragedy is emerging. Across the board, the same logic is gaining ground: belligerents are attacking culture in order to damage identities and shatter social cohesion, thus fueling the downward spiral of hatred and revenge. The destruction of cultural property deepens the wounds to society in the very long term, accelerating the collapse of communities and the loss of any sense of continuity felt by a people throughout history. The protection, safeguarding and transmission of this cultural heritage are indispensable elements for any sustainable security and peace strategy. It cannot be dissociated from protecting human lives.

Protecting heritage is the shared responsibility of States, as part of their obligations under international conventions, such as the 1954 Hague Convention and the 1972 World Heritage Convention. Attacks on cultural property, regardless to whom it belongs, are attacks against the cultural heritage of all mankind. We are all moved by the sight of buildings ripped apart by shells, regardless of the culture or civilization to which they belong. Our heritage is universal, and States must unite to protect it. This fundamental principle of the Hague Convention must be constantly recalled at a point in time when the blending of cultures and identities is shaping globalization. Over the past decades, a number of legal systems have been established to curb the barbarity of war, calling for the protection of civilians, schools, hospitals and cultural sites. The Hague Convention is part of a comprehensive legal arsenal, including, of note, six other UNESCO cultural Conventions and the Geneva Conventions, along with their additional protocols. Within the United Nations, UNESCO endeavors to enforce these legal systems and to integrate the protection of cultural heritage into contingency operations and peace-keeping operations. The work of the International Criminal Court to punish the perpetrators of offences against culture and the recent provisions of the United Nations Security Council on Mali and Syria have underscored the role protecting culture plays in armed conflict. This work represents an emerging irrevocable awareness and paves the way to the end of impunity for crimes against culture.

Putting such awareness into practice proves a complicated task. It requires the reinforcement and a more comprehensive knowledge of our legal arsenal, making this handbook even more valuable. There is no ready-made solution. Instead, all that counts is raising awareness and reinforcing fielded resources when facing contingencies. Politicians, citizens and soldiers should be kept informed and trained through all possible means, for example, manuals, workshops and awareness-raising campaigns. Such is UNESCO's mission. Work must begin during peace-time with the sharing of good practices, preventive protection and input from younger generations. Each time an armed conflict occurs, UNESCO shares with the military HQs the information it has available, as well as maps and geographic coordinates of protected sites. The organization also warns customs and police forces about the risks of illicit trafficking of cultural property, and recalls the States involved of their obligations. In this context, therefore, rehabilitating damaged cultural sites makes perfect sense, as highlighted by the UNESCO-led rebuilding operations of Mostar Bridge in Bosnia Herzegovina or the Timbuktu mausoleums in Mali. Rebuilding heritage helps the entire community regain its confidence and summon the strength to face the future. At stake is far more than safeguarding stones or paintings; our heritage tells us who we are and what we want to be. Without the transmission of culture, there can be no lasting peace.

Recent history has underscored the limited nature of taking a purely military “*hard power*” approach to finding sustainable solutions for peace, whether this is in Afghanistan, Iraq or Mali. War is no longer an exclusively military phenomenon. Broadly speaking, it has taken on a social dimension. Tailored responses are required in contexts of asymmetric civilian conflicts, where armed victory is often only an illusion. Educational and cultural issues, along with what we call “*soft power*” must be integrated into every strategy at the early stages, not only to restore security, but also to build lasting peace.

We should never have to choose between protecting human lives and safeguarding cultural heritage. Attackers rarely choose between destroying one or the other, instead they target both. Our response must meet this problem head-on. It should treat the safeguarding of cultural heritage as an integral part of protecting society as a whole. A society's history and identity is made unique by its culture. Claude Levi Strauss, a traveling companion of UNESCO, wrote that “seen on the scale of millennia, human passions fuse. (...) They remain the same today as they were in the past. Randomly removing ten or twenty centuries of history would not affect, in a meaningful way, our knowledge of human nature. The only irreplaceable losses would be these of the works of art which these centuries gave rise to. Human beings only differ through their works, and even exist only through them. (...) Works of art only provide the proof that, throughout history, amongst people, something actually happened”.

The French Army is a key partner in leading this action. UNESCO is glad to honor the commitment France has shown here, the host nation of our Paris headquarters. I have no doubt that the Army officers for whom this handbook was intended will adhere to it, thereby encouraging Armed Forces in other countries to do the same.

Irina Bokova



EXECUTIVE SUMMARY

Cultural property embodies strong symbolic and identity values, often representing “the soul of a nation”. Since antiquity, cultural property has been much coveted and subject to damage during armed conflicts, whether deliberate or not.

I. Organization of the protection of cultural property

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, dated 14 May 1954 (hereafter the 1954 Convention) and its protocols were specifically designed and form the cornerstone of an international protection regime for cultural property.

Article 1 of the 1954 Convention defines Cultural Property as follows:

- **movable or immovable property of great importance to the cultural heritage of every people, groups of buildings which, as a whole, are of historical or artistic interest as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;**
- **buildings whose main and effective purpose is to preserve or exhibit the movable cultural property;**
- **centers containing a large amount of cultural property, to be known as ‘centers containing monuments’.**

Articles 2 and following define two regimes of protection:

- **the general protection of cultural property** comprising the two-fold obligation of the safeguarding of and respect for cultural property;
- **the special protection of cultural property** concerning three categories of property of great importance, or a limited number (1) of refuges intended to shelter movable cultural property in the event of armed conflict; (2) of centers containing monuments; (3) other immovable cultural property of very great importance. This cultural property is granted immunity against any act of hostility. The immunity can be withdrawn only in exceptional cases of unavoidable military necessity (article 11(2) of the 1954 Convention).

The Second Protocol to the 1954 Convention, for protection of cultural sites, dated 26 March 1999 - still in process of ratification by France, but being applied by France - enhances the system of protection and establishes a veritable regime of individual criminal responsibility from a superior authority.

II. Contribution of the Second Protocol to the 1954 Convention

In view of improving the system put into place by the 1954 Convention, articles 10 to 12 of the Second Protocol establish a new protection system:

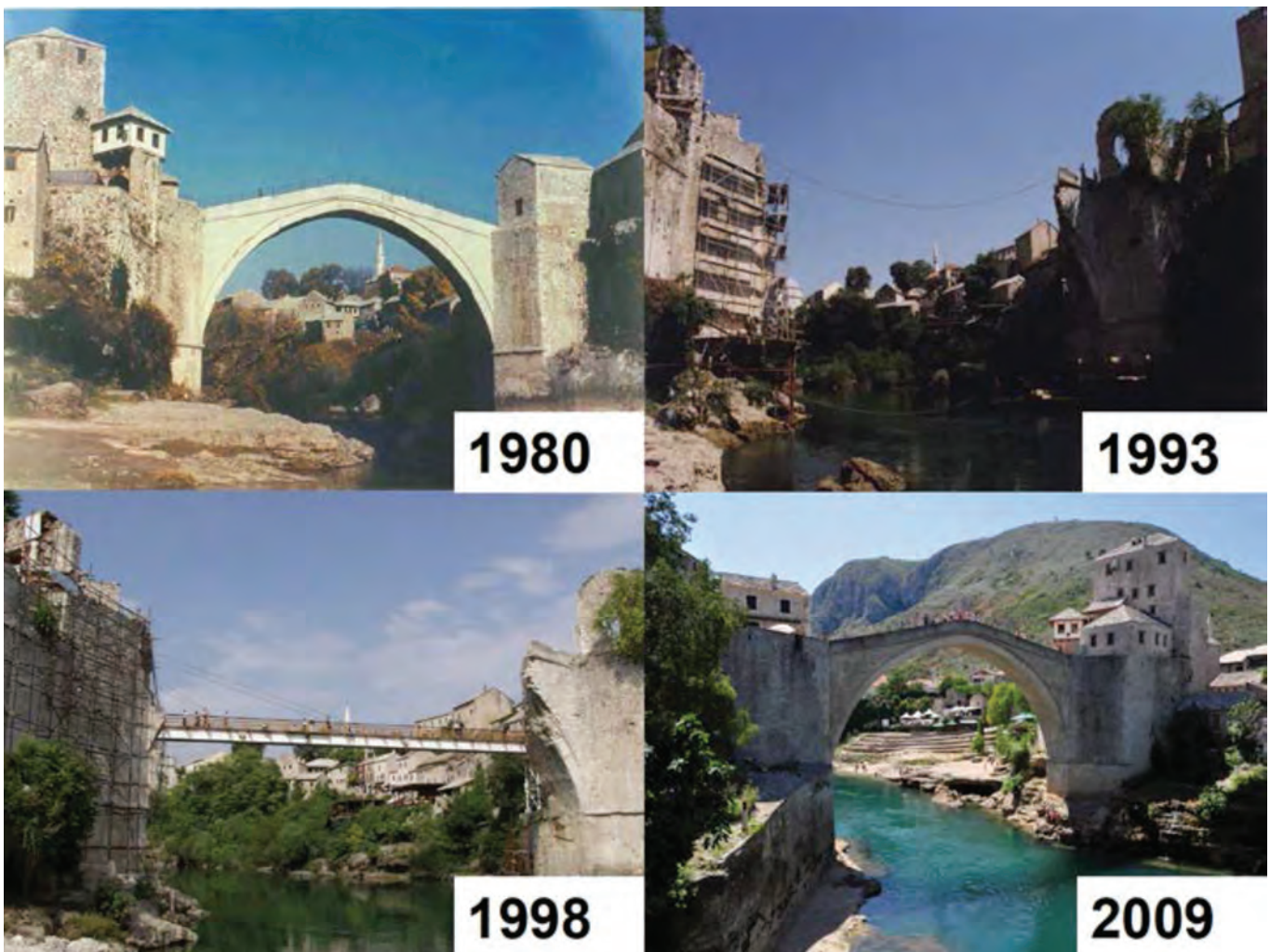
- **enhanced protection of cultural property** covering property included on the “List of Cultural Property under Enhanced Protection”, aimed at gradually replacing the special protection regime. Property placed under enhanced protection is granted immunity against attacks. Such property or its immediate surroundings cannot be used in support of any military action.

Chapter IV of this Protocol clarifies and supplements the 1954 Convention in terms of individual criminal responsibility, including that of hierarchical superiors.

Violations of the 1954 Convention and of the Additional Protocols to the Geneva Conventions of 1977 are punishable as criminal offences under international law (articles 8-2-b-ix and 8-2-e-iv of the Statute of the International Criminal Court) and under French national law (see **article L.461-13 of the *Code Pénal* / Penal Code and article D4122-10 of the *Code de la défense* / Defense Code**).

In principle, cultural property is protected from attack and from use for military purposes. However, in the event that use is nonetheless made of cultural property under general protection, this can only be attacked in the case of imperative military necessity and while taking all possible practical precautions. Destruction, pillage, theft and export are forbidden and constitute war crimes subject to penal sanctions.

As the depositary of the 1954 Convention, UNESCO offers advice to officers when needed, as well as information on protected cultural property and international assistance with implementing the Convention and its Protocols (www.unesco.org).



9 November 1993, HVO Croatian militias destroyed the old bridge, symbol of the town of Mostar. © UNESCO.

CONTENTS

FOREWORD	2
SUMMARY OF AMENDMENTS	4
PREFACE BY MRS. IRINA BOKOVA, DIRECTOR-GENERAL OF UNESCO	5
<i>Culture on the frontline of modern conflicts - May 2014</i>	5
EXECUTIVE SUMMARY	7
<i>I Organization of the protection of cultural property</i>	7
<i>II Contribution of the Second Protocol to the 1954 Convention</i>	7
GENERAL INTRODUCTION	11
<i>Note: Winning the battle-building peace</i>	13
<i>Operation SERVAL</i>	14
CHAPTER I - LEGAL INSTRUMENTS OF INTERNATIONAL AND NATIONAL LAW	15
<i>1.1 International Treaty law</i>	15
<i>1.2 International customary law</i>	16
<i>1.3 Special agreements</i>	16
<i>1.4 National law</i>	17
<i>1.5 Precedents of international courts</i>	18
CHAPTER II - DEFINITIONS	21
<i>2.1 Cultural Property</i>	21
<i>2.2 Military objectives</i>	22
<i>2.3 The United Nations Educational, Scientific and Cultural Organization – “UNESCO”</i>	23
<i>2.4 Committee for the Protection of Cultural Property in the Event of Armed Conflict</i>	24
CHAPTER III - THE PROTECTION OF CULTURAL PROPERTY	25
<i>3.1 Principle: the protection of cultural property</i>	26
<i>3.2 Cultural Property under Special Protection</i>	30
<i>3.3 Cultural Property under Enhanced Protection</i>	31
<i>3.4 Cultural Property as part of the cultural and spiritual heritage of peoples</i>	33
<i>3.5 Protection of cultural property as civilian objects</i>	33
<i>3.6 Identification of cultural property</i>	34
CHAPTER IV - MONITORING THE IMPLEMENTATION OF THE CONVENTION	37
CHAPITRE V - MILITARY MEASURES	39
<i>The protection of cultural property in Mali</i>	41
CHAPTER VI - CRIMINAL RESPONSIBILITY	43
<i>6.1 International law</i>	43
<i>6.2 Domestic law</i>	45

CHAPTER VIII - PARTICULAR RULES CONCERNING ILLICIT EXPORT AND TRAFFICKING OF CULTURAL PROPERTY	55
<i>8.1 The First Protocol to the 1954 Convention</i>	55
<i>8.2 The 1970 UNESCO Convention on the Illicit Trafficking of Cultural</i>	55
BIBLIOGRAPHY	57
SPECIAL THANKS	59
ANNEX 1 - CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA RELATED TO THE PROTECTION OF CULTURAL PROPERTY DURING A PERIOD OF ARMED CONFLICT	61
ANNEX 2 - RULES OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW ON THE PROTECTION OF CULTURAL PROPERTY	67
ANNEX 3 - RESOLUTIONS OF THE INTERGOVERNMENTAL CONFERENCE ON THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT. THE HAGUE, 14 MAY 1954	69
<i>Resolution I</i>	69
<i>Resolution II</i>	69
<i>Resolution III</i>	69
ANNEX 4 - EXTRACTS OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)	71
<i>Article 8 paragraph 2b ix) and 2e) iv)</i>	71
ANNEX 5 - RESPONSIBILITY OF COMMANDERS	73
<i>1) Provisions of the Hague Convention of 14 May 1954</i>	73
<i>2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977</i>	73
<i>3) Provisions of the Rome Statute of the International Criminal Court, of 17 July 1998</i>	74
ANNEX 6 - RESOLUTION 2100 OF THE UNITED NATIONS SECURITY COUNCIL 25 APRIL 2013	75
ANNEX 7 - HERITAGE PASSPORT FOR THE PRESERVATION OF CULTURAL PROPERTY (NORTH MALI)	77
<i>Heritage Passport</i>	77
<i>Protecting and respecting the Malian cultural heritage</i>	78
<i>Identifying cultural heritage</i>	79
<i>Respecting cultural sites</i>	82
ANNEX 8 - MILITARY NECESSITY AS A WAIVER TO OBLIGATIONS	85
<i>1 Contents and scope of the military necessity principle</i>	85
<i>2 The fragile balance between military necessity and humanitarian requirements</i>	86

GENERAL INTRODUCTION

Today, protecting cultural property and values is not only the duty of any person aware of how previous generations have contributed to art and culture. It is also an obligation under international legal standards and French law.

The law of war was the first to take this into account, through the adoption of provisions and of the first codified rules. The Lieber Code, dated 1863 (American Civil War) was the first attempt at codifying the laws of war. Article 35 granted protected status to classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals. It provided that they must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded. The process was taken further by Article 27¹ of the Regulations Annexed to the Hague Convention on the Laws and Customs of War on Land, drafted in 1899 and 1907, including the protection of, amongst others, places dedicated to religion from the consequences of armed conflict.

Article 56 of the Regulations annexed to the 1907 Hague Convention (IV) provides that in the specific case of occupation:

“the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”

During WWI, more effort was put into enhancing the protection of cultural property, although this did not prevent the destruction of the cities of Reims, Louvain (Leuven) or Arras.

This mindset developed further in the aftermath of the atrocities and large-scale systematic destruction of WWII, in the form of bombings as well as the export of cultural property from occupied territories. The provisions of the 1907 Hague Convention were hardly applied.

The signing of the Pax Cultura² in New York on 15 April 1935, as well as a worldwide rally in favor of an international organization that would endeavor to build peace on 26 June 1945, paved the way for the ratification of the Convention on the Prevention and Punishment of the Crime of Genocide on 9 December, 1948, the adoption of the Universal Declaration of Human Rights on 10 December 1948 and the four Geneva Conventions on 12 August 1949. In the same vein, The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, dated 14 May 1954 falls into this historical perspective.

On 16 November 1945, the constitution of UNESCO (United Nations Educational, Scientific and Cultural Organization) entrusted the Organization with the task of “assuring the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions”.

¹ Article 27.

“In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand”.

² Or ROERICH Pact.



This treaty greatly inspired the provisions of the Hague Convention of 1954 and the foundation of UNESCO.

Since then, UNESCO has built a whole set of international treaties for protecting culture with the Conventions of 1954, 1970 and 1972.

The 1954 Hague Convention has become the cornerstone of cultural property protection law, as it applies to both international and non-international conflicts. Its founding principles have become part of international customary law.

It was made more effective in 1999 with the adoption of the Second Protocol, thereby creating a new category of protection, namely the enhanced protection of cultural heritage of the greatest importance for humanity.

The Second Protocol takes into account major new elements in international humanitarian law, international criminal law and cultural heritage law. It significantly enhances the provisions of the 1954 Convention, in particular those concerning measures intended to preserve cultural property and to ensure they are respected. It provides a new system of enhanced protection, establishes a new institutional framework and defines the serious violations engaging individual criminal responsibility as well as Party States' obligation to incriminate such violations pursuant to their own national law. Last, it broadens the scope of application to non-international armed conflicts.

Finally, to combat the surge in theft of works of art and antiquities - from museums and archaeological and ethnological sites as well as their clandestine excavation and illicit export, in 1970, UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

Following UNESCO's initiative, the importance of culture in conflicts is also recognized by the United Nations Security Council. It takes on board the issue of protecting cultural property in peace-keeping operations or crisis exit negotiations. Thus, there were three resolutions for Mali in 2012 and 2013, and another for Syria in 2014.



Second World War 1939-1945. St-Lô church destroyed during the battle of Normandy -
Image library CICR(DR)/public domain.

Note: Winning the battle-building peace

As armed clashes of wills, wars always cause destruction and suffering. However, warfare has evolved, in that military engagement alone no longer leads to strategic success.

The Armed Forces have entered an era of wars fought in the midst of populations, who they themselves have become both major players and stakes in conflict.

Since the 1980s, the idea of destroying part or all of the adverse force is no longer workable.

What is more, tactical efficiency that may appear productive in the short term can prove counter-productive in the medium to long-term, as in certain situations it can contravene strategic and political efficiency: “To be effective, the use of force cannot be dissociated from what the people, plunged into disarray, chaos and arbitrariness, expect of it. Thus, if the victims of conflict hope, first and foremost, for protection, security and order, they also expect some form of respect and freedom”³.

The behavior of the Armed Forces must therefore maintain the legitimacy of their action and their missions, under the scrutiny of three perspectives: that of the adversary, and that of national and international public opinion. This three-fold requirement for respect lays the basis for gaining the approval of national and international public opinion and the legitimacy of the use of force.

Today, “war” is no longer a byword for destruction. To borrow a term from Clausewitz, it is also a dialogue. As is the case with military efficiency, this dialog insists on respect for the adversary’s history, culture and values.

Pursuing immediate technical efficiency does not justify the destruction of what constitutes the very soul of a people. Disregarding their historical and cultural heritage would, often irreversibly, alienate the very population that the Armed Forces were meant to rally to their cause.

The political outcome must take precedent over the tactical objective and moral legitimacy over short term efficiency.

New forms of conflict call for new forms of intervention that must also account for taking responsibility for protecting culture.

The French Land Forces are fully aware of this imperative. Operation Serval (Mali, 2013) is a prime recent example: the HQ ensured that the historical sites of Gao and Timbuktu were protected from any direct or collateral damage.

³ Extract from the French doctrine publication FT.01 “Winning the Battle, Building Peace – Land Forces in Present and Future Conflicts”, January 2007.

Operation Serval:



A meeting between the engagement support company commander from 1st RIMa (*Régiment d'Infanterie de Marine* – A Marine Infantry Battalion) and the authorities of a Malian village during Operation FARADA O.Debes © Armée de Terre



Intelligence collection by a captain from 6th RG (*Régiment du Génie* – Engineer Battalion) with the imam of Timbuktu Grand Mosque. © armée de Terre

CHAPTER I

LEGAL INSTRUMENTS OF INTERNATIONAL AND NATIONAL LAW

1.1 International Treaty law

The major instruments of international humanitarian law concerning cultural property are:

- the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted by UNESCO on 14 May 1954, hereinafter referred to as **“the 1954 Convention”** (ratified on 7 June 1957), applicable to both national and international armed conflicts;
- the Regulations for the Execution of the Convention, hereinafter **“the Regulations for the Execution”**;
- the First Protocol of 1954, ratified on 7 June 1957, preventing the export of cultural property from an occupied territory, and requiring that it be returned to the territory from which it was exported;
- the Second Protocol of 26 March 1999 (entered into force on 9 March 2004). Its 47 articles were intended to enhance the protection of cultural property as defined by the 1954 Convention (hereinafter **“the Second Protocol”**).

NOTE

To date, France has ratified the 1954 Convention and its First Protocol, but is not Party to the Second Protocol. Reservations at the time concerning the criminal responsibility of military commanders have since been withdrawn, ever since the ratification of the Rome Statute establishing the International Criminal Court on 9 June 2000.

Thus, in practice, France complies with the principles of the Second Protocol.

It was therefore decided to cross-check international laws on the protection of cultural property in the event of armed conflict.

- the 1977⁴ Additional Protocol I (relating to the protection of the victims of international armed conflicts), and the 1977 Additional Protocol II (relating to the protection of the victims of non-international armed conflicts) to the Geneva Conventions dated 12 August 1949;
- the UNESCO Convention dated 14 November 1970 on the means of prohibiting illicit trafficking of cultural property;
- the UNESCO Convention dated 16 November 1972 concerning the Protection of the World Cultural and Natural Heritage;

⁴ Additional Protocol I, article 53, specifies that no act of hostility can be directed against historic monuments, works of art or places of worship. It also establishes the criteria according to which such acts constitute serious infringements of the law. The Additional Protocol II extends this protection to non-international armed conflicts.

- the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) established by Resolution 827 (25 May 1993) of the United Nations Security Council, and more specifically Statute article 3(d);
- the Rome Statute of the International Criminal Court (17 July 1998), especially article 8, paragraph 2b) ix) and e) iv). (See annex 4).

To date, 126 States (including France), are parties to the 1954 Convention, of which 103 States are also party to the 1954 Protocol, and 68 to the 1999 Second Protocol.

The 1977 Additional Protocols I and II to the Geneva Conventions are binding on 167 States (including France) and 163 States respectively. 123 States signed up to the Rome Statute of the International Criminal Court (France ratified the Statute on 9 June 2000)⁵.

1.2 International customary law

Although the treaties relating to the protection of cultural property only apply to the States which have ratified them, their main provisions have customary value. Therefore they have to be respected at any time by the belligerents.

The UNESCO General Conference (Paris, October-November 1993) underscored that “the fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of international customary law”. This primarily concerns the principles contained in articles 3 and 4 of the 1954 Convention.

In its study of Customary International Humanitarian Law, the International Committee of the Red Cross identified the customary rules applied to cultural property, applicable to both to international and non-international armed conflicts.

This handbook will not cover these rules, as they are at the crossover of the international and domestic treaty provisions to which France and her troops are subject. These customary provisions are, nevertheless, provided in Annex 2.

1.3 Special agreements

War entails the breakdown of diplomatic relations between the belligerents. War does not, however, put an end to all legal ties. The question of legality continues throughout war and in spite of it; a testament to the prevailing nature of international law. The warring factions can conclude agreements during hostilities. Usually, these agreements concern the treatment of nationals. Special agreements can be temporary or permanent.

Article 19.2 of the 1954 Convention stipulates that “The parties to the Conflict shall endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention”. These special agreements can cover any issue the warring parties find fitting. A special agreement can lay the major basis for follow-up interventions aiming to overcome violations of the law. Having one identified leader for each party sign a special agreement and thereby take responsibility for adhering to it – not only provides a contact person and a reference point for future progress, but it also sends out a clear message to their forces.

⁵ To this date, China and Russia have not signed up, and the USA has not ratified the Statute.

A special agreement can comprise the following elements:

- first, a clear and direct statement of the provisions applicable from both treaty and customary international humanitarian law;
- second, a commitment from the parties to comply with and enforce these provisions;
- third, an indication that the agreement does not modify the legal status of the parties to the conflict;
- fourth, an obligation for the parties to promote IHL and the clauses of the special agreement;
- last, the provisions for implementing the special agreement.

In many respects, this source extra to treaties still involves overcoming a number of obstacles. Despite the precautionary measure of Common Article 3, which clearly states that reaching such an agreement does not alter the status of the parties by any means, certain States have expressed concern that signing a special agreement could confer a degree of legitimacy to an armed group. In other words, they feared it might provide an armed group with a legal personality.

In 1992, for example, at the invitation of the ICRC, the various parties to the conflict in the Republic of Bosnia-Herzegovina reached a special agreement.

The text started with the parties undertaking to comply with and enforce the provisions of the common Article 3, which were quoted in full. The parties had also agreed to implement additional provisions relating to the protection of cultural property, including in particular hospitals and other medical units.

In addition to these agreements that were comprehensive in their substance, the Bosnia-Herzegovina agreement included a certain number of further provisions:

- first, it specified that the terms of the agreement did not entail any modification to the legal status of the parties to the conflict, or to the provisions of law on armed conflict in force;
- then, it committed to promoting humanitarian law and the clauses of the agreement;
- last, it pledged to investigate alleged violations of international humanitarian law, to take the required measures for putting an end to these violations and punishing the perpetrators, and also to appoint liaison officers and provide the ICRC with the necessary security guarantees.

Other examples of special agreements include the 1962 agreement in Yemen or that of 1967 in Nigeria. Both were negotiated by the ICRC and both contain commitments to comply with the 1949 Geneva Conventions and other instruments governing conflicts.

1.4 National law

French national law includes provisions on the protection of cultural property. These regulations will be elaborated on later in chapter VI:

- Article D 4122-10 of the Defense Code (Code de la Défense)
- Articles L.322-3-1 and L.461-13 of the Penal Code (Code pénal)
- Articles L.114.1 and L.114-2 of the Heritage Code (Code du Patrimoine)

By the law of 13 December 1913 on historical monuments, which were then codified in the Heritage Code by the Order of 20 February 2004, France implemented an array of legal provisions for identifying properties in need of protection due to their historical, artistic or archaeological interest, aside from a context of armed conflict. In this respect, two kinds of protection are established under French law : classification as a historic monument (imprescriptible property subject to an export ban), and registration in the supplementary inventory of historic monuments (a preventative measure making it compulsory for the owner to notify of, for example, any intended modification to the property concerned).

1.5 Precedents of international courts

1.5.1 The International Criminal Tribunal for the former Yugoslavia (ICTY)

Behavior resulting in the damage or destruction of cultural property (not used for military purposes) is penalized subject to Article 3 of the ICTY Statute, as it constitutes a serious violation of the 1949 Geneva Conventions. The destruction of cultural property is punishable under the Statute Article 3 as a violation of the law and 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 willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”.*

Article 3 (d) Violations of the laws or customs of war in the ICTY Statute

Case law has specified the criteria defining the commission of an offence:

- the act has damaged or destroyed cultural property which is part of the cultural or spiritual heritage of peoples,
- the damaged or destroyed cultural property was not being used for military purposes at the time when the acts of hostility were being committed against them,
- the act was perpetrated with the intent of damaging or destroying the cultural property in question.

For an example of a decision condemning an illegal attack resulting in damage or destruction of cultural property that is part of the peoples’ cultural or spiritual heritage (Old Town of Dubrovnik in 1991), see Annex 1, an extract of the sentence in the case of the Prosecutor vs. Pavle Strugar (31 January 2005) confirmed in appeal (17 July 2008).

The ICTY also states that the destruction of cultural property is punishable as a **crime against humanity** under Article 5 of the Statute:

- *“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...”*

Article 5 (h) Crimes against humanity in the ICTY Statute

In the Martić⁶ case (6 October 2008), the ICTY considered that the destruction of cultural buildings, of historical monuments and of sacred sites constituted an act underlying the crime of persecution. The distinctive feature of persecution is the moral element, i.e. the perpetrator's intent to discriminate for political, racial or religious reasons.

1.5.2 The International Criminal Court

In January 2013, the International Criminal Court decided to open an investigation in Mali on war crimes allegedly committed since January 2012, considering that there was reasonable ground for believing attacks had been led against cultural property.



Sarajevo 1993, war in urban environment, where civil and cultural property is particularly vulnerable.

⁶ From August 1991 to December 1995, MARTIĆ, the then Minister of the Interior of the Serbian Autonomous Region of Krajina participated in a joint criminal enterprise the common purpose of which was the establishment of an ethnically Serb territory. He was found guilty of destroying buildings dedicated to religion or education.

CHAPTER II

DEFINITIONS

2.1 Cultural Property

The primary merit of the 1954 Convention is having introduced a new notion of cultural property to legal language. It covers three types of property:

- *movable or immovable property of great importance to the cultural heritage of every people, such as :*
 - *monuments of architecture, art or history, whether religious or secular;*
 - *archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest;*
 - *works of art;*
 - *manuscripts, books and other objects of artistic, historical or archaeological interest;*
 - *as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;*

(1954 Convention, Article 1 (a))

- *buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);*

(1954 Convention, Article 1 (b))

- *centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as “centers containing monuments”.*

(1954 Convention, Article 1 (c))

The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export Transfer of Ownership of Cultural Property, adopted by UNESCO on 14 November 1970, defines cultural property as follows:

- *“Property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science...”*

The Convention Concerning the Protection of the World Cultural and Natural Heritage adopted by UNESCO on 16 November 1972 defines cultural heritage as:

- *“monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science, groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science, sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view”.*

To date, there is no universally recognized definition of cultural property. Each standard-setting instrument sets its own scope of application and refers to its own definition of cultural property. However, these definitions do have a lot in common.

2.2 Military objectives

Inspired by the definition given in the Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 August 1949, Article 52.2⁷ of the Second Protocol introduces the notion of a military objective as:

- *“an object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.*

(Second Protocol, Article 1 (f))

2.3 The United Nations Educational, Scientific and Cultural Organization – “UNESCO”.

Besides its various other missions, this UN specialized agency is responsible for promoting culture through international cooperation between its member States. To this end, UNESCO provides the Secretariat for the 1954 Convention and its two Protocols. More specifically, UNESCO assists the Committee for the Protection of Cultural Property in the Event of Armed Conflict; the Intergovernmental Committee responsible for monitoring and supervising the implementation of the Second Protocol.

⁷ Article 52.2: Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

2.4 Committee for the Protection of Cultural Property in the Event of Armed Conflict

The Committee for the Protection of Cultural Property in the Event of Armed Conflict is responsible for monitoring the implementation of the Second Protocol. This intergovernmental committee is composed of representatives from 12 States, each elected for a four-year term.

The main functions of the Committee are:

- the granting, suspension or cancellation of enhanced protection of cultural property. Establishing, updating and ensuring the promotion of the list of cultural property under enhanced protection;
- monitoring and supervising the implementation of the Second Protocol and promoting the identification of cultural property under enhanced protection;
- receiving and considering requests for international assistance...

Secretariat to the Committee is provided by UNESCO, Paris.

The Committee may invite to its meetings, in an advisory capacity, eminent professional organizations such as the International Committee of the Blue Shield (ICBS), the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), or the International Committee of the Red Cross (ICRC)...



The Great Wall of China, a designated UNESCO World Heritage site.

© Ko Hon Chiu Vincent

CHAPTER III

THE PROTECTION OF CULTURAL PROPERTY

In principle, cultural property is protected against attacks and from being used for military purposes.

In the event that cultural property is used nonetheless, it can only be attacked in the case of unavoidable military necessity and by taking all practical precautions required.

Destruction, pillage, theft and export are prohibited, and constitute war crimes subject to criminal penalties.

The protection of cultural property is organized according to five separate systems:

- general protection,
- special protection,
- enhanced protection,
- protection granted to cultural property which constitutes the cultural or spiritual heritage of peoples,
- protection of cultural property as civilian objects (Article 52 of the 1977 First Additional Protocol).

The 1954 Convention, along with its First Protocol, is the cornerstone of the protection system for cultural property in the event of armed conflict. Its founding principles are now part of international customary law. It grants general protection to any category of cultural property, irrespective of origin or ownership.

According to Article 18 of the 1954 Convention, the provisions of the Convention apply to any armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them. They also apply to all cases of occupation.

Article 19 of the Convention underscores that in the event of armed conflict not of an international character, each party to the conflict shall be bound to apply, as, a minimum, the provisions of the Convention which relate to respect for cultural property. The parties to the conflict shall endeavor to bring into force, by means of special agreements, all or part of the other provisions of the 1954 Convention.

On this point, Article 22 of the Second Protocol supplements the 1954 Convention by stating that “this Protocol shall apply in the event of armed conflict not of an international character [...]” and thereby significantly broadening the scope of the provisions relating to the protection of cultural property. These shall therefore apply to non-international armed conflicts through the inclusion of, among others, the entire set of rules related to enhanced protection.

On this last point, it should be noted that after the wars that ravaged the Balkans during the 1990s, deliberate destruction of cultural property not classed as a military objective was used as a weapon of war and of destabilization. Afterwards, the scope of application of the 1954 Convention was extended, in the event that an armed conflict with no international character arises on the territory of one of the parties.



Destruction of a church in Europe during an armed conflict.

The Second Protocol was prepared at UNESCO. It takes into account major new elements in international humanitarian law, international criminal law and cultural heritage law. This Protocol significantly enhances the provisions of the 1954 Convention, especially those covering measures to preserve cultural property and ensure it is respected. It establishes a new enhanced protection system and a new institutional framework, as well as defining serious violations giving rise to individual criminal responsibility, and the obligation of Party States to incriminate them in their own jurisdiction. Last, as already stated, it extends the scope of application to non-international armed conflicts.

Just as Protocol II of 8 June 1977 enhances and supplements shared Article 3 of the Geneva conventions on dispositions governing conflicts not of an international character, Chapter V of the Second Protocol supplements the provisions of Article 19 of the 1954 Convention. The provisions in this Chapter also apply to armed conflicts not of an international character occurring within the territory of one of the Parties (Article 22). The Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

3.1 Principle: the protection of cultural property

The principle of protecting cultural property is based on the two-fold obligation to safeguard and respect cultural property:

- *“For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property”.*

(1954 Convention, Article 2)

3.1.1 Respect

Cultural Property must be respected during military operations. This obligation entails:

- refraining from any act of hostility directed against such property;

- 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;
- undertaking to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property;
- refraining from requisitioning movable cultural property situated in the territory of another High Contracting Party;
- refraining from any act directed by way of reprisals against cultural property.

(1954 Convention, Article 4)

The responsibility for the protection of cultural property lies with all of the parties to the conflict, regardless of whether the property is under their control or that of the adversary.

3.1.2 One exception: imperative military necessity

Cultural property remains protected even if it becomes a military objective by its function, except in the case of imperative military necessity.

Indeed, the 1954 Convention establishes a waiver to the general obligation of protection of cultural property:

- *“The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.”*

(1954 Convention, Article 4 (2))

The Second Protocol clarifies the notion of military necessity by listing the conditions required to implement it and to avoid any abuse. Thus, a waiver on the basis of military necessity can only be invoked under the following conditions:

- a) For the attacking party:
 - that cultural property has, by its function, been made into a military objective; and
 - there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;

(Second Protocol, Article 6 (a))

- an effective advance warning has been given whenever circumstances permit.

(Second Protocol, Article 6 (d))

- b) for the party under attack:
 - a waiver on the basis of imperative military necessity may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage.

(Second Protocol, Article 6 (b))

The Second Protocol adds an extra guarantee to these conditions: the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise.

The clause of Article 6 (c) of the Second Protocol applies equally and symmetrically to both the attacking and defending party.

(Second Protocol, Article 6 (c))

3.1.3 Precautions in attack

The Second Protocol includes the precautionary measures covered in the 1977 Additional Protocol I (Article 57) relating to the distinction to be made between civilian and military targets, and applies them specifically to cultural property under the 1954 Convention.

Each Party to the conflict in an *attack scenario* shall:

- do everything feasible to verify that the objectives to be attacked are not cultural property;
- take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property;
- refrain from deciding to launch any attack which may be expected to cause incidental damage to protected cultural property which would be excessive in relation to the concrete and direct military advantage anticipated;
- and cancel or suspend an attack if it becomes apparent:
 - that the objective is protected cultural property
 - that the attack may be expected to cause incidental damage to protected cultural property which would be excessive in relation to the concrete and direct military advantage anticipated.

(Second Protocol, Article 7)

Each Party to the conflict in a defensive situation shall, to the maximum extent feasible:

- remove movable cultural property from the vicinity of military objectives or provide for adequate in situ protection;
- avoid locating military objectives near cultural property.

(Second Protocol, Article 8)

3.1.4 Safeguarding

The 1954 Convention requires that the States undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.

(1954 Convention, Article 3)

Although the 1954 Convention specifically establishes the marking of cultural property for purposes of identification by a specified distinctive emblem (see paragraph 3.4.1 below), it provides no detailed indication on how to proceed. However, Articles 20 and 21 of the Regulations for the Execution do provide some guidelines.

The Second Protocol is useful in specifying these preparatory measures, which “*shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property*”.

(Second Protocol, Article 5)

This list is not exhaustive and these preparatory measures have also been recognized as useful in the event of natural disasters.

National civil authorities may call upon UNESCO for technical assistance (**1954 Convention, article 23**), particularly when it comes to affixing distinctive signs to the principal monuments, drawing up lists and inventories and maps of property to protect, building refuges and other technical forms of protection...



Syria: The castle Krak des Cheavliers before and after it was destroyed. © UNESCO

3.1.5. Protection of cultural property in occupied territory

A Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory:

- any illicit export, removal or transfer of ownership of cultural property;
- any archaeological excavation save where it is strictly required to safeguard, record or preserve cultural property;
- any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence.

(Second Protocol, Article 9)

3.2 Cultural Property under Special Protection:

Unlike the General Protection regime, the Special Protection regime only applies to immovable cultural property of very great importance that has been previously identified and registered.

Certain categories of immovable cultural property are granted special protection, covering cultural property of very great importance. These are granted immunity against any acts of hostility, and against using them, or their immediate surroundings, for military purposes. This special protection is governed by the 1954 Convention (Articles 8 to 11) and by the Regulations for Execution (Articles 11 to 16).

Special protection is granted to three categories of property. This amounts to a limited number:

- of refuges intended to shelter movable cultural property in the event of armed conflict,
- of centers containing monuments,
- and other immovable cultural property of very great importance.

(1954 Convention, Article 8 (1))

To this end, the cultural property must meet the following conditions:

- be situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication;
- not be used for military purposes;
- be listed in the International Register of Cultural Property under Special Protection.

If any cultural property is situated near an important military objective, it may nevertheless be placed under special protection if the State Party “undertakes, in the event of armed conflict, to make no use of the objective and particularly, in the case of a port, railway station or aerodrome, to divert all traffic there from. In that event, such diversion shall be prepared in time of peace”.

(1954 Convention, Article 8 (5))

Attacking cultural property under special protection is only possible in two cases:

- when a Party uses it or its immediate surroundings for military purposes, the opposing Party is released from the obligation to ensure its immunity so long as the violation persists. This first case demonstrated that special protection is subject to reciprocity.
- in case of unavoidable military necessity.

1954 Convention, Article 11)

NOTE

In practice, the concept of special protection has seldom been used. To date, only five sites have been listed in the UNESCO International Register: one refuge in Germany, three in the Netherlands, and the whole of the Vatican as a monumental center.

However, in 2013, the Secretariat of the 1954 Convention received a request submitted by Mexico to register nine Mexican cultural properties under the Special Protection Regime. All of them are already on the World Heritage List.

3.3 Cultural Property under Enhanced Protection

3.3.1 The system *stricto sensu*

In order to improve on the system under the 1954 Convention, the Second Protocol introduced a complementary system of *enhanced protection*. It is intended for cultural property of the greatest interest for humanity that is not used for military purposes. It is intended to substitute for the *special protection* regime.

Furthermore, by extending to movable property, *enhanced protection* is a more comprehensive system. As such, it differs from both special protection and from the system established by the World Heritage Convention of 1972.

State Parties to the Second Protocol undertake that cultural property under *enhanced protection* and its immediate surroundings shall never be used for military purposes. Protection against attacks is reinforced, and attacks can only take place under exceptional circumstances, at the risk of engaging the violators' criminal responsibility, (Articles 12 and 15.1 of the Second Protocol).

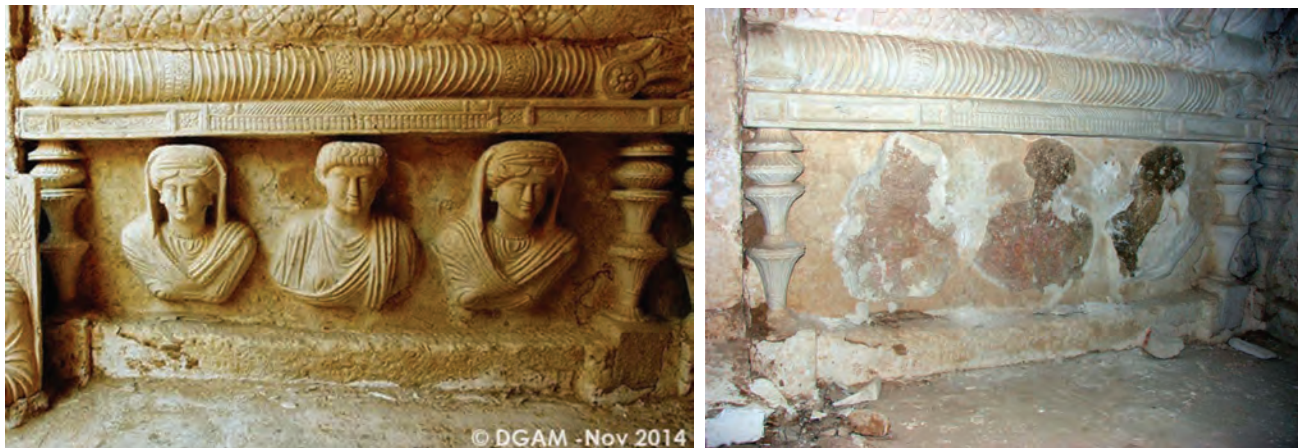
Regarding the properties registered on the World Heritage List, the Second Protocol Committee considers that the first condition (greatest importance) is assumed to have been met.

3.3.2 The cultural property concerned

To be placed under enhanced protection, the cultural property must meet the following three conditions:

- it is cultural heritage of the greatest importance for humanity;
- it is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection;
- it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.

(Second Protocol, Article 10)



Palmyra: Taibul Tomb before and after the looting - © UNESCO IRAQ

Furthermore, the cultural property must be registered on the “List of Cultural Property under Enhanced Protection”, enabling it to be identified and safeguarded (see list below). The decision to register it lies with the Committee, at the request of the Party with jurisdiction or control over the cultural property.

3.3.3 Loss of Enhanced Protection

Enhanced protection can be lost in two alternative and non-cumulative cases:

- by a decision of suspension or cancellation from the Committee for the Protection of Cultural Property, if the property no longer meets one of the criteria granting it enhanced protection, or if a party State violates its immunity; or
- if, and for as long as, the property has, by its use, become a military objective, under the strict conditions specified below.

(Second Protocol, Articles 13 and 14)

However, in the above circumstances, such cultural property may only be the object of attack if:

- the property has, by its use, become a military objective;
- the attack is the only feasible means of terminating the use of the property for military purposes;
- all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimizing, damage to the cultural property.

(Second Protocol, Articles 13 (2a) and (2b))

Unless circumstances do not permit, due to requirements of immediate self-defense:

- the attack is ordered at the highest operational level of command;
- effective advance warning is issued to the opposing forces requiring the termination of the use of the property for military purposes; and
- reasonable time is given to the opposing forces to redress the situation.

(Second Protocol, Articles 13 (2c))

3.4 Cultural Property as part of the cultural and spiritual heritage of peoples

Besides the 1954 Convention and its Protocols, there are other international treaties governing the protection of cultural property in the event of armed conflict and that punish violations of this protection. In particular, these international treaties include:

- the two 1977 Additional Protocols to the Geneva Conventions of 1949, which also provide a protection regime for certain cultural properties: *“historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples”*.

The most important cultural properties representing the *“spiritual heritage of peoples”* are governed by this regime. Under Articles 53 and 12 of Additional Protocols I and II respectively, it is prohibited:

- to commit any acts of hostility directed against such property;
- to use such property in support of the military effort;

Moreover, under Article 53 of Additional Protocol I it is prohibited:

- to make such objects the object of reprisals.

Additional Protocol I of 1977 makes no mention of any possible waiver of these prohibitions for reasons of military necessity;

- The Statute of the International Criminal Court, in particular Articles 8 2.b) ix) and 8.2 e) iv) prohibit intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, provided they are not military objectives.

3.5 Protection of cultural property as civilian objects

Cultural property also benefits from the general protection granted to civilian objects. **This protection is particularly relevant to property not covered by the aforementioned specific rules.** These rules are codified in Additional Protocol I of 1977 to the Geneva Conventions, although they also have customary value. They are equally applicable to international and non-international armed conflicts.

Civilian objects are all objects which are not military objectives. These are defined as all objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. In case of doubt, an object usually dedicated to civilian use is presumed not to be used to make an effective contribution to military action.

In principle, civilian objects shall not be the object of attacks or reprisals. In the event of an attack against the adversary near to or inside civilian objects (such as museums or places of worship), the belligerents are bound to take all feasible practical precautions in choosing the means and methods of attack in order to avoid, or at least, to minimize damage to civil properties which could be caused by accident. Moreover, the belligerents must endeavor to remove civilian objects that are subject to their authority from the surroundings of military objectives. This is particularly relevant for works of art and other objects of cultural value.

The willful attack of civilian objects is a war crime.

3.6 Identification of cultural property

There is a distinctive emblem for protecting cultural property that has replaced the Pax Cultura symbol designed by Professor Nicolas ROERICH (see p....) and adopted on 15 April 1935. Articles 16 and 17 of the 1954 Convention organize the protection regime related to this distinctive emblem.

3.6.1 The marking of cultural property

ARTICLE 16.1.1

The distinctive emblem of the Convention shall take the form of a shield, pointed below, per saltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle).

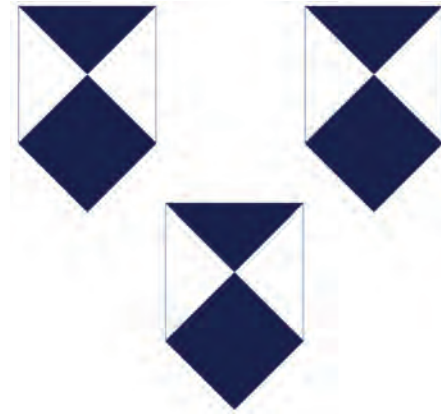
16.2. The emblem shall be used alone, or repeated three times in a triangular formation (one shield below), under the conditions provided for in Article 17.

ARTICLE 17

1. The distinctive emblem repeated three times may be used only as a means of identification of:
 - (a) immovable cultural property under special protection; [.../...]
2. The distinctive emblem may be used alone only as a means of identification of:
 - (a) cultural property not under special protection



General Protection



Special protection

For the time being, there is no distinctive emblem for enhanced protection.



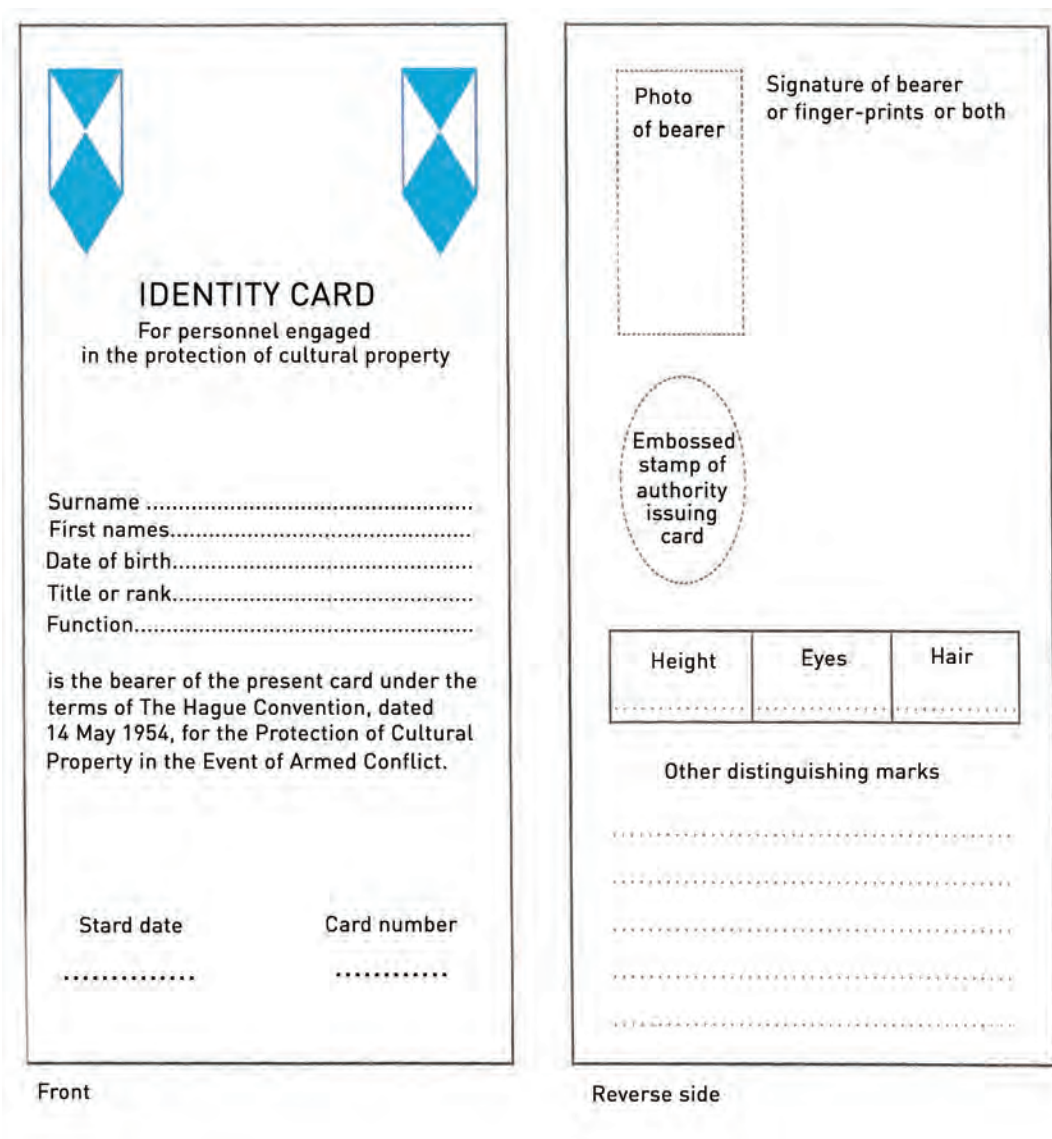
Protective emblem / Preah Vihear temple, Cambodia - © UNESCO.

3.6.2 Identification of persons: identity card

Persons responsible for protecting cultural property may wear an armband bearing the distinctive emblem, issued and stamped by the competent authorities.

Such persons shall carry a special identity card bearing the distinctive emblem. This card shall mention at least the surname and first names, the date of birth, the title or rank, and the function of the holder. The card shall bear the photograph of the holder as well as his signature or his fingerprints, or both. It shall bear the embossed stamp of the competent authorities.

(Regulations for the Execution, Article 21)



CHAPTER IV

MONITORING THE IMPLEMENTATION OF THE CONVENTION

The Intergovernmental Conference which drafted and passed the 1954 Convention also adopted three resolutions (see Annex 3). These express the determination and above all the hope that the Convention is implemented by the High Contracting Parties, specifically through the setting up of a national advisory committee to ensure the Convention is applied. These resolutions do not have the force of law.

The Regulations for the Execution of the 1954 Convention establishes, in Articles 2, 3 and 5 that each party to the conflict shall appoint:

- a representative for cultural property situated in its territory;
- if it is in occupation of another territory, it shall appoint a special representative for cultural property situated in that territory;
- a protecting power in charge of ensuring that humanitarian law is applied and of safeguarding its interests during the conflict.

Under the definition contained in the Additional Protocol I to the Geneva Conventions of 1949, the expression **“Protecting Power”** refers to a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the 1949 Geneva Conventions and under Additional Protocol I.

A Commissioner-General for Cultural Property shall be chosen from the international list of persons by joint agreement between the Party to which he will be accredited and the Protecting Powers acting on behalf of the opposing Parties. (Regulations for the Execution, Article 4).

The Commissioner-General shall:

- have the right to order an investigation or to, conduct it himself (Regulations, Articles 6,7);
- make any representations which he deems useful for the application of the Convention (Regulations, Article 6);
- report to the Parties and to the Director-General of the UNESCO (Regulations, Article 6);
- exercise some of the functions of the Protecting Power (Regulations, Article 6).

However, taking into account the difficulties in appointing a Commissioner-General, the Director-General of UNESCO has put in place the practice of using his own representatives for conducting diplomatic negotiations between the Parties concerned.

CHAPITRE V

MILITARY MEASURES

As recalled by Article 87⁸ of Additional Protocol I, the first duty of military commanders is to exercise command. Here, we touch upon the very problem of enforcing treaty rules in the field.

To date, the French Army does not have available the specialized personnel services as established under Article 7 of the 1954 Convention, whose role it is to ensure respect for cultural property, and to collaborate with civilian authorities in charge of safeguarding these properties.

For this reason, it is for the “Legal Advisor” (LEGAD) to advise the Forces Commander in the theater and to promote respect for cultural property.

The joint provision on LEGADs in overseas operations of 8 February, 2006 specifies that the Legal Advisor’s general task is to advise the theater commander and staff on any issues presenting a legal aspect, in the planning phase as much as during the execution of operations.



OPERATION SERVAL: A patrol of Marsouins (Marine infantrymen) in Timbuktu, implementing a military measure. *O.Debes © Armée de Terre*

8 Article 87 – Duty of commanders

- 1 - The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
- 2 - In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

This provision is a clear reflection of Article 82⁹ of Additional Protocol I, specifying that Parties to the conflict shall ensure that LEGADS are available to advise military commanders.

The legal adviser helps in determining the norms of international, French and local law applicable to the operation, as accurately as possible.

In compliance with French joint and Army doctrine¹⁰, the legal adviser is consulted during the targeting procedure to supply legal elements assessing possible target designation. The 1954 Convention forms part of the statutes guiding his advice.

Although none of the rules of the 1954 Convention are controversial, implementing the Convention may raise questions or prove difficult to apply on the ground. It must also be acknowledged that, even when only considering non-controversial rules that can be applied directly by military commanders in the field, the law of armed conflict is becoming increasingly complex, detailed and far-reaching.

⁹ Article 82 - Legal advisers in armed forces

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

¹⁰ See French doctrine publication **EMP** 50. 654, "Fondamentaux Juridiques à l'usage du commandant d'une force terrestre en OPEX", 1 March, 2013.

The protection of cultural property in Mali

**Account from Brigadier General B. BARRERA,
Commander of the SERVAL Force (2013)**

Resulting from the *Guépard* Alert system (French 3rd Mechanized Brigade) and pre-positioned forces, in January 2013, the Serval Brigade was deployed as a matter of urgency from Bamako and Niamey. Its mission was to liberate the country and destroy the armed terrorist groups in order to restore the rule of law. Doing so was achieved between January and May, followed by the election of the President of the Republic by universal suffrage in July 2013.



Protecting cultural property was not a consideration of the Rules of Engagement (ROE) at the outset. Nevertheless, the force's action did have to comply with the law of armed conflicts, as recalled in the preamble of the ROEIMPL. The principle of protecting cultural property was therefore implicit.

Nonetheless, this point was brought to the fore when it came to the targeting part of the operation. A NO STRIKE LIST and a RESTRICTED TARGET LIST were supplied in an annex of the national targeting instruction (*CDSF*). These listed specific locations with coordinates including bridges, wells, ancient villages and mosques.

Operations to liberate the country were conducted at a very fast tempo and over vast spaces. Throughout, all the players involved paid particular attention to cultural property, especially when approaching the cities on the bend of the River Niger, in particular Timbuktu. Everyone was aware that Jihadists had inflicted damage on mausoleums and other ancient sites although specific locations and details were unknown. Liberating Timbuktu did not lead to any damage, as the units did not have to resort to force.

Franco-Malian troops arrived on 28 January. As soon as the next day, the Deputy Mayor, representing the only local authority still in town, requested a meeting with the Brigade Commander at the airport. This was to discuss the situation in the city and cultural property in particular; whether this was to be watched over or if it was protected by the population. An agreement was reached on patrols to be carried out for preventing any act of vandalism. Working closely with the Malians, the French units maintained a deterrent presence in the surroundings of the ancient Mosque, the house of René Caillé and the library. On 2 February, it was in this area that Mr. F. Hollande, President of the French Republic, Mr. Traoré, President of the Malian Republic and Mrs. Irina Bokova, General-Director of UNESCO all met, under the protection of Franco-Malian troops.



Once the cities had been freed and secured, no known cultural property remained north of the river. Since then, tactical commanders have always acted according to common sense. Apart from combats during February-March in urban areas (Gao and Timbuktu), clashes have taken place in open terrain, far from any cultural property. Malian and MINUSMA forces were rapidly deployed in Gao, Timbuktu, and on the Malian territory.

CHAPTER VI

CRIMINAL RESPONSIBILITY

6.1 International law

The Rome Statute engages the criminal responsibility of the perpetrator of a willful attack against civilian objects and cultural property, as this constitutes a war crime.

The fact that such a crime was committed by a subordinate does not absolve his superiors from penal responsibility, if they knew or should have known that their subordinate was committing or was about to commit said crime, and if they did not take all necessary and reasonable measures within their power to repress their commission, and, if need be, to submit the matter to the competent authorities for investigation and prosecution. To avoid penal liability, commanders must prevent, and, if need be, repress these crimes and report them to competent authorities (Article 28 of the Rome Statute, see Annex 5).

Like the provisions of the Geneva Convention IV of 12 August 1949, in the case of grave breaches of the provisions governing the protection of civilian persons in armed conflicts, Chapter 4 of the Second Protocol enhances and supplements Article 28 of the 1954 Convention by organizing the criminal responsibility and jurisdiction for prosecuting offenders (see Annex 5).

The 1954 Convention defines individual criminal responsibility in very general terms:

- **Individual responsibility.** Any member of the Armed Forces, irrespective of rank, is personally responsible for respecting the law.
- **Responsibility of a hierarchical superior.** All military commanders have the duty to enforce the law of armed conflict.

The 1954 Convention imposes on The High Contracting Parties the obligation to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the Convention.

(1954 Convention, Article 28)

Article 15 of the Second Protocol supplements the 1954 Convention and makes it more explicit from a military standpoint by listing **five offenses** that, if they are committed intentionally and in serious violation of the 1954 Convention and Second Protocol, engage **individual criminal responsibility**:

For cultural property under enhanced protection:

- making cultural property under enhanced protection the object of attack;
- using cultural property under enhanced protection or its immediate surroundings in support of military action;
- extensive destruction or appropriation of cultural property protected under the Convention and the Second Protocol;

For other cultural properties:

- making cultural property protected under the Convention and this Protocol the object of attack;
- theft, pillage or misappropriation of cultural property protected under the Convention, or acts of vandalism directed against cultural property.

State Parties have the specific duty to adopt such measures as may be necessary to establish as criminal offences under its domestic law the five violations listed above, and to make such offences punishable by appropriate penalties.

Second Protocol, Article 15 (2)¹¹

In order to address serious violations, the Second Protocol also organizes the jurisdiction of the courts of State Parties: prosecution, extradition and legal assistance. It also clearly depoliticizes acts against cultural property so that State Parties can no longer dub violations as political in a bid to refuse the extradition of one of their nationals.

As regards the jurisdiction of the courts of State Parties to prosecute serious violations of the Second Protocol, Article 16 of this legal instrument establishes each Party's obligation to adopt the legislative measures necessary to establish its jurisdiction over offences in this area in the following cases:

- when such an offence is committed in the territory of that State;
- when the alleged offender is a national of that State;
- when the alleged offender is present in its territory, and in cases of offences against a cultural property under enhanced protection, or of extensive destruction or appropriation of cultural property under general protection.

Nevertheless, there is a noticeable tendency to qualify crimes against cultural property as war crimes.

¹¹ Article 15.2: Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

In this respect, on 31 January 2005, for the first time, the International Criminal Tribunal for the Former Yugoslavia (ICTY) held an officer, the superior commander of the former Yugoslav People's Army (the JNA), criminally responsible for failing to take any measure to put an end to the shelling of the old city of Dubrovnik (Croatia) on 6 December 1991 (see Annex 1).

The importance of Chapter IV of the Second Protocol to the 1954 Convention should be stressed. The individual criminal responsibility stemming from Article 15.2¹² points to the hierarchical superior as the main person responsible.

Military commanders must therefore be made aware of this legal risk relating to the protection of cultural property. As well as other measures, they must make their subordinates aware of the provisions of the 1954 Convention through appropriate dissemination and through training that is as comprehensive as possible.

6.2 Domestic law

The legal obligation for the State to respect and to ensure respect¹³ for Geneva law extends to the law on the protection of cultural property.

French law considers respecting cultural property to be a military duty, and any failure to do so can lead to disciplinary or even penal sanctions.

Article D 4122-10 of the French Defense Code, establishes specific protection for cultural property:

- *“A soldier in combat is bound to direct his attacks against military objectives only. He is therefore prohibited from destroying or seizing civilian properties, except in the case of military necessity.*
- *A soldier is also bound to respect cultural property wherever it is located, except when unavoidable military necessity imposes derogating from this rule. Soldiers must respect and protect hospitals and other movable or immovable properties devoted to health care, unless these properties are used to commit acts harmful to them and outside their humanitarian function. Soldiers in combat are bound to refrain from directing any attack likely to cause excessive damage to persons or protected property in relation to the expected military advantage.*
- *It is also prohibited for soldiers to direct any attack likely to cause excessive extensive, long-lasting and serious damage to the natural environment in relation to the expected military advantage”.*

The French Penal Code (Code Pénal) does not contain any specific provisions following France having ratified the 1954 Convention. What applies are general provisions, especially those of Articles 322-3-1 and 461-13 of the Penal Code, and Articles L114-1 and L114-2 of the French Heritage Code (Code du Patrimoine).

¹² Even if France has not ratified the Second Protocol to this date, it is applied in practice.

¹³ Article 1 common to the four Geneva Conventions of 12 August 1949:

“The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”.

The Penal Code identifies three specific behaviors: destruction, damage and deterioration. Here, lawmakers aimed to define the incriminated act by its consequences and results rather than by the means used to produce it. Therefore, any process leading to one of the aforementioned results can be sanctioned, as long as these require positive actions on the part of their author:

“destruction, damage or deterioration is punishable by seven years’ imprisonment and by a fine of 100,000 Euros when it is directed against:

- 1° A building or movable object that is classified or pursuant to the provisions of the Heritage Code, or a document from private archives that is classified pursuant to the provisions of said Code;*
- 2° An archaeological discovery found during excavations or by chance, or a parcel of land where archaeological operations are being conducted or a building devoted to worship;*
- 3° A cultural property belonging to the movable public domain, or that is displayed, preserved or held, even temporarily, in a museum, a library, a media library or archive, either in a place supervised by a public or private person, or by a private person providing public service, or in a building devoted to worship.*

The penalties shall be increased to ten years’ imprisonment and a fine of 150,000 euros when the offense hereof is committed under the circumstances described in 1 of Art.322-3.

The fines mentioned under this Article can be increased to up to half of the value of the destroyed, damaged or deteriorated property.”

Article 322-3-1 of the Penal Code

“Willfully attacking buildings devoted to religion, to education, to art, to science or to charity, historical monuments, hospitals or places where the sick and wounded are gathered, is punishable by 20 years’ of rigorous imprisonment, unless they are being used for military purposes.”

Article 461-13 of the Penal Code

“Two years of imprisonment and a fine of 450,000 euros shall punish those who attempt to export:

- a) definitively, a cultural property mentioned under [Article L 111-1](#);*
- b) temporarily, a cultural property mentioned in [Article L 111-1](#), without the prior authorization provided for by [Article L111-7](#) or without respecting the conditions thereby established;*
- c) definitively, a cultural property mentioned in [Article L 111-2](#) without having obtained the certificate established in this Article;*
- d) temporarily, a cultural property mentioned in [Article L 111-2](#) without having obtained either the certificate or the temporary export authorization established in this Article.”*

Article L114-1 of the Heritage Code

Offenses relating to destruction, damage and deterioration of cultural heritage are punishable by the provisions of Article 322-1 and 322-2 of the Penal Code.

French military disciplinary law also outlines sanctions:

- Article R.41 37-13 of the Defense Code states that any commander has the right and the duty to request that his subordinates be sanctioned for the faults and failings they commit;
- Article D.41 22-10 of the Defense Code states that service members are bound to respect cultural property wherever they are, unless unavoidable military necessity forces this respect to be waived.

CHAPTER VII

PARTICULARS OF PEACE-KEEPING OPERATIONS

According to the Charter of the United Nations, the first purpose of the UN is the maintenance of international peace and security, (Article 1.1). Primary responsibility for this is conferred to the Security Council (Art. 24). When pacific settlement to disputes cannot be reached (Chap. VI), the UN charter provides for a collective security system entitled to carry out coercive operations (Articles 41 and 42, Chapter VII). Practice has shown that recourse to Article 42 is very difficult for institutional reasons (unanimity of the five permanent Members and the right to veto).

As regards peacekeeping operations (PKO), most often these address situations of humanitarian emergency. To date, their mandate has seldom concerned the protection of cultural property.

On 6 August 1999, the United Nations Secretary-General published a bulletin entitled: “Observance by United Nations forces of international humanitarian law”. Two articles in particular concerned the protection of cultural property by United Nations forces:

- *“6.6 The United Nations force is prohibited from attacking monuments of art, architecture or history, archaeological sites, works of art, places of worship and museums and libraries which constitute the cultural or spiritual heritage of peoples. In its area of operation, the United Nations force shall not use such cultural property or their immediate surroundings for purposes which might expose them to destruction or damage. Theft, pillage, misappropriation and any act of vandalism directed against cultural property are strictly prohibited.*
- *6.9 The United Nations force shall not engage in reprisals against objects and installations protected under this section”.*



Today, the Blue Helmets represent a force of 120,000 people, including 82,000 service members, 16,000 police officers and more than 22,000 civilians. © Armée de Terre.



UN experts at the different checkpoints of the facilities of Timbuktu Airport. *O.Debes © Armée de Terre*

The resolution adopted by the Security Council on 25 April, 2013 for establishing MINUSMA (United Nations Multidimensional Integrated Stabilization Mission in Mali), is a major example of the Security Council taking into account the protection of cultural and historical sites in the context of peacekeeping operations.

Indeed, Resolution 2100 of 25 April, 2013 (see Annex 6) tasks MINUSMA with the mission of assisting the transitional authorities of Mali in protecting the country's cultural and historical sites from attack, in collaboration with UNESCO. MINUSMA is also requested to operate mindfully in the vicinity of these sites.

MINUSMA works closely with UNESCO in aiding the Malian population to regain the all the wealth of their material and immaterial cultural heritage.

Protection of cultural property in Kosovo:

An account by Lieutenant General X. de MARNHAC (now retired), former KFOR Commander (2007-2008)

The issue of cultural heritage was at the core of the rift between the (predominantly Serbian and Albanese) communities from the outset of the armed crisis in Kosovo (1997), due to the symbolic and identity value it held. Despite the limited resources available, preserving and therefore protecting this cultural property rapidly became an imperative for the international community (an idea more difficult to accept for the parties to conflict).

In 1999, Resolution 1244 of the UN Security Council¹⁴ (UNSC) set the conditions for international engagement in Kosovo and specified the obligations of each of the parties to the crisis. In particular, it tasked the NATO military Force dubbed Kosovo Force (KFOR) with implementing and guaranteeing “a safe and secured environment” (SASE). The protection of cultural property is broadly included, although there is no specific mention of it in Resolution 1244.

This heritage mainly comprised historical monuments (such as the Gazimestan Monument near Pristina, commemorating the famed and so-called Battle of the Field of Blackbirds against the Ottoman forces in 1389) and religious sites (Orthodox churches and monasteries). Also included were archaeological sites from the Illyrian era, the Roman occupation and early Christianity, up until the early Middle-Ages. Examples are the ruins of the Novo Brdo Fortress and the famous “Kulas” (fortified houses) located in western Kosovo, which today count as a UNESCO World Heritage Site, as well as sites dating back to the Ottoman occupation, such as mosques and public bathhouses (as in Prizren). Out of all the heritage, that which was



The Gazimestan Monument (Central Kosovo, protected by the Czech and Slovak contingents).

– tied to Serbian culture proved to be the most sensitive. Churches and monasteries in particular were subject to substantial pressure from the Albanese community, although not so much for religious reasons, as some would still have us believe¹⁵. Instead, these were viewed as symbols of the Serbian presence in Kosovo, so the pressure inflicted was primarily ethnically-motivated. The first attacks came as soon as 1999, although it was not until March 2004 – in other words, five years after the deployment of an international presence – that the sudden and brutal nature of events provoked an international public outcry.

¹⁴ RESOLUTION 1244 (1999)

Adopted by the Security Council on 10 June, 1999, at its 4011th meeting.

¹⁵ How else can one explain the fact that not one of the many churches of the Catholic (Albanese) community was threatened?



The Monastery of Decani (western Kosovo, protected by the Italian contingent).

For the most radical elements of the Albanese community, these events were the opportunity to use violence to demonstrate their hostility to the Serbian presence. Although limited, this presence was symbolized by a few emblematic sites, mostly of a religious nature. Consequently, numerous Orthodox monasteries and churches came under frequent attack, were torched, and sometimes even destroyed. This was the case particularly in Prizren (German sector), in Gjakova (Italian sector) or the Monastery of Devic (French sector), to name only the most salient events. These bouts of violence were most often perpetrated by hostile civilian crowds, who

did not hesitate in pushing forward women and children. The incapacity displayed by UNMIK (with its police force) and KFOR (with its military units) to oppose these attacks drew harsh criticism (especially towards the members of the UN). The UN rapidly imposed a radical review of the concept of operation to avoid similar situations occurring. An adequate course of action had to be found to avoid systematically being compelled to use lethal weaponry, which is usually that used by troops when faced with civilians.

In the wake of severe criticism for its incapacity to adequately cope with the emerging situation, KFOR (and through it, NATO) therefore committed to resolving deficiencies and to following courses of action more suitable for maintaining a “safe and secured environment” as the mission required, while still ensuring the protection of cultural sites.

Using the lessons learned from the 2004 crisis as a basis, KFOR (along with the Member States’ armed forces) pointed its reorganization in four complementary directions that were deemed indispensable:

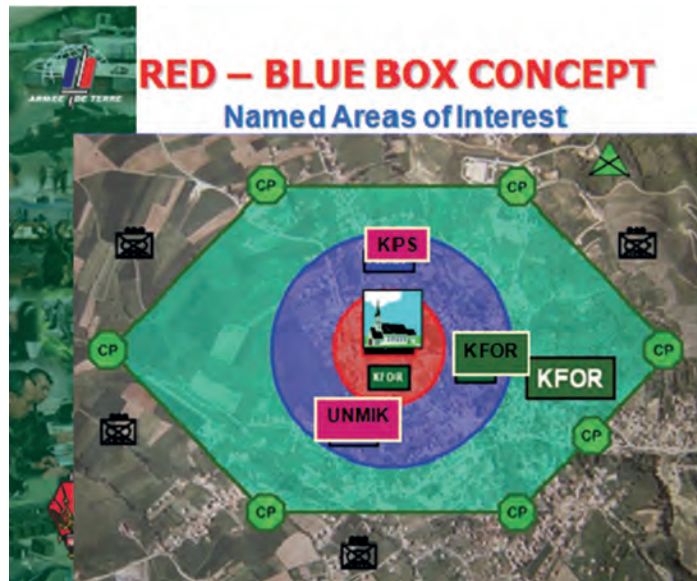
- Reducing or even suppressing “caveats”, i.e. restrictions on domestic employment imposed by the Member States of the Force on their respective contingents, whether these be NATO Member States or non-NATO Members associated with the Force;



Soldiers from the Portuguese contingent training with CRC equipment.

- Introducing the concept of “Crowd and Riot Control” (CRC) by providing adequate equipment (riot shields, batons, protective gear, tear gas, etc.), training (prior to deployment and in-theater) and coordination with specialized units (Multinational Specialized Units or MSU¹⁶, UNMIK or local police forces);
- Developing a concept of operations (“red and blue boxes”) fit for the protection of cultural sites (see diagram);
- Improving the chain of command and the decision-making process to adequately respond to this kind of situation.

At the same time, representatives of the international community (the UN, NATO, and the OSCE) pressed on with drawing up the list of specific sites concerned, taking care to limit their number while setting priorities. From NATO’s standpoint, limited resources meant that keeping consumer objectives within reason and allotted into fixed tasks was what mattered. Indeed, immobilizing units (platoons, and even companies) went against the will of Member States to gradually downsize the force strength as the crisis lessened in intensity.



A typical diagram of the protection of a cultural site (2005/ 2006).¹⁷

The 2006 “Ahtisaari Plan¹⁸” thereby lays out this protection in the following terms, while specifying the number of sites deemed deserving of protection as part of the cultural heritage:

- “6. **Protection and promotion of religious and cultural heritage.** *The Settlement places great emphasis upon ensuring the unfettered and undisturbed existence and operation of the Serbian Orthodox Church in Kosovo. The Church and its internal organization shall be recognized explicitly by the Kosovo authorities, its property shall be inviolable, and it shall enjoy tax and customs duty privileges. **Protective zones shall be created around more than 40 key religious and cultural sites.** Without prejudice to ownership of the property in protective zones, specific restrictions shall apply to activities within those zones to guarantee the peaceful existence and functioning of major religious and cultural sites. NATO shall also provide additional physical security for selected sites, until such time as the military presence decides the conditions have been met for a transfer of their protection responsibilities to the Kosovo Police Force.”*

¹⁶ Predominantly composed of Italian Carabinieri and French Gendarmes.

¹⁷ Caption: CP=Check Point ; KPS=Kosovo Police ; UNMK=UN Mission in Kosovo Police Force.

¹⁸ Martti Ahtisaari, the former President of Finland and former negotiator to the UN (Northern Ireland, Namibia, Bosnia, Timor), was appointed UN Special Envoy on 2 November 2005, to monitor the negotiations on Kosovo’s final status. On 26 January 2007, he presented his report on Kosovo’s final status.

This list was revised by KFOR in 2007, on the eve of the declaration of independence according to the schedule. By this time, the Force had been significantly downsized in terms of troops and capability.

Implementing all of these provisions became possible as soon as 2005, even if some Member States maintained certain caveats. Since then, KFOR has had available infantry units that are generally equipped, trained and ready for crowd control. Whether in coordination with the UNMIK Police (and later with the EULEX Police, within the limits of its capabilities) or with the Kosovo Police, the Force has been able to rely on these units; in 2008, for example, at the time of Kosovo's self-declared independence (at the Court of Mitrovica) or later on in the North of Kosovo during the summer of 2011.

This concept of operation, which was initially designed for guaranteeing the protection of sites of cultural interest and that was trialed in Kosovo, has now been implemented far beyond these reaches. This includes in other theaters of operation, for example the Republic of Ivory Coast. The notion of CRC has become one of the standards of employment among the forces of democratic countries' forces who take care - as much as possible - to treat with respect any demonstrators trying to counter their action and without resorting to lethal weaponry.

CHAPTER VIII

PARTICULAR RULES CONCERNING ILLICIT EXPORT AND TRAFFICKING OF CULTURAL PROPERTY

Throughout history, victors have seized works of art as war trophies, thus fuelling the exhilaration of victory and deepening the loser's humiliation at defeat.

Following the destruction of cultural property and the systematic pillaging of properties in the occupied territories during the Second World War, it was decided to adopt a special protocol on the safeguarding of each country's cultural property in the event of armed conflict.

8.1 The First Protocol to the 1954 Convention

The High Contracting Parties are agreed as follows:

- Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict...
- Each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory. This shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory.
- Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.

8.2 The 1970 UNESCO Convention on the Illicit Trafficking of Cultural Property

Adopted at the 16th session of the General Conference of UNESCO on 14 November, 1970, the Convention covers the measures to be taken to prohibit and prevent the illicit import, export, and transfer of cultural property.

Today, it counts 125 Party States. The Party States undertake to:

- Set up protection measures within their territories (**Article 5**):
- develop adequate domestic legislation;
- set up national services for the protection of cultural property;
- promote museums, libraries and archives;

- establish national inventories;
 - encourage the adoption of codes of conduct in the art market;
 - develop educational programs to spread awareness of respect for cultural heritage.
- supervise the circulation of cultural property (**Articles 6 to 9**):
- introduce an export certificate system;
 - prohibit the export of cultural property from their territory unless accompanied by the above mentioned export certificate;
 - prevent museums from acquiring cultural property unless accompanied by an export certificate;
 - prohibit the import of cultural property stolen from a museum or a religious or secular public monument;
 - impose penalties on any person responsible for infringing the prohibitions hereof;
 - adopt emergency measures prohibiting import if the cultural property of a Party State is in jeopardy from extensive archaeological or ethnological pillage (Afghanistan, Iraq, Syria, etc.);
 - require professional art dealers to maintain a register precisely recording the exact origin of each item they buy.
- return stolen cultural property (**Article 7**):
- at the request of the State Party of origin to the convention, another State Party seizes on its territory and returns cultural property stolen from a museum, a religious institution or a public monument;
 - requests for recovery and return shall be made through diplomatic offices;
 - it shall be proven that the object appertains to the inventory of the institution;
 - the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property;
 - the requesting Party shall furnish all proof necessary to establish its claim for recovery and return.

BIBLIOGRAPHY

- BACHELET, Jean-René, *Pour une éthique du métier des armes, Vaincre la violence*, VUIBERT, 2006,
- BUGNION, François, *La genèse de la protection juridique des biens culturels en cas de conflit armé*, *Revue Internationale de la Croix-Rouge*, no. 854, 2004, pp. 313-324,
- CANTO-SPERBER, Monique, *Le bien, la guerre et la terreur*, Éditions PLON, 2005,
- CICR, *Conseils pratiques pour la protection des biens culturels en cas de conflit armé*,
- CICR, *Mieux faire respecter le Droit International humanitaire dans les conflits armés non internationaux*, CICR, Geneva, 2008
- DAVID, Éric, *Principes de droit des conflits armés*, Bruxelles, Bruylant, 2008, p. 1117,
- HENCKAERTS J-M and DOSWALD-BECK Louise *Droit International Humanitaire coutumier*, BRUYLANT, Geneva, 2006,
- HLADIK, Jan, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Notion of Military Necessity*, *International Review of the Red Cross*, no. 835, Vol. 81, 1999, pp. 621-635,
- HLADIK, Jan, *The Review Process of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Impact on International Humanitarian Law*, *Yearbook of International Humanitarian Law*, Vol. 1, 1998, The Hague, TM.C. Asser Press, 1998, pp. 313-322,
- HUDE, Henri, *L'éthique des décideurs*, Presse de la Renaissance, 2006,
- MAINETTI, Vittorio *De nouvelles perspectives pour la protection des biens culturels en cas de conflit armé: l'entrée en vigueur du Deuxième protocole relatif à la Convention de LA HAYE de 1954*, *Revue Internationale de la Croix-Rouge*, (International Review of the Red Cross) no. 854, Vol 86, p 337-366,
- ROYAL, Benoît, *L'éthique du soldat français*, Economica, 2011,
- TÉMOIN DE L'HISTOIRE, *recueil de textes et documents relatifs au retour des objets culturels*, Éditions UNESCO, 2011,
- TOMAN, Jiri, *La protection des biens culturels en cas de conflit armé (commentaire de la Convention de La Haye du 14 Mai 1954)* Editions UNESCO 1994,

TOMAN, Jiri *Cultural Property in War: improvement in Protection. Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO Publishing, 2009, p. 892,

VERRI, Pietro, *Le destin des biens culturels dans les conflits armés*, Revue internationale de la Croix-Rouge (Genève), no. 752, March-April, 1985, pp. 67-85 and no. 753, May-June 1985, pp. 127-139.

DOCTRINE

FT-05 sur l'exercice du commandement en opération pour les chefs tactiques,

EMP 10 421. sur le concept d'engagement de forces terrestres en zone urbaine,

EMP 50.654 mémento des fondamentaux juridiques à l'usage du commandant d'une force terrestre en opération extérieure (n°30/DEF/CDEF/DDO/BSE o/NP 1 March 2013),

L'étude sur le droit international humanitaire et les conflits armés d'aujourd'hui (application du droit des conflits armés par les Forces Terrestres) (n°285/DEF/CDEF/DDO/BSEO/NP of 8 October 2013) (See the except chosen in Annex 8),

FT 03 sur l'emploi des forces terrestres dans les opérations interarmées, 4 February 2014.

SPECIAL THANKS

We are particularly grateful to the experts from UNESCO and the International Committee of the Red Cross (ICRC) for their support in our research, for documentary sources and for the guidance given to our reflection.

with UNESCO:

- Mr. Jan HLADIK, Head of the UNESCO Cultural Heritage Protection Treaties Section.
- Mr. Édouard PLANCHE, Program Specialist, for the Return of Cultural Property to its Country of Origin or its Resolution in Case of Illicit Appropriation Program, Section of Museums and Cultural Objects, Division of Cultural Objects and Intangible Heritage.
- Mr. Benjamin GOES, Chairperson of the Committee for the Protection of Cultural Property in the Event of Armed Conflict, UNESCO.
- Mr. Khalid ERMILATE, Consultant, Cultural Heritage Protection Treaties Section.

With ICRC in Paris:

- Mrs. Ghislaine DOUCET, Legal Adviser
- Mrs. Maria Teresa DUTLI, Regional Legal Adviser
- Mr. Romain CLERCQ-ROQUES, Legal Assistant

We are particularly grateful to them for agreeing to proof-read our handbook.

ANNEX 1

CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA RELATED TO THE PROTECTION OF CULTURAL PROPERTY DURING A PERIOD OF ARMED CONFLICT

The conflict in the former Yugoslavia was marked by a significant number of acts of destruction and damage to cultural property, used as a means of wiping out the identity of the adversary. To this end, the International Criminal Tribunal for the former Yugoslavia (ICTY) heard in several cases of attacks against cultural property during a period of armed conflict, classing them as war crimes (I) and even crimes against humanity (II).

1. ATTACKS AGAINST CULTURAL PROPERTY CONSTITUTING WAR CRIMES

Pursuant to analysis of ICTY case-law and under article 3) d) of the ICTY Statute, in order to constitute a war crime, attacks on cultural property must:

- Firstly, have caused damage or destruction to buildings dedicated to religion or education which at the time were not used for military purposes;
- Secondly, have been committed wilfully, with the direct intention to damage or destroy the property in question or with the indirect intention to destroy or damage a building as result of recklessness.
- Lastly, these buildings must have been destroyed or damaged in the context of an armed conflict.¹⁹

1.1. Case of the Prosecutor v. Timohir Blaškić

In this case, the Tribunal ruled that in order to constitute a war crime under article 3) d) of the ICTY Statute ²⁰, “the damage or destruction must have been committed intentionally to institutions which may be clearly identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts”.²¹

¹⁹ In this regard, see in particular: ICTY, *the Prosecutor v. Pavle Strugar*, IT-01-42. Judgement dated 31 January 2005, par. 312.; ICTY, *the Prosecutor v. Milan Martić*, IT-95-11-T, Judgement dated 12 June 2007, par. 96.

²⁰ According to the terms of article 3) d) of the ICTY Statute, “[t]he International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but no 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”.

²¹ ICTY, *Prosecutor v. Blaškić*, IT-95-14-TJ. Judgement dated 3 March 2000, par. 185.

1.2. *Case of the Prosecutor v. Dario Kordić and Mario Čerkez*

Respectively a political leader and a military commander, Mr. Kordić and Mr. Čerkez were both members of the Croat Defense Council. Of note, they were convicted for war crimes including the wilful destruction and damage of buildings dedicated to religion and education based on article 3) d) of the ICTY Statute.

The Court thereby ruled that Kordić and Čerkez had deliberately targeted Muslim mosques and other religious and cultural institutions throughout the course of the military campaign.

To reach this conclusion, the Court used the 1st article of the 1954 Hague Convention as a basis for defining cultural property²².

The Appeals Chamber also found that two types of protection exist for cultural, historic and religious monuments.

- General protection, as provided for under article 52 of Additional Protocol I (API) to the Geneva Conventions, granted to civilian objects;
- Special protection, in light of article 53 of API intended to protect cultural objects and places of worship as defined under article 1 of the 1954 Hague Convention. This special protection prevails over general protection²³.

In view of general protection, *“the building or monument cannot be destroyed unless it has turned into a military object by offering the attacking side ‘a definite military advantage’ at the time of the attack. Schools and places of worship are part of this category of buildings”*²⁴.

Special protection, on the other hand, applies to three categories of objects: historic monuments, works of art, and places of worship, provided they constitute the cultural or spiritual heritage of peoples²⁵.

Thus, the Tribunal did not consider that educational buildings per se benefit from the protection granted to cultural property under article 53 of the API and the 1954 Hague Convention, as they do not count systematically as immovable property of great importance to the cultural heritage of peoples²⁶.

It also found that in order for a cultural object to benefit from the special protection provided for under article 8 paragraph 1 of the Hague Convention, forbidding without exception all use of such property even in the case of imperative military necessity, it was not necessary for the property in question to be registered on the international register of cultural property²⁷.

22 ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T. Judgement dated 26 February 2001, par. 359.

23 *Ibid.*, par. 361. ICTY, *the Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeals Judgement dated 17 December 2004, par. 89 to 91.

See also, ICTY, *the Prosecutor v. Milan Martić*, IT-95-11-T, Judgement dated 12 June 2007, par. 97.

24 *Ibid.*, par. 89.

25 *Ibid.*, par. 90.

26 *Ibid.*, par. 92.

27 See supra note 4, par. 362.

1.3. Case of the Prosecutor v. Biljana Plavšić

The former president of the Republika Srpska was convicted for a war crime in light of article 3) d) of the ICTY Statute, due to the destruction of several cultural monuments and religious sites. This included the Alidža mosque in Foča, which dated from the sixteenth century and had been considered a “*pearl amongst the cultural heritage [of the Balkans] in this part of Europe*”²⁸.

1.4. Case of the Prosecutor v. Miodrag Jokić

In this case, covering the shelling of the Old Town of Dubrovnik, Mr. Jokić had been commander of the Ninth Naval Sector of the Bosnian Serb Army. He was involved in the military campaign against Dubrovnik and was sentenced for having violated article 3) d) of the ICTY Statute for destruction and damage caused to the Old Town of Dubrovnik, included in the UNESCO Registry of World Cultural Heritage as a cultural site. The Tribunal stressed that the entire Old Town of Dubrovnik had been considered, at the time of the events, as “an especially important part of the world cultural heritage. It was, among other things, an outstanding architectural ensemble illustrating a significant stage in human history”²⁹. The Tribunal thereby concluded that “the shelling attack on the Old Town was an attack not only against the history and heritage of the region but also against the cultural heritage of humankind”³⁰.

1.5. Case of the Prosecutor v. Pavle Strugar

Continuing with the shelling of the Old Town of Dubrovnik, Pavle Strugar was convicted based on article 3) d) of the ICTY Statute for having destroyed or damaged more than a hundred buildings during the offensive on the Old Town of Dubrovnik³¹.

In this Case, the Court recalled that, according to the Hague Convention of 1954, protection of cultural property can be waived if the property is used for military purposes or in the case of imperative military necessity³².

Regarding the use of a cultural property’s immediate surroundings for military purposes, as opposed to what was upheld in the *Blaškić* case, the Tribunal found that it is “*the use of the cultural property and not its immediate surroundings determining if and when protection of the cultural property should be withdrawn*”³³. The Tribunal did, however, specify that in this case, when military activities or installations exist in a cultural property’s immediate surroundings, in practical terms it is difficult to establish if the acts that caused the damage or destruction of the cultural property were directed against this particular property, or against legitimate military objectives located in its vicinity³⁴.

²⁸ ICTY, *the Prosecutor v. Biljana Plavšić*, IT-00-39 and 40/1. Sentencing Judgement dated 27 February 2003.

²⁹ ICTY, *the Prosecutor v. Jokić* IT-01-42/1-s. Judgement dated March 2004, par.51.

³⁰ *Ibid.*.

³¹ See *supra* note 2, par. 309 and 310.

³² *Ibid.*, par. 328. ICTY, *the Prosecutor v. Pavle Strugar and others*, IT-01-42-4. Judgement dated 7 September 2009, par.279.

³³ ICTY, *the Prosecutor v. Pavle Strugar and others*, IT-01-42-PT. Decision on Interlocutory Appeal dated 2 November 2002, par. 310.

See also ICTY, *The Prosecutor v. Milan Martić*, IT-95-11-T, Tribunal Judgement dated 12 June 2007, par. 98. ICTY, *The Prosecutor v. Mladen Naletilić and Vinko Nartinović*, IT-98-34-T, Judgement dated 31 March 2007 par. 604. In this case, the Tribunal concluded that the mere fact that a building was in the immediate vicinity of a military objective did not justify its destruction.

³⁴ *Ibid.*

2. ATTACKS AGAINST CULTURAL PROPERTY CONSTITUTING CRIMES AGAINST HUMANITY

In terms of ICTY case-law, destruction or damage to institutions dedicated to religion or education which were not used for military purposes at the time, may, if they are committed with the requisite discriminatory intent³⁵, be treated as persecution constituting a crime against humanity in terms of article 5) h) of the ICTY Statute.

2.1. Case of *The Prosecutor v. Timohir Blaškić*

In this case, the ICTY convicted General Blaškić of persecution constituting a crime against humanity, due to his role in the destruction and damage of “institutions dedicated to religion or education”.

For the Tribunal, “*persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind [...] persecution may thus take the form of confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence belonging to the Muslim population of Bosnia-Herzegovina*”³⁶.

2.2. Case of *the Prosecutor v. Dario Kordić and Mario Čerkez*

In this case, the ICTY convicted the two accused of persecution constituting a crime against humanity. The Tribunal thereby found that the destruction of buildings dedicated to religion constituted “*a clear case of persecution as a crime against humanity*”³⁷. The ICTY also specified that this act “*when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of ‘crimes against humanity’, for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects*”³⁸.

2.3. Case of *The Prosecutor v. Milan Milutinović and others*

The Tribunal found that in order for an act of persecution to constitute a crime against humanity, the destruction and damage to religious and cultural institutions must present certain characteristics.

³⁵ In view of ICTY case-law and in particular the case *The Prosecutor v. Milorad Krnojelac*, IT-97-25-A, Appeals Judgment dated 17 September 2003, par.184, citing a specific intent to discriminate on political, racial or religious grounds. This intent targets a group and not an individual. The requisite element is therefore the special intent to harm a person as belonging to a particular group or community. This specific intent cannot be directly inferred from the general discriminatory nature of an attack described as a crime against humanity.

³⁶ See *supra* note 4, par.227.

³⁷ See *supra* note 5, par. 206.

³⁸ *Ibid.*, par. 207.

The Tribunal thereby specified that, in this case, proof must be provided of *actus reus* (the objective element of a criminal offense) along with the *mens rea* (the intention to commit the criminal offense) of the wanton destruction or damage of religious sites and cultural institutions, as a form of persecution, a crime against humanity. To demonstrate *actus reus*, the following must be proved:

- a) The religious or cultural property must be destroyed or damaged extensively;
- b) The religious or cultural property must not be used for a military purpose at the time of the act; and
- c) The destruction or damage must be the result of an act directed against this property.

To meet the requirements of *mens rea*, the Tribunal specified that the perpetrator must have acted with the direct intent to damage or destroy the property in question, or to have acted recklessly in disregard of the likelihood of its destruction or damage³⁹.

The Tribunal also specified for each of the elements mentioned above:

- Regarding the first, the term “destruction” signifies demolition or reduction to a useless form.
- The term “damage” refers to harm or physical injury to an object that impairs its usefulness or value⁴⁰.
- Regarding the second element constituting *actus reus*, the Tribunal refers to the reasoning upheld by the Appeals Chamber in the *Brđanin* case⁴¹, by specifying that the military necessity that would justify destruction or damage to an institution dedicated to religion or culture cannot be presumed. On the contrary, it was recalled that in order to determine whether the destruction or damage to such an institution was justified by military necessity, it must be determined if the institution in question was indeed a military objective as defined under article 52 of API. The Tribunal upholds that if the monument in question was situated in the immediate surroundings of a military objective, this does not justify its destruction as it is its function and not its location determining its loss of protection.
- Regarding the third constitutive element constituting *actus reus*, the Tribunal considers that the causal link is characterized when destruction or damage to the institution results from an act against the property. Consequently, damage caused to the cultural property as a result of fighting in its vicinity would not be considered as a crime against humanity as the latter does not directly target the property in question⁴².

³⁹ ICTY, *The Prosecutor v. Milan Milutinović and others*, IT-05-87-T. Judgement dated 26 February 2009, par. 206.

⁴⁰ *Ibid.*, par. 207.

⁴¹ ICTY, *The Prosecutor v. Radoslav Brđanin*, IT-99-36-A. Appeals Chamber Judgement dated 3 April 2007, par.337.

⁴² *Ibid.*, par. 209.

ANNEX 2

RULES OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW ON THE PROTECTION OF CULTURAL PROPERTY



The Taj Mahal in INDIA, a designated UNESCO World Heritage Site. © *Nikolas Oikonomou*

Jean-Marie HENCKAERTS and Louise DOSWALD BECK “Customary International Humanitarian Law”, Bruylant, Geneva, 2006, Vol. 1 The Rules

Rule 7 - The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.

Rule 8 - In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Rule 10 - Civilian objects are protected against attack, unless and for such time as they are military objectives.

Rule 15 - In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Rule 24 - Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives.

Rule 38 - Each party to the conflict must respect cultural property:

- Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.
- Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.

Rule 41 - The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory.

Rule 61 - The improper use of other internationally recognized emblems is prohibited.

Rule 139 - Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.

Rule 144 - States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.

Rule 147 - Reprisals against objects protected under the Geneva Conventions and Hague Convention for the Protection of Cultural Property are prohibited.

Rule 150 - A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.

Rule 151 - Individuals are criminally responsible for war crimes they commit.

Rule 156 - Serious violations of international humanitarian law constitute war crimes.

ANNEX 3

RESOLUTIONS OF THE INTERGOVERNMENTAL CONFERENCE ON THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT. THE HAGUE, 14 MAY 1954

Resolution I

The Conference expresses the hope that the competent organs of the United Nations should decide, in the event of military action being taken in implementation of the Charter, to ensure application of the provisions of the Convention by the armed forces taking part in such action.

Resolution II

The Conference expresses the hope that each of the High Contracting parties, on acceding to the Convention, should set up, within the framework of its constitutional and administrative system, a national advisory committee consisting of a small number of distinguished persons: for example, senior officials of archaeological services, museums, etc., a representative of the military general staff, a representative of the Ministry of Foreign Affairs, a specialist in international law and two or three other members whose official duties or specialized knowledge are related to the fields covered by the Convention.

The Committee should be under the authority of the minister of State or senior official responsible for the national service chiefly concerned with the care of cultural property. Its chief functions would be:

- a) to advise the government concerning the measures required for the implementation of the Convention in its legislative, technical or military aspects, both in time of peace and during an armed conflict;
- b) to approach its government in the event of an armed conflict or when such a conflict appears imminent, with a view to ensuring that cultural property situated within its own territory or within that of other countries is known to, and respected and protected by the armed forces of the country, in accordance with the provisions of the Convention;
- c) to arrange, in agreement with its government, for liaison and co-operation with other similar national committees and with any competent international authority.

Resolution III

The Conference expresses the hope that the Director-General of the United Nations Educational, Scientific and Cultural Organization should convene, as soon as possible after the entry into force of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, a meeting of the High Contracting Parties.

ANNEX 4

EXTRACTS OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

Article 8 paragraph 2b ix) and 2e) iv)

“1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

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

- a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention [...]

- 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”.

ANNEX 5

RESPONSIBILITY OF COMMANDERS

1) Provisions of the Hague Convention of 14 May 1954

Article 28 SANCTIONS

- The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977

Article 85- Repression of breaches of this Protocol

- *In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the Conventions or the Protocol:*

making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

Article 86 – Failure to act

- *The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.*
- *The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.*

Article 87 Duty of commanders

- *The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.*
- *In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.*
- *The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.*

3) Provisions of the Rome Statute of the International Criminal Court, of 17 July 1998

Article 28 – Responsibility of commanders and other superiors

- *In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:*
 - (a) *A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:*
 - (i) *That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and*
 - (ii) *That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*
 - (b) *With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:*
 - (i) *The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;*
 - (ii) *The crimes concerned activities that were within the effective responsibility and control of the superior; and*
 - (iii) *The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*

ANNEX 6

RESOLUTION 2100 OF THE UNITED NATIONS SECURITY COUNCIL 25 APRIL 2013

(Chosen excerpts)

The Security Council,

Recalling its resolutions 2056 (2012), 2071 (2012) and 2085 (2012), its Presidential Statements of 26 March 2012 (S/PRST/2012/7) and 4 April 2012 (S/PRST/2012/9) as well as its Press Statements of 22 March 2012, 9 April 2012, 18 June 2012, 10 August 2012, 21 September 2012, 11 December 2012 and 10 January 2013 on Mali,

[.../...]

Determining that the situation in Mali constitutes a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

7. *Decides* to establish the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA),

[.../...]

16. *Decides* that the mandate of MINUSMA shall be the following:

f) Support for cultural preservation

To assist the transitional authorities of Mali, as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO;

17. *Authorizes* MINUSMA to use all necessary means, within the limits of its capacities and areas of deployment, to carry out its mandate as set out in paragraphs 16 (a) (i) and (ii), 16 (c) (i) and (ii), 16 (e), 16 (f) and 16 (g) and requests MINUSMA's civilian and military components to coordinate their work with the aim of supporting the tasks outlined in paragraph 16 above;

18. *Authorizes* French troops, within the limits of their capacities and areas of deployment, to use all necessary means, from the commencement of the activities of MINUSMA until the end of MINUSMA's mandate as authorized in this resolution, to intervene in support of elements of MINUSMA when under imminent and serious threat upon request of the Secretary-General;

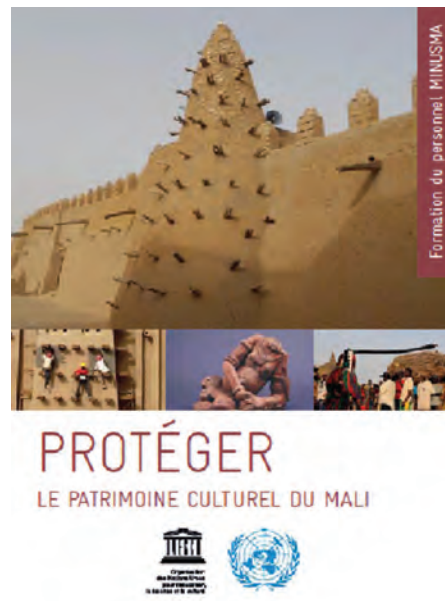
27. *Urges* the transitional authorities of Mali to ensure that all perpetrators of serious violations and abuses of human rights and serious violations of international humanitarian law are held accountable and to continue to cooperate with the International Criminal Court, in accordance with Mali's obligations under the Rome Statute;

[.../...]

32. *Requests* the Secretary-General to consider the environmental impacts of the operations of MINUSMA when fulfilling its mandated tasks and, in this context, encourages MINUSMA to manage them, as appropriate and in accordance with applicable and relevant General Assembly resolutions and United Nations rules and regulations, and to operate mindfully in the vicinity of cultural and historical sites.

ANNEX 7

HERITAGE PASSPORT FOR THE PRESERVATION OF CULTURAL PROPERTY (NORTH MALI)



(Excerpts)

Heritage Passport

This “Heritage Passport” is intended to contribute to the safeguarding of Malian cultural heritage, currently under threat in the northern regions that have been occupied by armed groups since April 2012. It aims to help Mali implement its law on Cultural Heritage and the four closely related UNESCO international Conventions:

- the Convention concerning the Protection of the World Cultural and Natural Heritage (1972), ratified by Mali on 5 April 1997.
- the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), ratified by Mali on 18 May 1961, and its 1999 Second Protocol to which it acceded on 15 November 2012.
- the Convention on the fight against illicit trafficking of cultural property (1970), ratified by Mali on 6 April 1987.
- the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), ratified by Mali on 3 June 2005.

Protecting and respecting the Malian cultural heritage

A mission that is part of the MINUSMA mandate (United Nations Multidimensional Integrated Mission in Mali) created in April 2013 by the United Nations Security Council (Resolution no. 2100).

The cultural heritage includes:

- **sites**
- **objects**
- **living heritage** (cultural practices and events belonging to the local communities)

Cultural heritage must be protected in the same way as you protect hospitals and civilians.

**MINUSMA Soldiers, police forces and civilian personnel
Help Mali to protect its cultural heritage**



One of Timbuktu's mosques.

Identifying cultural heritage

What is a cultural site?

It may be:

- a religious building (mosque, mausoleum, church...)
- a cemetery
- ruins (archaeological site...)
- a museum
- a library/ archives
- a monument
- a place with a particular architecture or with a specific function.



Some of Mali's cultural sites are very important for the heritage and are included on UNESCO's World Heritage List, which contains cultural heritage of exceptional and universal value. These sites are:

- ancient cities in **Djenné**
- the cliffs of **Bandiagara** (the Land of the Dogons)
- the city of **Timbuktu**
- the **Tomb of Askia**

These last two sites were inscribed on the List of World Heritage in Danger in 2012.



Many other sites are also important for the Malian cultural heritage. Some are located in the area where you are carrying out your mission. Such sites are, for example:



- the historic city of **Es-Souk** and the **rock engravings** in the Kidal region
- The archaeological site of the **Kankou Moussa mosque** in Gao
- the archaeological site of **Djenné-Djeno**
- the archaeological site of **Gao-Saneyé** near Gao



Your **experience** and your **professionalism** as MINUSMA **Service members, police forces and civilian personnel** can be very useful for **protecting these cultural sites**.

You must consider the **archaeological sites, monuments and museums** as sensitive areas that make attractive targets and that can be used as a way of affecting people and their identity.

Respecting cultural sites

As cultural sites are important elements of the Malian heritage, your duty is to respect them and ensure that they are respected.

In order to safeguard cultural sites, it is forbidden for anyone to:

- damage the place (by leaving drawings, graffiti, garbage...)
- displace or take away elements belonging to the place (objects, stones...)
- dig holes or excavations

During your mission, you must imperatively avoid:

- settling there
- using them as part of a military operation (for example as an observation post)
- use them as checkpoints during a police operation

It is illegal to:

- excavate and look for objects on cultural sites
- purchase, sell, exchange or export stolen or pillaged objects
- collect and export cultural objects without the permission of the Malian authorities

According to the Malian Law, the Malian authorities alone can:

- authorize archaeological excavations
- regulate the prospection, the marketing and export of cultural property

Failing to respect Malian and international law is a crime punished by sanctions provided for by law. By helping to protect the Malian cultural heritage, you are also protecting part of the world heritage.

Have you been witness to pillage, theft, damage, profanation, trafficking of cultural property or disrespectful behavior?

Are you in doubt, and don't you know how to react in the context of your mission?

Do not hesitate to alert, report to or ask advice from your commanders so that they can contact the local cultural authorities.

Helping the Malian population preserve and protect their cultural heritage is part of your mission.



For the success of your mission as much as for the reputation of your unit and of your country, your duty is to ensure that cultural property is not the object of illegal behavior.

Cooperate with the Malian governmental institutions, the police forces, the customs and the military forces to guarantee the protection of the Malian cultural heritage.

For further information, you can visit the site of the Ministry for Culture: www.maliculture.gouv.ml

Contact:

- By SMS/MMS: +223 65700631 1 + 223 77544017
- By email : dnpcmali@gmail.com
- By post: SOS patrimoine Mali, BP 91 BAMAKO

This pamphlet was produced with the support of the Secretariat of The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Additional Protocols of 1954 and 1999.

NOTE:

The passport provides further information and quotes large excerpts of national and international statutes in force concerning the protection of cultural property. It includes maps and satellite pictures showing the quarters of the main cities in the North of Mali (TIMBUKTU, GAO, ES SOUK) with the locations of the different protected sites. See example of an extract of the map of the city of TIMBUKTU (see overleaf);

08_TIMBUKTU

CITY MAP







Caption

MOSQUES

- 1 Mosque of Djingarey Berre
- 11 Mosque of Sidi Yahia
- 13 Mosque of Sankoro

OTHER POINTS OF INTEREST & REMARKABLE BUILDINGS

- 2 Iman Essayoutil Library
- 3 Museum of Al-Mansour Korey
- 4 Residence of Gordon Laing
- 5 Residence of René Caillié
- 6 Buktu's Well and Market
- 7 Residence of Dr. Berky
- 8 Residence of Dr. Heinrich Barth
- 9 Residence of Mohamed Bagayogo & al-Wangary Library
- 11 Central Market / Youbou Ber
- 12 Residence of Dr. Oscar Lenz
- 14 Ahmed Baba HERIAB Center
- 15 Health Center
- 16 Military Camp
- 17 City Hall
- 18. Al Farouk
- 19. Moroccan Casbah

-  - main roads and streets
-  - historical center
-  - dwelling units
-  - garden, orchard, agricultural area
-  - cemetery
-  - military camp



ANNEX 8

MILITARY NECESSITY AS A WAIVER TO OBLIGATIONS

**(Excerpts from the Study on International Humanitarian Law and today's conflicts
– application of the law on armed conflicts by the French Land Forces – 20 April 2014)**

Military necessity is one of the fundamental principles of International Humanitarian Law (IHL) governing the conduct of hostilities. For the commanders invoking it, military necessity expresses the idea of justified use of force, which must be provided for and recognized by law. This resort to force also has to comply with the principles of proportionality and discrimination.

1 Contents and scope of the military necessity principle.

In the U.S. Air Force Law of War Handbook, military necessity is defined as:

- “(taking) *measures of limited recourse to force, not prohibited by international law indispensable to compel the complete submission of the enemy with the least possible expenditure of time, life, and money*”.
- Military necessity concerns the main objective of an armed conflict, which is *the complete submission of the enemy as early as possible with the least possible losses in terms of personnel and resources*.

The concept of military necessity assumes that:

- the force used can be controlled;
- resorting to force is necessary to secure submission of the enemy;
- the extent of the force used is limited to what is necessary for a rapid submission.

The 1863 Saint Petersburg Declaration called the parties to “conciliate the necessities of war with the laws of humanity”. Reconciliation will probably not be possible, although striking the balance between military necessity and humanitarian considerations is vital for the sake of humanity.

2 The fragile balance between military necessity and humanitarian requirements

There are four possible ways for military commanders to reach this balance:

- Respecting the most longstanding customary laws of war which condemn certain actions which from a military standpoint have no value. They are therefore simply forbidden. Examples include sadistic acts of cruelty, pillage, as well as other private reprehensible acts committed by soldiers. Far from helping the army to reach its military goals, such acts tend to undermine the disciplined behavior expected from a professional armed force;
- certain acts may have some value from a military standpoint, but it is commonly accepted that humanitarian requirements shall prevail. It is on this ground that the employment of poison and toxic gases was prohibited;
- certain rules constitute a real compromise, as it is true that humanitarian requirements limit military necessity. Besides, the latter can prevail on humanitarian obligations but only to a well-measured extent. One such example is the rule of proportionality in attacks where civilian victims are accepted as “collateral damage”, unless the damage is excessive compared to the direct and concrete military advantage expected;
- in particular situations, certain provisions allow for military requirements to outweigh the humanitarian rule that normally applies. Such provisions resemble derogation clauses. For example, “in exceptional cases of unavoidable military necessity”, the immunity granted to a cultural property under special protection can be waived, or that medical personnel cannot be attacked, unless they are engaged in hostile military acts.

Directeur de la publication : Général ANTOINE WINDECK
CDEF - 1 place Joffre-Case 53 - 75 700 PARIS SP 07
Téléphone du secrétariat : 01.44.42.51.02 -

Auteurs :
Colonel (r) François MIRIKELAM
Lieutenant-colonel Philippe FRIN

Traduction : Lieutenant-colonel Aleksandar STÉFANOVIĆ

Editeur rédactionnel : Capitaine Soraya AOUATI

Contact : CDEF/Division doctrine - téléphone : 01 44 42 52 08

Maquettage : Mme Christine VILLEY/CDEF/DAD/PUB

Infographie : (Montage Couverture) : Mme Nanci FAUQUET/CDEF/COM

Crédits photographiques : Les auteurs des illustrations sont indiqués sur ces dernières

Impression-Routage : EDIACA - 76, rue de la Talaudière - B.P. 508 42007 SAINT-ETIENNE Cedex 1
Téléphone : 04 77 95 33 21 ou 04 77 95 33 25

Tirage : 100 exemplaires

Dépôt légal :
ISSN de la collection « Document de doctrine » en cours
ISBN du volume 978-2-11-138981-6 - août 2014
La version électronique de ce document est en ligne sur le(s) site(s) Intradef (et Internet) du CDEF
à l'adresse <http://www.cdef.defense.gouv.fr>
Les documents classifiés ne peuvent être téléchargés que sur les réseaux protégés.



**CENTRE DE DOCTRINE
D'EMPLOI DES FORCES**

www.cdef.terre.defense.gouv.fr

