

Inserts on the 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

Foreword

The inserts are designed specifically as a dissemination tool for armed and security forces. They are offered to States signatories and States party to the Second Protocol to assist them if required for this purpose. They are not aimed at replacing national military law and regulations implementing the Second Protocol in armed and security forces. Nor are they an authoritative interpretation of those provisions, which may only be made by States party to the Second Protocol.

The main insert is aimed at junior to middle ranking officers. It might for example, be used as an aid to instruction at military academies, training schools, junior command colleges as well as more senior staff colleges. It has been written with this audience in mind by a retired officer with both operational command and legal experience.

In addition, the main insert contains a list of optional questions that an instructor might wish to use to confirm knowledge or simply prompt discussion. It also contains a list of examples and case studies. ***It is important to note that the case studies and examples do not reflect the views or opinions of UNESCO, the author, or the editors, and that in some instances they actually represent violations of the law of armed conflict. They are nevertheless real examples, which illustrate the law as it relates to the protection of cultural property in action or in some cases a failure to apply it. As such, they might form a useful basis for class or course discussion. Examples from modern conflicts are used whenever possible. This has led to a slight but hopefully understandable imbalance in the geographical distribution of the examples.***

Instructors are encouraged to use their own culturally specific or militarily relevant examples in the place of those offered in the insert.

The second insert is aimed at junior ranks- Privates to Junior Non Commissioned Officers. It summarizes in one page the key provisions of the applicable law.

In terms of layout, bold type is used to highlight the exact wording of the law or for headings. Author's emphasis or additions are either included in italics or underlined. To assist instructors or the reader to cross reference legal points, the exact reference is included either in the text or as a footnote. A few abbreviations are also used as follows:

Art - A particular Article of the law and in particular the Second Protocol.

AP I and AP II - Protocols I and II Additional to the Geneva Conventions, 1977.

GC I, II, III & IV. - Refers to the relevant Geneva Conventions of 1949.

Hague Regulations IV - Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907

LoAC - The Law of Armed Conflict.

The 1954 Convention - The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

The Second Protocol - The 1999 Second Protocol to the 1954 Hague Convention.

UNESCO - The United Nations Educational, Scientific and Cultural Organization.

**The 1999 Second Protocol to the 1954 Hague Convention
for the Protection of Cultural Property in the Event of Armed Conflict**

INTRODUCTION

Throughout military history, operations have often resulted in the destruction of irreplaceable cultural property. This represents a loss not only to a particular nation but also to our cultural heritage as human beings. Realizing the significance of this loss, the international community adopted in 1954 **The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict** (hereafter the 1954 Convention) and its First Protocol, which deals mainly with protection of property in occupied territory and, in particular, with the prohibition of export of cultural property from occupied territory. They remain the principal international instruments for protecting such property in conflict situations. **In 1999 a Second Protocol was introduced.** This was intended to supplement the existing law, not in any way to replace it. It only applies to States that have already become party to the 1954 Convention as well as to the Protocol itself.

AIM

The aim of this Chapter is to explain the additional rules for the protection of cultural property in armed conflict established by the Second Protocol to the 1954 Hague Convention.

BACKGROUND

In ancient times, war was often waged in accordance with customs, practices or agreements containing humanitarian elements designed to protect not only those taking part but also cultural and religious property. Modern treaty law strengthens that protection. It should be noted, however, that certain legal systems had rules protecting cultural property centuries before that.

The actual treaty making process for the protection of such property dates back to the American Civil War. The carnage of that war led to the 1863 Lieber Code which gave protected status to libraries, scientific collections, and art works.¹ The process was continued by the Hague Regulations of 1907 which required those carrying out sieges and bombardments to spare, as far as possible, buildings dedicated to religion, art or science, and historic monuments.²

Following the massive destruction, sometimes of whole cities, associated with the Second World War, the international community realized there was a need to strengthen the applicable law. The result was the 1954 Hague Convention, which applies both to international and non-international conflicts. This Convention became the cornerstone of the law protecting cultural property and its basic principles are recognized as part of customary international law.

The law relating to cultural property was strengthened by the 1977 Protocols Additional to the Geneva Conventions of 1949 (hereafter Additional Protocols). Additional Protocol I states that no acts of hostility may be directed against cultural objects and places of worship. It also states the criteria whereby such acts qualify as grave breaches of the law.³ Additional Protocol II extends this protection to include non-international armed conflicts.⁴

Why therefore, with this wealth of customary and treaty law was there any need for a new Protocol? One reason was that although the 1954 Convention remains an instrument of key importance, over the years a number of its provisions have been included and expanded in newer laws namely the Additional Protocols. There was a growing need to bring together all aspects of the law protecting cultural property into one document, the aim being to try and make the law more easily understood and, as a result, improve the prospects of it being properly applied by States and in particular by their armed forces.

¹ The Lieber Code of 1863. Art. 35.

² Hague Convention on Land Warfare Convention (IV) Respecting the Laws and Customs of War on Land 1907. Art. 27.

³ Protocol I Additional to the Geneva Conventions, 1977 Arts. 38, 53 and 85.

⁴ Protocol II Additional to the Geneva Conventions, 1977 Art. 16.

Another reason is that the law must be dynamic. In other words it must keep up to date with developments in warfare and the modern battlefield. Also it has to be relevant and effective. It has to be digestible and understandable to those required to use it - in particular the armed forces. The aim of the Second Protocol is to do just that. It does not replace the 1954 Convention. What it does do, however, is add to, update and clarify its provisions.

Also, very importantly from a military perspective, it cross references into the law protecting cultural property, key elements of Additional Protocol I that concern the conduct of operations. We see in the Second Protocol clear references to exactly what a military objective is, what precautions we must take in an attack and what precautions we must take against the effect of hostilities.

The Second Protocol deals with the realities of modern warfare. It more clearly explains how the principles of international humanitarian law such as distinction, proportionality and military necessity apply to the protection of cultural property. It gives the armed forces much clearer guidance on when and if cultural property might become a legitimate military objective. For commanders and operational staff officers it provides clear instructions on how cultural property should be treated as a factor in planning and conducting military operations.

Some important definitions. Before examining the Second Protocol let us define some important terms that it uses:

Cultural property. The definition of cultural property is the same as it was for the 1954 Convention. Essentially this is:

- any 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; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historic 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 Art. 1(a).
- buildings whose main and effective purpose is to preserve or exhibit such property, e.g. museums or large libraries.
1954 Convention Art. 1(b).
- centres containing a large amount of cultural property.
1954 Convention Art. 1(c).

Military objective. The definition is the same as that found in Additional Protocol I. A military objective means 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.

*Art. 1.(f).
AP I. Art 52 (2).*

The United Nations Educational, Scientific and Cultural Organization - "UNESCO". The UN Specialized Agency charged with overseeing the implementation of and respect for the law concerning the 1954 Convention and its two Protocols.

In addition to cultural property under general protection already protected by the Convention, the Second Protocol introduces a new category of protection called '**Enhanced Protection**'.

Scope of application. Art. 3

Corresponding to the 1954 Convention, the Second Protocol applies in situations where the law of armed conflict (hereafter the LoAC) applies.

GENERAL PROVISIONS REGARDING PROTECTION

The 1954 Hague Convention grants general protection to all categories of cultural property, regardless of its origin or ownership. The Second Protocol complements further this protection by providing additional protection. Let us now examine these provisions **more closely**.

MEASURES TO BE TAKEN IN PEACETIME FOR ALL CULTURAL PROPERTY

Safeguarding of cultural property - *Second Protocol Art. 5*

Whereas the 1954 Convention mentioned the need for States to take 'appropriate' measures to protect cultural property in time of peace it did not actually give much detailed guidance on how this might be achieved. The Second Protocol adds to our understanding by giving a list of concrete measures.

Preparatory measures 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**
- **the designation of competent authorities responsible for the safeguarding of cultural property.**

In line with this practical advice the Second Protocol also provides for the establishment of a voluntary fund to provide financial or other assistance to support States in establishing these peacetime measures. *Art. 29*

MEASURES TO BE TAKEN ON OPERATIONS REGARDING ALL CULTURAL PROPERTY

Respect for all cultural property – *Art. 6*

The 1954 Convention makes it clear that cultural property must be respected during military operations.⁵ Cultural property is generally civilian property and as such must not be attacked, but what happens if such property is misused for military purposes? Does it immediately become a military objective? The Second Protocol gives clear rules to military commanders on how they should react if this situation arises. These rules as we can see reflect our understanding of what does and does not constitute a military objective under the LoAC.

Without actually specifying the terms, the Second Protocol lists the rules regarding respect for cultural property firstly from the standpoint of the '*attacker*' and then from that of the '*defender*' which for our military purposes is most useful. It does so by referring to 'Waivers' that can be applied under certain operational circumstances on the basis of imperative military necessity.

The attacker

A waiver on the basis of imperative military necessity may only be invoked to direct an act of hostility against cultural property when and for as long as:

- **that property has, by its function, been made into a military objective.** For example, it has been taken over by the military and transformed by its use into a military objective. If on this basis the property now fits the two cumulative criteria for a military objective then you may deal with it.

⁵1954 Convention Art. 4 (1).

That is, it is now making an *effective contribution* to your opponents military action and to attack it would give you a *definite military advantage at the time*. It is important here to note the exact wording of the waiver. It refers to an act of hostility. This covers the whole range of actions you might wish to take. You must also take into account the precautions noted below. For example, 'act of hostility' does not necessarily mean total destruction. Neutralization, might be sufficient to meet your military aim and result in less damage to the cultural property.

- **there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.** For example, your opponents might have made an historic bridge across a river the key to their defence. Unless you can capture the bridge, then you can no longer continue your advance. In such circumstances the waiver might come into effect. Beware however that you have taken all factors into account. In particular remember that the law requires you to consider that when there is a choice between several military objectives for obtaining a similar military advantage and one of them happens to be a cultural property, then an attack on the latter should be avoided⁶. If there are other bridges up or down stream that offer you the same military advantage then attack and secure them and leave the historic bridge alone.
- **In both the above circumstances the attack should be preceded by an effective advance warning whenever circumstances permit.** What is meant by effective? Well, from other areas of the law where warnings are mentioned⁷ and from pure military common sense we can say 'effective' means that the warning is actually received and understood and the offender has a reasonable time to comply. A warning, followed immediately by an artillery bombardment or an air strike would hardly fit this criteria. In addition, it could hardly be considered a professional military approach.

The defender

- **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.** Here we can repeat the bridge scenario but this time reverse the roles and put ourselves in the defender's position. We would only be justified in using the historic bridge if it was absolutely *vital* to our defence and it provided the *only feasible* way of blocking the enemy advance.

Decisions regarding any waiver

- It should be noted that the decision to invoke imperative military necessity and attack or use cultural property on the basis of the waivers mentioned above must **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.** This pragmatic approach to the realities of battle gives a degree of flexibility to the military. It ensures that in an emergency situation, in the absence of a battalion commander's order, subordinates can react and retain the initiative if absolutely necessary. It ensures that they are not placed in unnecessary danger whilst awaiting a decision.

Precautions in an attack on any form of cultural property – Art. 7

The Second Protocol incorporates the precautionary rules found in Additional Protocol I⁸ regarding the distinction between civilian objects and military objectives and applies them specifically to cultural property as defined in the 1954 Convention.

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

- **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 minimizing, incidental damage to cultural property.**

⁶ Protocol I Additional to the Geneva Conventions, 1977. Art. 57(3).

⁷ See for example Protocol I Additional to the Geneva Conventions 1977. Art. 57(2)(c).

⁸ Protocol I Additional to the Geneva Conventions, 1977. Art. 57.

- refrain from deciding to launch any attack which may be expected to cause incidental damage to 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 cultural property;
 - that the attack may be expected to cause incidental damage to cultural property which would be excessive in relation to the concrete and direct military advantage anticipated.

Precautions against the effects of hostilities – Art. 8

In the same way the Second Protocol directly translates the provisions of Additional Protocol I⁹ dealing with precautions against the effects of attacks.

The Parties to the conflict shall, to the maximum extent feasible *in a defensive scenario*:

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

Occupied territory – Art. 9

Under the 1954 Convention States Parties occupying territory must preserve cultural property in that territory and under the First Protocol prevent its illicit export. The Second Protocol gives additional instructions regarding the protection of cultural property in wholly or partially occupied territory. In such situations States and their armed forces must prohibit and prevent:

- any illicit export, other removal or transfer of ownership of cultural property;
- any archaeological excavation, save where this 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.

If within the rules outlined above archaeological excavation, alteration or change of use does take place it should wherever possible be carried out in close co-operation with the competent national authorities of the occupied territory

See Also 1954 Convention, Art. 5, 1954 Protocol, Art. 1-4

CULTURAL PROPERTY UNDER ENHANCED PROTECTION

The 1954 Convention provides a system of '**special protection**' for certain categories of cultural objects such as a limited number of refuges intended to shelter movable cultural objects, and of centres containing monuments and other immovable cultural property of very great importance, provided that they are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point and are not used for military purpose.¹⁰

Unfortunately, the system of special protection has had very limited success. In order to improve on the 1954 system, the Second Protocol introduces a new category of '**enhanced protection**'. If property has been granted both special and enhanced protection then only enhanced protection applies.

The intention is that States that now want to register any such property should start using the new enhanced property list established by the Second Protocol. States that have registered property in the

⁹ Protocol I Additional to the Geneva Conventions, 1977 Art. 58.

¹⁰ The 1954 Convention Art. 8 (1).

previous special protection list should request a transfer to the new list if the conditions of the granting of enhanced protection allow for such transfer.

The Criteria Necessary for Enhanced Protection - Art. 10

Cultural property may be placed under enhanced protection provided that it meets 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.**

A decision to grant or deny enhanced protection may only be made on the basis of the above criteria. Such decisions would be made by the UNESCO Committee for the Protection of Cultural Property in the Event of Armed Conflict established under the Second Protocol (hereafter "the Committee"). (See institutional matters below.) *Art. 11*

These criteria represent significant additions to the 1954 Convention. States Party to the Second Protocol are in effect declaring a promise that such property will never be used for military purposes. If they break this promise, as we will see below, they would be guilty of a war crime. As for an adversary they should now be left in no doubt as to whether a property is on the list of enhanced protection or not. If it is on the list, an attack on it would have the most serious consequences.

Immunity of Cultural Property Under Enhanced Protection – Art. 12

Once granted enhanced protection, the Parties to the conflict must ensure its immunity by refraining from making it the object of attack or from any use of the property or its immediate surroundings in support of military action.

Loss of Enhanced Protection – Art. 13

Cultural property granted enhanced protection can only lose such protection under strict conditions. Many of these conditions are, as you might expect, a repetition of the rules applicable to all cultural property. Equally, some conditions are much tighter, reflecting the greater importance of such property. Let us examine the conditions and highlight the differences.

Cultural Property Under Enhanced Protection shall only lose that protection:

- **If such protection is suspended or cancelled.** This would be carried out by the UNESCO Committee. It would happen, for example, if the property failed to meet any one of the three criteria mentioned above. In practice UNESCO would ensure the property was removed from the list of enhanced protection and that the Secretary-General of the United Nations and all parties involved were informed. The armed forces of a State would be informed of this through the chain of command.

Art. 14

- **If, and for so long as, the property has, by its use, become a military objective.**

Even if the property has, by its use, become a military objective there are still some strict rules that commanders or operational staff officers must take into account. **Such property may only be the object of attack if:**

- **the attack is the only feasible way 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.**

The rules continue and it is here that we can see the tighter requirements relating to enhanced protection.

- **Unless circumstances do not permit, due to requirements of immediate self-defence:**
- **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.**

We have highlighted the tightening of the law. Let us briefly look at each element.

The armed forces retain the initiative to react to a misuse of enhanced protection status, i.e. in life threatening situations of **immediate self-defence**. This is a clear and important military translation of the concept of imperative military necessity and the customary interpretation of self defence. However, if circumstances do permit then these additional and very strict criteria must come into play:

The attack must only be ordered at the highest level of command. This is generally considered to mean the commander-in-chief of the States armed forces. In multinational, coalition or allied forces, the most senior officer would hold this responsibility. Remember that "general protection" only required a battalion commander to give the order or even possibly a lower rank when circumstances did not permit.

Warning of attack was certainly required for property under general protection. So is there anything new here? Well yes there is. We can see that now **the warning is mandatory**. Before you might recall the wording was "whenever circumstances permit". In addition, the requirement that a **reasonable time be given to the opposing forces to redress the situation** is new and adds an extra level of protection. You will recall that in connection with general protection we suggested this might be a sensible military approach, however, it was not mandatory, now it is.

CRIMINAL RESPONSIBILITY AND JURISDICTION

The Second Protocol adds to the 1954 Convention and to our military understanding by listing exactly what are serious violations of international humanitarian law in relation to cultural property. Further it explains exactly who has jurisdiction over such violations. Obviously such a protocol should not be expected to repeat all the LoAC provisions relating to individual and command responsibility. These you will find in the relevant section of the manual. However, it is worth reminding ourselves of the key issues. These are as applicable to the protection of cultural property as to any other aspects of the LoAC.

Individual Responsibility for Compliance with the Law. Every member of the armed forces, whatever his or her rank, has a personal responsibility to comply with the law. It is no defence to a war crime to say that the act was committed in compliance with a superior order. It might be considered a mitigating factor in sentencing but it does not excuse law breakers. A soldier who carries out an order which is illegal under the LoAC is guilty of a war crime, provided he or she was aware of the circumstances which made that order unlawful or could reasonably have been expected to be aware of them.

Command Responsibility for Compliance with the Law. All military commanders are under a duty to enforce the LoAC. In particular they must never turn a blind eye to violations of the law. Failure to act (i.e. to prevent or to repress violations) when the law is being flouted cannot be tolerated in any commander. It will result in disciplinary and perhaps even criminal action being taken against you. Commanders will be held criminally responsible under the law if:

- they knew, or should have known, that subordinates were going to break the law, i.e. commit a war crime, but did nothing to prevent it;
- they fail to take any action (punish or report) subordinates who have already committed a war crime.

A commander therefore cannot use the excuse "I did not know" - Command means just that-being in control and being responsible for what is happening in your command all the time, every time.

GC I, Art. 49

GC II, Art. 50

GC III, Art. 129

GC IV, Art. 146

1954 Convention, Art. 28

AP I, Art. 86 & 87

Commanders must also demonstrate by their interest and emphasis on **teaching and training** in peacetime and of course by the example they set and their behaviour in battle that they respect the law.

Let us now look at the provisions of the Second Protocol in relation to criminal responsibility and jurisdiction.

Serious Violations of the Second Protocol – Art. 15(1)

Five acts are defined which if committed intentionally and in violation of the Convention or the Second Protocol are considered as serious violations which entail individual criminal responsibility.

Regarding enhanced protection these are:

- 1. making cultural property under enhanced protection the object of attack**, i.e. your responsibility in attack;
- 2. using cultural property under enhanced protection or its immediate surroundings in support of military action**, i.e. your responsibility in defence.

Regarding all cultural property:

- 3. extensive destruction or appropriation of cultural property;**
- 4. making cultural property the object of attack;**
- 5. theft, pillage or misappropriation of, acts of vandalism directed against cultural property.**

As well as listing serious violations in relation to cultural property the Second Protocol also ensures that there is a mechanism available to bring those persons responsible for committing them to justice. It does this by requiring States to establish effective national enforcement measures to make violations criminal offences and to establish their jurisdiction to try or extradite. Let us briefly examine the key elements of each of these:

Criminal Responsibility – Art. 15(2)

States have the specific duty to adopt whatever measures are necessary to establish the five violations listed above as criminal offences under their domestic law and to make them punishable by appropriate penalties. This of course also entails incorporating the rules into manuals of military law.

Jurisdiction, Prosecution and Extradition

Each State Party must ensure that its legislation establishes jurisdiction over the above violations when:

- **the offence is committed on its territory, or**
 - **the alleged offender is a national of that State, or**
 - **In the case of violations 1 to 3, when the alleged offender is present in its territory.**
- Art. 16 (1)*

The reason for the broader jurisdiction in relation to violations 1 to 3 is that they are "*grave breaches*" of the Geneva Conventions. States have a duty to either **prosecute in their own courts or extradite** non-nationals for grave breaches committed abroad who are present in their territory. This reflects the principle of mandatory **universal jurisdiction** for grave breaches.

Art. 17 & 18.

The serious violations 4 and 5 above were added because they are recognized as "war crimes" (but not "grave breaches") subject to criminal sanction by the Rome Statute of the International Criminal Court. States have the obligation to repress them when they are committed on their territory or when the offender is one of their nationals. There is no obligation however, to establish jurisdiction over cases where the offence was committed abroad by a non-national, although States may exercise such jurisdiction if they wish to. This reflects the principle of customary international law by which all States have jurisdiction to try non-nationals for war crimes committed abroad but are under no obligation to do so if the crimes do not amount to grave breaches.

NON INTERNATIONAL ARMED CONFLICTS - Art. 22

It is important to note that the entire Second Protocol, including the section on criminal responsibility and jurisdiction applies to non-international armed conflicts. It also applies to all parties involved in such conflicts whether they are government or insurgent forces.

UNESCO may offer its services to the parties to the conflict, e.g. to advise, to act as an honest broker in the event of disagreement, etc.

INSTITUTIONAL ISSUES - Art. 24, 27 & 29

A committee of twelve members who are elected from States which are Party to the 1954 Convention and the Second Protocol is responsible for overseeing and monitoring its implementation. In particular this 'Committee for the Protection of Cultural Property in the Event of Armed Conflict' is responsible for granting, suspending or cancelling the designation of enhanced protection. The Committee is also responsible for administering a fund to provide peacetime or emergency assistance to States to protect cultural property. The resources of the fund are based on voluntary contributions from the signatory States and other contributions.

DISSEMINATION AND ASSISTANCE

Dissemination - Art. 30

Of importance to the armed forces is the requirement to ensure the provisions of the Second Protocol are properly disseminated. In particular States and their armed forces must:

- **incorporate guidelines and instructions on the protection of cultural property in their military regulations.**
- **develop and implement, in co-operation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes.**

It is not enough for States simply to become party to the Second Protocol. **Its provisions must be taught** in particular to the armed forces during peacetime training. In this way it will be understood **and implemented on operations**. Instruction should be followed up by practical field training where scenarios based on the protection of cultural property are included and practised. The Protocol also advises states where they can obtain help in this respect, i.e. UNESCO itself. States may also turn for example to organizations that are specifically mandated to offer their services for the dissemination of the LoAC to armed forces, such as the International Committee of the Red Cross (ICRC) or the International Institute of Humanitarian Law (San Remo, Italy).

Assistance of UNESCO - Art. 33

A Party may call upon UNESCO for technical assistance in organizing the protection of its cultural property. E.g. Preparatory peacetime measures, measures to meet emergencies or with compiling national inventories. UNESCO also has the right to make proposals to the Parties on its own initiative for the improvement of the protection of cultural property.

EXECUTION OF THE PROTOCOL

Protecting Powers - Art. 34-36

The LoAC provides States with the option of requesting a 'Protecting Power' to assist in safeguarding their interests in a particular conflict situation. If established, such Protecting Powers would also be responsible for lending their good offices to matters or disagreements considered useful in the interests of protecting cultural property. In the absence of a Protecting Power the Director General of UNESCO or the Chairman of the Committee for the Protection of Cultural Property may offer to mediate. Finally as provided in the LoAC, a State might request the International Committee of the Red Cross to fulfil this role.

See Also:

GC I, Art. 8 & 10

GC II, Art. 8 & 10

GC III, Art. 8 & 10

GC IV, Art. 9 & 11

1954 Convention Art. 21

AP I, Art. 2 & 5

Translation and Reports - Art 37

Closely linked with the requirement to disseminate the Second Protocol is the responsibility of States to translate its provisions. Also States must report to the Committee every four years on the implementation of the Protocol.

THE DISTINCTIVE EMBLEM

The distinctive blue and white shield of the 1954 Convention used as the emblem to identify cultural property under general protection remains exactly the same.



Remember that in addition to identifying the actual property the sign may also be used to identify persons who have duties in relation to the control or protection of the property. Such persons should be respected and allowed to carry out their duties. They may wear an armband showing the distinctive sign. They should carry a special identity card bearing the distinctive emblem. An example of this card is given as an annex to 1954 Convention regulations.

1954 Convention, Art. 15, 16 & 17

Regulations for Its Execution

Art. 20, 21 and Annex

Some might say "I have travelled extensively and been involved in many operations but I have never seen this sign being used." This may be true but never expect everything to be perfectly marked on the battlefield. The signs may not have been put up or they might have been knocked down.

As professional, intelligent and well trained soldiers you should act accordingly and not look for excuses. You know very well what a temple, church or monument looks like. Art galleries and museums are usually imposing buildings. If in doubt- take a moment to make absolutely sure. Get confirmation from your superiors if possible before taking action that might destroy something that is irreplaceable.

It should be pointed out that the Second Protocol does not provide for a special separate sign for cultural property under enhanced protection. However, this issue will be considered by the Committee following the entry of the Second Protocol into force in order to seek a satisfactory solution.

Summary:

The law of armed conflict must be dynamic. It must keep pace with developments in warfare. The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict does just that. It represents a major step forward in the protection of cultural property under the LoAC. It supplements the 1954 Convention, it does not replace it. It provides the military with clear definitions as to when waivers on the basis of 'imperative military necessity' may or may not be applied. It brings into the law relating to cultural property the principles of distinction and proportionality as defined in Additional Protocol I. It provides a new system of 'enhanced protection' for cultural property of the greatest importance for humanity. It obliges States Parties to establish individual criminal responsibility under their domestic law for serious offences against such property. It further expands the protection of cultural property in situations of non-international armed conflict.

Cultural property is of importance not only to individual States but to the whole world. It is the armed forces of a state that bear the main responsibility for applying and respecting the law applicable to the protection of cultural property. In order to discharge this responsibility in a professional way, the armed forces of a State must have a system in place to ensure the law is taught, practised and understood in peacetime. Then, equally important, that it is applied to the planning and conduct of all military operations.

QUESTIONS, EXAMPLES AND CASE STUDIES
POSSIBLE QUESTIONS

1. You are a battalion commander. As part of the routine training of your soldiers in the LoAC you wish to include the subject of the protection of cultural property. Suggest some ways you might approach this training.

Answers might include:

The armed forces have a responsibility to disseminate the law. Commanders in particular are under a responsibility to ensure those under their command are taught and understand the provisions relating to the protection of cultural property and have the opportunity in peacetime to include it in their training programs and field exercises. Some detailed ideas might include:

- classroom instruction on the main provisions of the law. - Mostly for officers - field training will be more appropriate for junior ranks.
- map or model room exercises that include the topic
- field training exercises where scenarios based on cultural property are included, e.g.
 - an attack scenario where a building clearly marked with the distinctive emblem is obviously being used by the enemy;
 - include a similarly marked building as part of a defensive exercise- can the building be used as part of the defensive plan?

Art. 30

2. Your company is tasked with defending a village. As part of your defensive plan you order that an observation post of four soldiers is established on the rooftop of a religious centre that is designated as property under general protection and is marked with the distinctive emblem. You consider that as they are only tasked with observation they will not be breaking the law. Are your orders lawful, is our thinking correct?

Answer - No on both counts. Your orders were not lawful. By using the protected property for military purposes you have turned it into a possible military objective. It loses its protection and could be attacked. Your order would only be lawful if there was absolutely no other suitable place to establish an observation post in the village. This is most unlikely to be the case. You have broken the law and would be liable to criminal charges.

Art. 6, 8, 15 to 17

3. Your Battalion is attacking a town. Suddenly on the main axis of your advance your lead platoon is pinned down by sniper fire from the top windows of a building. Prior to the attack you gave orders that the very same building known to be a museum was subject to general protection. Your radio operator reports that the platoon commander in question is requesting your permission to attack the building. How would you react to this request?

Answer - The museum has been used by the enemy and has therefore lost its protective status. The platoon commander realizing its significance has reacted correctly by asking you as his battalion commander for permission to deal with the problem. The snipers are blocking your main axis of advance leaving you with no feasible alternative than to deal with the problem. Although the snipers may be engaged, the aim if at all possible should be to neutralize them whilst at the same time causing the least possible damage to the museum. A graduated response using the range of weapons available to you would be appropriate. Also remember the law requires that an effective advance warning should be given to the enemy to stop their action or face the consequences. In this case however the circumstances would not appear to be appropriate for such a warning and you would not be held accountable if you decided to do without it.

Art. 6 and 7

4. Consider the same problem above. This time however put yourself in the position of the platoon commander and the scenario is slightly changed. You are still the lead platoon, you are still pinned down. You try to contact your Battalion commander for permission to attack the snipers. As you do so your radio operator is killed and the same bullet has damaged the radio - it is unworkable. Would you be justified in dealing with these snipers on your own initiative?

Answer - Most definitely yes. The circumstances clearly do not permit you to obtain the necessary permission. Military necessity dictates that you must react to this dangerous situation quickly and decisively. You should proceed on your own initiative just as if you had received the order from your commander.

Art. 6

5. A commander orders an anti-aircraft gun to be sited in the car park of an art gallery designated and marked as property under general protection. "That should guarantee its security and surprise the enemy" he says - "no one will attack it there." Do you agree with the commander's orders and thinking?

Answer - You should disagree with the orders. His thinking is entirely against the law. You must avoid locating military objectives near cultural property. It is prohibited to make improper use of the protective emblem of cultural property. What is being contemplated amounts to perfidy under the LoAC. That is, you are leading your opponent to believe that he is obliged to accord protection to the building under the rules of international law, with the specific intent to betray that confidence. In other words your actions are illegal and treacherous. This would be a serious violation of the LoAC and the commander would be liable to criminal charges.

Art. 8

See Also AP I :

Art. 37(1) - Perfidy

Art. 38 - Recognized Emblems

Art, 85 - Repressions of breaches of the Protocol

6. A soldier in your company shows you a small statue he found lying in the rubble of a partially destroyed museum. "I thought I should rescue this" he says "as it looks quite valuable."

How would you deal with the situation?

Answer - Theft, pillage or misappropriation of cultural property are forbidden. In this case however the soldier is reporting the removal of the property and actually stating he did it to safeguard it. He should be congratulated for his action and honesty. The property should be handed over to the appropriate military or civilian authorities for safekeeping.

Art. 15

Hague Regulations IV Art. 28,52 & 53

GC IV Art. 33

EXAMPLES AND CASES

1. Some examples of cultural property that might well qualify for enhanced protection, i.e. property of the greatest importance for humanity. (NB At the time of writing they did not appear on the list, the purpose of the example is simply to show the level and type of property States might consider registering as property under enhanced protection.) The list is by no means exhaustive but simply illustrative:

- The Taj Mahal - India.
- The Pyramids - Egypt.

- The Imperial Palace (forbidden City) - China.
- The Palace and Park of Versailles - France.
- The Acropolis - Greece.
- Historic Centre of Mexico City – Mexico.

2. Some cases related to protected property

A. **World War II.** During allied operations in Italy in 1943, the Allies gave various assurances that they would respect churches and religious institutions, provided they were not used for military purposes. The ancient Benedictine abbey at Monte Cassino was included in the list of buildings to be protected. The German Embassy at the Vatican gave assurances that the abbey would not be used by German troops. On 24 December 1943, General Eisenhower issued an order to all commanders drawing attention to the importance of cultural monuments in Italy, stating, among other things: "Today we are fighting in a country which has contributed a great deal to our cultural inheritance, a country rich in monuments which by their creation helped and now in their old age illustrate the growth of the civilization which is ours. If we have to choose between destroying a famous building and sacrificing our own men, then our men's lives count indefinitely more and the buildings must go. But the choice is not always so clear-cut as that. In many cases the monuments can be spared without any detriment to operation needs. Nothing can stand against the argument of military necessity. That is an accepted principle. But the phrase 'military necessity' is sometimes used where it would be more truthful to speak of military convenience or even of personal convenience. I do not want it to cloak slackness or indifference." The German forces included the ridge on which the abbey stood in their defensive plans, but gave instructions that the abbey itself should not be used. The decision was nevertheless made to bombard the abbey. It was based on erroneous intelligence reports of machine guns, aerials, telescopes and troop movements seen at the abbey and on the supposition that the abbey made such a perfect observation post that surely no army could refrain from using it. On 15 February 1943, the abbey was bombed and shelled, leaving it in ruins and causing the death of an estimated 300-400 civilian refugees. No Germans were killed. Source: A.P.V. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester, 1996, pp. 54-55, Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)*, UNESCO document CLT-93/WS/12, Paris, 1993, p. 55, *Records of the Conference convened by the United Nations Educational, Scientific and Cultural Organization held at The Hague from 21 April to 14 May 1954*, published by the Government of the Netherlands, Staatsdrukkerij- en Uitgeverijbedrijf, The Hague - 1961, p. 309.¹¹

B. **The Gulf War, 1991.** The Government of Iraq used cultural property to protect legitimate targets from attack. A classic example was the positioning of two fighter aircraft adjacent to the ancient temple of Ur on the theory that Coalition respect for the protection of cultural property would preclude the attack of those aircraft. Source: *US/UK Report on the conduct of the Persian Gulf War*.

C. **The War in the former Yugoslavia.** Dubrovnik was one of the most beautiful and perfectly preserved walled cities in Europe and a World Heritage Site. On 6 December 1991, it was hit by more than 500 rockets that damaged 45% of the buildings in the old city and destroyed 10%. The 15th century Rector's Palace and St. Saviour's Church were badly damaged. Source: A.P.V. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester, 1996, p. 84.

D. In November 1993, Bosnian Croats shelled and destroyed the Neretva Bridge in Mostar, an ancient landmark of obvious cultural significance. Source: P. Moss in *Crimes of War: What the public should know*, R. Gutman & D. Rieff (eds.), W.W. Norton & Co., New York/London, p. 111.

E. **South Lebanon, 1997.** The Israeli Defense Forces turned the fortress ruins of Karkum (Beaufort castle), originally built in the Middle Ages, into a stronghold. Modern concrete fortifications were poured on top of the old fortifications and a Greek temple that once crowned the hilltop at Karkum. Source: P. Cokburn, *The Independent*, 10 December 1997, p. 10.

¹¹ There is a discrepancy as to the date of General Eisenhower's order. The Rogers book and Professor Boylan's study on the review of the Convention provide the date of date of 29 December 1943; the Records of the 1954 Conference give the date of 24 December 1943. For this reason, the date of 24 December 1943 is retained; the full quotation is based on the text provided in Professor Boylan's study.

F. Afghanistan. In March 2001 the Giant Buddhas of Bamiyan in Northern Afghanistan were destroyed by the Taliban armed forces. The two sandstone statues were carved into Bamiyan's sandstone cliffs. The statues are believed to date back to the third century with a height of 55 meters (182 feet) and 38 meters (125 feet) respectively. The two Buddhas were believed to be the tallest in the world. They were regarded as some of the finest examples of early Central Asian art. UNESCO described them as a unique cultural treasure and called their destruction "cultural vandalism." Over a period of days the two statues were gradually reduced to rubble by artillery fire and explosives. Source: CNN.com/ world website - December 6, 1997 (background) and March 6, 2001, (description).

THE PROTECTION OF CULTURAL PROPERTY - SOLDIERS RULES

The following rules based on the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict are offered as a briefing sheet for junior ranks. It is suggested that in addition to briefing, the rules are *incorporated into field training exercises whenever appropriate*. Through this routine training, they will then become an automatic and accepted way of behaving in action.

- Cultural property means such things as monuments, archaeological sites, religious centres (temples, churches, mosques, etc.), museums, art galleries and libraries. It can also include valuable objects such as small statues, jewellery, paintings, etc. This property might not only be regarded as of great value to our country but in many cases is regarded as being part of our cultural heritage as human beings. *In our country for example the following places would be regarded as cultural property. list your own examples here -----,*
- The 'law of war' says very clearly that property like this must be protected. Unless it becomes absolutely necessary (see below) it must not be attacked and it should not be used for any military purposes. This is because once such property is damaged or destroyed it is irreplaceable. It is lost to us and the whole world forever.
- The *only time* such property could possibly be attacked is if our enemy has broken the law and used it themselves for military purposes. Now of course it could represent a danger to us and if absolutely necessary it can be attacked. Such an order to attack will be given to you by your superior commanders. Without this authority you should not attack cultural property.
- The *only time* we would ever use cultural property ourselves is in a defensive position if it was absolutely vital to our defensive plan. If it was used in this way it would of course lose its protection and the enemy could attack it. Any order to use it would be given to you by your superiors after very careful consideration.
- Cultural Property can be marked with this distinctive emblem or sign:



It might be placed on the roofs or walls of a building to help you identify it. These emblems might not always be used or they might have been damaged or knocked down in a battle. As professional, intelligent soldiers you know exactly what a museum religious centre (church, temple, mosque, etc.), or monument looks like. So you should respect it and not attack or damage it. You may not misuse or abuse the distinctive sign because in actual combat situation such behaviour will amount to a perfidy and you will be severely punished.

- Persons responsible for looking after cultural property are to be respected as well. They should be allowed to get on with their work. They might be issued with arm bands displaying the protective emblem above. Their vehicles might also be marked with the emblem. They should be issued with an identity card that shows this emblem. Remember that these emblems and cards might not always be used. The persons obviously looking after the property and their equipment should nevertheless be protected.
- Stealing cultural property or taking such items as '*souvenirs*' is prohibited - If you do you will be severely punished.
- Acts of vandalism against such property, that is trashing, wrecking or deliberately desecrating such property is prohibited and will also be severely punished.

You have a responsibility as a professional soldier to respect cultural property. If you break the rules of the law of war we have covered above you discredit yourself, your unit and your country. You are also liable to face severe punishment or court martial.