United Nations
Educational, Scientific and
Cultural Organization

Convention for the Protection of
Cultural Property in the Event
of Armed Conflict

Protection of Cultural Property

Military Manual

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ABBREVIATIONS AND ACRONYMS

CCAAA	Coordinating Council of Audiovisual Archives Associations
CDE	Collateral Damage Estimation
IAC	International Armed Conflict
ICA	International Council on Archives
ICBS	International Committee of the Blue Shield
ICC	International Criminal Court
ICCROM	International Centre for the Study of the Preservation and Restoration of Cultural Property ('Rome Centre')
ICL	International Criminal Law
ICOM	International Council of Museums
ICOMOS	International Council on Monuments and Sites
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IFLA	International Federation of Library Associations and Institutions
IHL	International Humanitarian Law
IHRL	International Human Rights Law
INTERPOL	International Criminal Police Organization
LOAC	Law of Armed Conflict
MFA&A	Monuments, Fine Arts and Archives
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
NATO	North Atlantic Treaty Organization
NIAC	Non-International Armed Conflict
NGO	Non-Governmental Organization
NSL	No-Strike List
OMG	Office of Military Government
ROE	Rules of Engagement
RTL	Restricted-Target List
SBAH	State Board of Antiquities and Heritage
SHAEF	Supreme Headquarters Allied Expeditionary Forces
SPINs	Special Instructions
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNOSAT	United Nations Operational Satellite
UNIFIL	United Nations Interim Force in Lebanon
UNITAR	United Nations Institute for Training and Research
USCBS	United States Committee of the Blue Shield

Foreword

This Manual comes at a particularly appropriate time, to respond to the growing needs of military forces to better take into account the protection of cultural heritage in situations of conflict.

Over the last decades, culture has moved to the frontline of war, both as a collateral damage and also as a direct target for belligerents who use the destruction of culture as a means to foster more violence, hatred and vengeance. This destruction strikes at societies over the very long term, weakening the foundations for peace, hindering reconciliation when hostilities end. Recent conflicts in Mali, in Libya, Yemen, Iraq or Syria have demonstrated that the protection of heritage is inseparable from the protection of human lives. The destruction of heritage has become an integral part of a global strategy of cultural cleansing, which seeks to eliminate all forms of diversity. In this context, military forces need to adapt and strengthen their tools, behaviours and skills to take into account the protection of heritage as an integral part of sustainable strategies to build peace and security.

Over the last seven decades, UNESCO has elaborated unique standard-setting instruments to help Member States tackle these issues. As the very first international agreement with a universal scope exclusively focused on the protection of cultural property in times of armed conflict, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict has made a tremendous contribution to the protection of cultural heritage. It has inspired many subsequent international treaties aimed at protecting cultural heritage. Following challenging conflicts during the 1990s, the Hague Convention was strengthened and adapted with the adoption of the Second Protocol in March 1999, which enhanced the level of protection of cultural property, and presented new operational mechanisms for its implementation on the ground. This has been combined with several other instruments, notably the UNESCO 1970 Convention and UNIDROIT 1995 Convention to fight against illicit trafficking of cultural goods, as well as the UNESCO 1972 World Heritage Convention. Most recently, in 2015, UNESCO Member States adopted a full-fledged strategy for the reinforcement of UNESCO's action for the protection of culture. The example of rebuilding the mausoleums in Timbuktu (Mali), destroyed by violent extremists, combined with the training of military personnel for the United Nations peacekeeping operation (MINUSMA), as well as the recent condemnation of Ahmad Al Faqi Al Mahdi for war crime by the International Criminal Court – these all attest to UNESCO's determination to take forward this new strategy.

Conventions and legal instruments are necessary, but they are not enough to tackle increasingly complex situations on the ground. Just as culture is on the frontline of conflicts, it should be at the frontline of peace. To succeed, we need to enlarge and rethink traditional approaches to protect heritage. We need to connect the dots between cultural, security and humanitarian aspects, in full respect of the mandate and prerogatives of every actor. Military forces require special attention and must possess the capacity to ensure the protection of heritage in difficult circumstances. This is the aim of this Manual, as a concrete implementation of the Hague 1954 Convention and its second protocol, which

calls on Member States to incorporate guidelines and instructions on the protection of cultural property in their military regulations in cooperation with UNESCO.

This should not be perceived as placing an additional burden on the military but as a way to better reach and consolidate long-term security goals, including that of social cohesion and reconciliation. I am convinced that this manual will provide a useful guide and be beneficial for future military operations.

I wish to thank the Sanremo International Institute of Humanitarian Law for their contribution to producing this publication, and I extend my appreciation also to the Government of Azerbaijan for its generous support. I strongly encourage all Governments to use this publication as their own, to enhance the capacity of their military to address the new challenges of protecting cultural property in times of conflict. This is not only a cultural issue -- it has become a security issue.

Irina Bokova

Director-General of UNESCO

Foreword

The International Institute of Humanitarian Law welcomes with great interest this military manual published under the auspices of UNESCO, which marks a significant step towards a more tangible dissemination and effective application of the principles and rules governing the international protection of cultural property in the event of armed conflict.

The destruction of cultural property in the course of armed conflicts has been all too common in recent years, with repeated, egregious violations of the existing international legal rules aimed at safeguarding the cultural heritage of all mankind. Such crimes highlight an urgent need to encourage and ensure the implementation of the 1954 Hague Convention for the Protection of Cultural property in the Event of Armed Conflict and of its 1999 Second Protocol, as well as of the overall international regime regarding the protection of cultural property.

The International Institute of Humanitarian Law – an independent organization based in Sanremo, Italy, which has earned an international reputation as an expert centre for training and research in international humanitarian law – has always devoted special attention to this important and delicate issue. In 1984 the Institute organized a symposium to commemorate the 30th anniversary of the 1954 Hague Convention, and in 1986 it hosted a workshop entitled "The adaptation of international law on the protection of cultural property to technical developments in relation to modern means of warfare". More recently, in 2009, faithful to this tradition, the Institute contributed to longstanding action promoted by UNESCO with the organization of a seminar on "The regime of international protection of cultural property in the event of armed conflict", which marked the 10th anniversary of the 1999 Second Protocol to the Hague Convention. This seminar was aimed at promoting knowledge of the international rules on the protection of cultural property in armed conflict, as well as at sharing information and facilitating the exchange of practices among civilian and military actors.

The efforts made in this field by the Institute are also particularly relevant with respect to the organization of specific training activities. Every year the Institute organizes training courses on international humanitarian law for international civil servants and military experts with the aim of providing a thorough understanding of the principles and rules concerning the protection of cultural property in different international operational scenarios.

The Sanremo Institute is pleased to include this military manual in its publications, as an important contribution to the dissemination and teaching of international humanitarian law on this burning issue. It will continue to welcome cooperation with UNESCO in this field.

Fausto Pocar

President of the International Institute of Humanitarian Law

I.

INTRODUCTION

A. THE PURPOSE OF THIS MANUAL

1. This manual serves as a practical guide to the implementation by military forces of the rules of international law for the protection of cultural property in armed conflict. It combines a military-focused account of the relevant international legal obligations of states and individuals with suggestions as to best military practice at the different levels of command and during the different phases of military operations, whether by land, sea or air.

2. The manual does not deal with military operations not governed by the international law of armed conflict, such as military assistance in connection with natural disasters or the deployment of military forces during internal disturbances and tensions. While some of what the manual specifies in relation to the conduct of military forces in preparation for and during armed conflict might usefully be applied in other contexts, the manual's focus is the protection of cultural property specifically in the context of armed conflict.

B. THE IMPORTANCE TO MILITARY FORCES OF THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT

3. The importance to military forces of the protection of cultural property in armed conflict is abstract, strategic and legal.

4. In abstract terms, cultural property forms a vital part of the cultural identity of individuals, communities, peoples and all humanity. It is the tangible expression of the unchanging human condition and of the creative genius, diversity and memory of humankind. Its preservation is essential to human wellbeing and flourishing.

5. In strategic terms, the protection of cultural property in armed conflict is an imperative. Avoidable destruction or damage and all misappropriation of cultural property by military forces, especially foreign military forces, as well as its looting by others through these forces' lack of vigilance, endangers mission success. It arouses the hostility of local populations, offers the adversary a potent propaganda weapon, undermines support on the home front and among allies for the continued pursuit of victory, and, in the case of failure to prevent and put a stop to looting, provides a source of income for hostile non-state armed groups and terrorist organizations. It also embitters a conflict, making a returning to peace and subsequent reconciliation more

difficult. Conversely, taking due care to spare cultural property from destruction, damage and all forms of misappropriation, including through rigorous adherence to the laws of armed conflict, can form an effective part of strategic communications. It can win hearts and minds.

6. In legal terms, military forces' failure during armed conflict to take all measures required by international law to protect cultural property results, first, in the international legal responsibility of their state. This state may find itself compelled to make reparation to another state or to individuals for destruction, damage or misappropriation in armed conflict of objects, buildings and sites or historic, artistic or archaeological significance.

> At the end of the two world wars, several of the defeated states were required by peace treaties to make good in material terms their unlawful destruction or plunder of cultural property. For example, article 247 of the Treaty of Versailles obliged Germany 'to furnish to the University of Louvain … manuscripts, incunabula, printed books, maps and objects of collection corresponding in number and value to those destroyed in the burning by Germany of the Library of Louvain'. In 1998, the United Nations Compensation Commission awarded close to USD 19,000,000 to an individual Kuwaiti collector for the destruction and pillage by invading and occupying Iraqi forces of his collections of Islamic art and rare books, which Iraq was compelled by the United Nations Security Council to pay. In 2009, the Eritrea Ethiopia Claims Commission ordered Ethiopia to pay Eritrea USD 50,000 for wilful damage caused by Ethiopian troops to an ancient Eritrean monument during the war between those two states.

Additionally, and of direct personal concern to every man and woman in uniform, the intentional destruction, damage or misappropriation of cultural property in armed conflict can result in the prosecution of culpable individuals for war crimes and even crimes against humanity.

> Several of the defendants before the International Military Tribunal at Nuremberg were convicted for their role in the systematic destruction and plunder of cultural heritage in occupied territory. More recently, a number of the accused before the International Criminal Tribunal for the former Yugoslavia were convicted for their intentional destruction and damage of cultural sites during the conflicts in the Balkans in the 1990s. The deliberate destruction of cultural property has also been the sole focus of one conviction to date before the International Criminal Court, and the Prosecutor has expressed an interest in pursuing further such cases should the opportunity arise. Prosecutions for war crimes against cultural property have taken place at the national level as well.

Culpable individuals include not just those who physically destroy, damage or misappropriate the property but also those who in some other way participate intentionally in its destruction, damage or misappropriation. It includes too military commanders who fail, intentionally or simply negligently, to take all necessary and reasonable measures within their power to prevent or repress such crimes or to submit them to the competent authorities for investigation and, where appropriate, prosecution.

C. THE SOURCES OF THE INTERNATIONAL RULES ON THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT

(*i*) The law of armed conflict (LOAC)

7. The main source of the international rules on the protection of cultural property in armed conflict is the law of armed conflict (LOAC), also known as international humanitarian law (IHL). The pertinent rules of LOAC are found in several multilateral treaties and in customary international law.

(a) 1954 Hague Convention and its First and Second Protocols

8. The centrepiece of the relevant treaty-law is the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ('1954 Hague Convention') and the Regulations for the Execution of the Convention, concluded in 1954. The 1954 Hague Convention is supplemented by two optional protocols, one concluded at the same time as the Convention in 1954 and now known as the First Protocol, the other a Second Protocol concluded in 1999. Together these three treaties provide a detailed international legal framework for the protection of cultural property during armed conflict, including belligerent occupation. Aspects of this framework are elaborated on in non-binding fashion by the Guidelines for the Implementation of the 1999 Second Protocol, as endorsed and amended by the Meeting of the Parties to that Protocol.

9. The 1954 Hague Convention establishes a two-tiered regime of protection. The majority of its provisions serve to protect all objects, buildings and sites qualifying as 'cultural property' under article 1 (see §§44–49), while a handful of provisions apply only to a select category of cultural property under so-called 'special protection' (see §§50–52). For its part, and with the ultimate aim of replacing special protection with a more comprehensive system or protection, the 1999 Second Protocol provides for a select tier of cultural property under 'enhanced protection' (see §§53–55), a level of protection supplementary to that provided by the Convention and Second Protocol to all cultural property within the meaning of article 1 of the Convention.

(b) 1977 Additional Protocols to the 1949 Geneva Conventions

10. Brief provisions on the protection of cultural property in armed conflict can be found in article 53 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Victims of International Armed Conflicts 1977 ('Additional Protocol I') and in article 16 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Victims of Non-International Armed Conflicts 1977 ('Additional Protocol II'). Both article 53 of Additional Protocol I and article 16 of Additional Protocol II, however, are expressed to be without prejudice to the provisions of the 1954 Hague Convention and, where pertinent, of other relevant international instruments, among which instruments can be counted the 1999 Second

Protocol to the 1954 Hague Convention. This primacy, in the event of normative conflict with the Geneva regime, of the Hague regime for the protection of cultural property in armed conflict is reiterated in Resolution 20(IV) of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977, adopted by the Diplomatic Conference on 7 June 1977.

(c) Customary international law of armed conflict

11. Even where a state is not party to one or other treaty regulating the protection of cultural property in armed conflict, it remains bound by obligations imposed by the customary international law of armed conflict—that is, by what might loosely be called 'unwritten' rules of international law, developed over time through the maintenance among states of a general practice accepted as law. As it relates to cultural property, the content of this customary international law of armed conflict mirrors to a large extent the rules embodied in treaty form in the 1954 Hague Convention and its two Protocols.

(*ii*) International criminal law (ICL)

12. A significant source of rules of international law for the protection of cultural property in armed conflict is international criminal law (ICL), the part of international law that deals with the criminal responsibility of individuals and the rights and obligations of states in relation to it.

(a) War crimes

13. The most relevant body of rules of ICL in the present context is the law of war crimes. A war crime is a violation of LOAC that gives rise to the criminal responsibility of the perpetrator under international law, whether customary or treaty-based. Perpetrators of war crimes may find themselves prosecuted before a national criminal court, military or civilian, and whether in their own state or in another. Indeed, various LOAC treaties oblige states parties to prosecute criminal violations of their substantive provisions, including on extraterritorial bases. Alternatively, perpetrators of war crimes may find themselves prosecuted before an international criminal court or tribunal.

14. Both the destruction or damage and the misappropriation of cultural property during either international armed conflict (IAC), including belligerent occupation, or non-international armed conflict (NIAC) can amount to a war crime, and many perpetrators have been convicted of such crimes by both national and international criminal courts and tribunals (see appendix IV), including by the International Military Tribunal at Nuremberg and the International Criminal Tribunal for the former Yugoslavia (ICTY). One war crimes case for the destruction of cultural property is currently before the International Criminal Court (ICC).

15. In some cases the relevant war crime may be defined in terms specific to cultural property. For example, the Rome Statute of the International Criminal Court vests the ICC with jurisdiction over the war crime, in IAC and NIAC respectively, of '[i]ntentionally directing attacks against buildings dedicated to … art [or] science … [and] historic monuments, … provided they are not military objectives'. In other instances a war crime against cultural property may be prosecuted under a more general heading, such as '[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war' or '[p]illaging a town or place, even when taken by assault', as per the Rome Statute.

16. Under article 28 of the 1954 Hague Convention, states parties are obliged '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 … Convention'. More significantly, chapter 4 ('Criminal responsibility and jurisdiction') of the 1999 Second Protocol to the 1954 Hague Convention specifies a range of war crimes, referred to as 'serious violations' of the Protocol, involving violations of the Second Protocol and of the Convention itself. It also imposes on states parties a detailed array of obligations, including of prosecution on extraordinary jurisdictional bases, in respect of persons suspected of criminal responsibility for serious violations of the Protocol. In addition, and without prejudice to article 28 of the Convention, article 21 of the Second Protocol obliges states parties to adopt 'such legislative, administrative or disciplinary measures as may be necessary to suppress' any intentional use of cultural property in violation of the Convention or Second Protocol and any intentional illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or Protocol.

17. Criminal responsibility for war crimes extends under international law not just to those who physically commit the crime but also to those who in some way intentionally participate in it, whether by ordering it, aiding, abetting or otherwise assisting in it, or contributing to a common plan to commit it. Additionally, military commanders who fail, intentionally or just negligently, to take all necessary and reasonable measures within their power to prevent or repress such acts or to submit them to the competent authorities for the purpose of investigation and prosecution can be held criminally responsible for the war crimes of their subordinates.

(b) Crimes against humanity

18. The intentional destruction of cultural property on discriminatory grounds can also constitute the crime against humanity of persecution when it is committed as part of a widespread or systematic attack against a civilian population, and both the Nuremberg Tribunal and the ICTY convicted perpetrators on this count (see appendix IV). Several trial chambers of the ICTY similarly held that the plunder of public or private property, which would include cultural property, on a discriminatory basis can,

in appropriate circumstances, amount to persecution as a crime against humanity (see appendix IV).

19. As with war crimes, criminal responsibility under international law for crimes against humanity encompasses not just physical perpetrators but also those who intentionally participate in the crimes some other way and to military commanders who intentionally or negligently fail to take all necessary and reasonable measures within their power to prevent or repress such crimes or to submit them to the competent authorities for the purpose of investigation and prosecution.

(*iii*) International human rights law (IHRL)

20. A number of guarantees under international human rights law (IHRL) are relevant to the protection of cultural property in armed conflict. The most generally applicable is article 15(1)(*a*) of the International Covenant on Economic, Social and Cultural Rights 1966, which guarantees to everyone the right to take part in cultural life. This right is taken to impose on states parties to the Covenant an obligation to '[r]espect and protect cultural heritage in all its forms, in times of war or peace', in the words of General Comment No 21 of the Committee on Economic, Social and Cultural Rights.

21. As General Comment No 21 indicates, IHRL does not cease to apply in armed conflict. At the same time, the jurisprudence of the International Court of Justice suggests that whether a state has complied during armed conflict with its IHRL obligations in relation to cultural property is to be assessed by reference to the standards provided by the relevant rules of LOAC.

22. In practice, when it comes specifically to the protection of cultural property in armed conflict, military forces need not concern themselves independently with the obligations imposed by IHRL, since compliance with the relevant rules of LOAC guarantees compliance with the corresponding rules of IHRL. By the same token, however, a violation of the relevant LOAC can constitute in addition a violation of IHRL.

(*iv*) The World Heritage Convention

23. Around 1,500 cultural sites worldwide of outstanding universal value, over 800 of them inscribed on the so-called 'World Heritage List' and the rest of them on the respective 'tentative lists' submitted to the World Heritage Committee by each state party, are protected by the Convention concerning the Protection of the World Cultural and Natural Heritage 1972 ('World Heritage Convention'), adopted under the auspices of UNESCO. Article 4 of the World Heritage Convention obliges states parties to protect any cultural sites on their territory covered by the Convention, while article 6(3) obliges the parties not to take any deliberate measures that might damage,

directly or indirectly, any protected cultural sites situated on the territory of another state party.

24. The World Heritage Convention does not cease to apply in armed conflict. That said, by analogy with the relationship between IHRL and LOAC, whether a state party to the World Heritage Convention has complied with its obligation to protect cultural sites on its territory covered by the Convention or with its obligation not to take deliberate measures that might damage protected sites on another party's territory is to be assessed in the light of the relevant rules of LOAC.

25. In practice, as with IHRL, when it comes to the protection of cultural property in armed conflict military forces need not concern themselves independently with the obligations imposed by the World Heritage Convention. Compliance with the relevant rules of LOAC guarantees compliance with the World Heritage Convention. Conversely, however, breach of LOAC can amount further to a breach of the World Heritage Convention. Moreover, the ICTY has treated the presence of a site on the World Heritage List as an aggravating factor when sentencing those convicted of war crimes for the destruction or damage of cultural property, and it is likely that the ICC will do the same.

26. It is worth noting that the World Heritage Convention can in fact assist military forces to comply with the rules of LOAC. The inclusion of a cultural site on either the World Heritage List or a state party's national tentative list and, when it comes to forces in the field, the presence on or near the site of the World Heritage Emblem (see appendix III) are in practice conclusive indicators that the site is of sufficient importance to the cultural heritage of the state concerned to be considered 'cultural property' for the purposes of the 1954 Hague Convention and other relevant rules of LOAC (see §§44–49). These lists are readily accessible online.

(*v*) 1970 UNESCO Convention

27. A key component in the international legal fight against the illicit traffic in cultural objects is the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, adopted under the aegis again of UNESCO. The Convention is indirectly relevant to military forces involved in armed conflict, including belligerent occupation, in two ways, both of which should serve as disincentives to unlawful conduct. First, article 8 of the Convention increases the likelihood of prosecution of personnel who, in the course or at the close of active service, smuggle cultural objects out of a country or smuggle certain cultural objects into another. Article 8 requires states parties to impose penalties or administrative sanctions on any person responsible for the unlawful export of cultural property from their territory or for the unlawful import into their territory of documented cultural property stolen from a museum, public monument or similar. Secondly, the obligations shouldered by states parties under articles 7 and 13 increase the likelihood that any cultural objects trafficked by military forces on active service

are seized and repatriated. Pursuant to article 7(*b*)(ii), states parties must, at the request of the state party of origin, take appropriate steps to recover and return cultural property stolen from a museum, public monument or the like and imported after the entry into force of the Convention; and, pursuant to article 13(*c*), states parties must, consistent with their national law, admit actions for recovery of any stolen cultural property brought by or on behalf of its rightful owners. In accordance with article 13(*b*), states parties must ensure that their heritage services cooperate in facilitating the restitution to its rightful owner of illicitly exported cultural property. In this latter regard, article 11 requires states parties to regard as illicit for the purposes of the Convention the export of cultural property under compulsion arising directly or indirectly from belligerent occupation.

(*vi*) United Nations Security Council resolutions

28. Military forces operating pursuant to a mandate conferred by the United Nations Security Council may find themselves obliged, authorized or encouraged by the mandate to take measures in relation to cultural property.

> In resolution 2100 (2013) of 25 April 2013, by which the Security Council established the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), the Council decided that MINUSMA was 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', and authorized it to use 'all necessary means, within the limits of its capacities and areas of deployment', to carry out this mandate. The Council also encouraged MINUSMA 'to operate mindfully in the vicinity of cultural and historical sites'. The mandate was renewed and the encouragement reiterated in subsequent resolutions.

It is also possible outside the context of UN operations for a Security Council decision, binding on UN member states in accordance with article 25 of the UN Charter, to have direct implications for the conduct of military operations in relation to cultural property.

> In resolution 1483 (2003) of 22 May 2003, adopted while Coalition forces were in belligerent occupation of Iraq, the Security Council decided that all UN member states were to 'take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed'. The decision was directed chiefly towards the imposition by member states within their own territory of import restrictions on, and a ban on the sale of, cultural objects illegally removed from Iraq. Its legal effect, however, was also to oblige member states with military forces in Iraq to ensure that those forces took appropriate steps to facilitate the safe return of such objects to Iraqi institutions.

In resolution 2199 (2015) of 12 February 2015, the Security Council decided that all UN member states were to 'take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items'. Again, while the obligation is directed towards the adoption by member states of legal and administrative measures within their own territory, it would have implications for any military forces deployed by member states in Iraq or Syria.

In sum, where acting under a Security Council mandate and even where not, military forces must be cognizant of any implications of the relevant resolution or resolutions for their conduct with respect to cultural property.

(*vii*) UN Secretary-General's bulletin 1999/13

29. On 6 August 1999, the UN Secretary-General promulgated bulletin 1999/13 (ST/SGB/1999/13), entitled 'Observance by United Nations Forces of International Humanitarian Law', which entered into force on 12 August 1999. The bulletin sets out what it refers to as 'fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control'. These fundamental principles and rules are stated in section 1(1) to apply 'to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement', with the consequence that they apply 'in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence'. Several of these principles and rules have relevance for the protection of cultural property. Section 6(6) of the bulletin, a bare minimum of rules specifically on respect for cultural property, provides that United Nations forces are prohibited from attacking cultural property and must not use such property or its immediate surroundings for purposes which might expose it to destruction or damage. It further stipulates that theft, pillage, misappropriation and any act of vandalism directed against cultural property is strictly prohibited. Section 6(9) prohibits UN forces from engaging in reprisals against objects, among them cultural property, protected under section 6. In addition, section 5 of the bulletin restates various general rules of LOAC with implications for the conduct of UN forces with respect to cultural property. These include the prohibition on attacks that may be expected to cause incidental damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated and the obligation to take all necessary precautions to protect civilian objects against the dangers resulting from military operations.

30. In addition to its wider significance, the Secretary-General's bulletin enables the UN to acquit obligations of relevance to cultural property undertaken by it towards host states. For example, article 7(*a*) of the Agreement between the United Nations and Lebanon on the Status of the United Nations Interim Force in Lebanon (UNIFIL), concluded on 15 December 1995, obliges the UN to ensure that UNIFIL conducts its

operations in Lebanon with full respect for the principles and spirit of, *inter alia*, the 1954 Hague Convention.

31. It is important to stress that military forces deployed in UN-authorized operations under national, not UN, command and control remain subject to LOAC obligations incumbent on their state.

(*viii*) Regional arrangements

32. There may be situations in which military operations are additionally regulated by international rules of regional application. These rules may derive from a freestanding regional treaty. For example, the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments 1935, known as the 'Roerich Pact', applicable during peacetime and armed conflict alike, remains in force among eleven American states. Equally, such rules may take their binding force from a regional security agreement, from the constituent instrument of an intergovernmental organization of a regional character or from some other regional international legal arrangement.

33. Military forces should always familiarise themselves with any regional rules that may supplement the constraints of international law under which they operate in armed conflict.

D. BEST MILITARY PRACTICE ON THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT

34. Best military practice on the protection of cultural property in the event of armed conflict can be drawn from a range of sources.

35. Examples of relevant best practice can be found in the periodic implementation reports that states parties to the 1954 Hague Convention and to its 1999 Second Protocol are obliged to submit to UNESCO. Others can be gleaned from a variety of other reports and materials produced by states, international organizations and non-governmental organizations, as well as in the academic literature.

36. Non-binding normative instruments such as declarations, recommendations and guidelines adopted by international organizations and treaty bodies can provide general principles of use to military forces in the protection of cultural property in armed conflict. Significant instruments in this regard include the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, adopted by the Organization's General Conference in 2003; the Recommendation for the Protection of Movable Cultural Property, adopted by the General Conference of UNESCO in 1978, and the Recommendation on International Principles Applicable to Archaeological Excavations, adopted by the UNESCO General Conference in 1956; and, in relation to the 1999 Second Protocol to the 1954 Hague Convention, the

Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

37. Finally, for the military forces of those states not parties to the 1954 Hague Convention or to either or both of its two Protocols, the provisions of these three treaties, in particular of the 1999 Second Protocol, may nonetheless provide instructive guidance for the protection of cultural property in armed conflict.

E. THE SCOPE OF APPLICATION OF THE RELEVANT RULES

38. As far as states go, the 1954 Hague Convention and its two Protocols, along with the 1977 Additional Protocols I and II to the Geneva Convention, bind only those states that are parties to them. These treaties cannot bind states not parties to them (so-called 'third states') without the latter's express consent. In contrast, the customary international law of armed conflict binds all states, at least insofar as they have not maintained a position of persistent objection to a given rule. The distinction, however, is of secondary importance when it comes to the protection of cultural property in armed conflict. The relevant rules of customary international law mirror to a large extent the rules embodied for the purposes of treaty law in the 1954 Hague Convention and its Protocols. As a consequence, whether or not they are parties to the Convention and to one or other of its two Protocols, states are bound in most cases by customary international rules to the same effect. Not every provision of the 1954 Hague Convention and its two Protocols, however, has a customary equivalent, and this manual makes it clear when a rule is binding only as a matter of treaty law.

39. In principle, the rules of LOAC applicable in the event of IAC, including belligerent occupation, and those applicable in the event of NIAC are not necessarily the same. But leaving aside belligerent occupation, which by definition exists only in the context of IAC, in practice the substantive rules on the protection of cultural heritage in armed conflict, be they treaty-based or customary, are identical as between IAC and NIAC. The conduct with respect to cultural property required of military forces during armed conflict is for all intents and purposes the same whether conflict is an IAC or a NIAC.

40. Finally, the rules of LOAC relevant to the protection of cultural property are the same whether the military operations are by land, sea or air.

F. THE ROLE OF MILITARY COMMANDERS IN ENSURING THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT

41. Military commanders at all levels bear operational responsibility for ensuring that military forces abide by the rules of LOAC and adopt best practice for the protection of cultural property in armed conflict.

42. The responsibilities of commanders are not just operational. They are also legal. They are reflected in the military law of a commander's own state, and are punishable under that law in the event of the commander's failure. They are also enshrined in international law. Military commanders can be held criminally responsible under international law for war crimes, crimes against humanity and other international crimes committed as a result of their failure to exercise control properly over forces under their command.

History provides numerous examples of orders, directives and the like from senior commanders directed towards the protection of cultural property during a campaign. On 29 December 1943, a few weeks before the Allied landings at Anzio, General Eisenhower, then Allied Commander in the Mediterranean, issued General Order No 68 ('Historical Monuments'), spelling out detailed instructions with respect to the military use and prevention of looting of historic buildings in the Italian campaign and emphasizing that the seriousness of offences against cultural property was to be impressed by commanders on all Allied personnel. General Order No 68, which put in more emphatic form a similar order issued by Allied Force Headquarters in April 1943, bore a covering memorandum in which Eisenhower emphasized that he did not want military necessity 'to cloak slackness or indifference' and placed the responsibility on all commanders to ensure compliance with his orders. Eisenhower reiterated these points as Supreme Commander, Allied Expeditionary Force, in a directive and memorandum of 26 May 1944, just prior to the Normandy landings, in which he instructed commanders to preserve centres and objects of historical and cultural significance 'through the exercise of restraint and discipline'. General Alexander, Supreme Commander of the Allied Forces Headquarters in the Mediterranean theatre, issued a similar directive on 12 January 1945. Many other examples could be given.

43. There is a range of ways in which commanders can seek to ensure that forces under their command abide by the rules of LOAC and adopt best practice for the protection of cultural property in armed conflict. Different ways may be appropriate to different services, force sizes, missions, national military traditions, and so on. But the bottom line remains that the wartime fate of cultural property rests on the effective acquittal by commanders of their operational and legal responsibilities.

II.

DEFINITION OF 'CULTURAL PROPERTY'

The term 'cultural property' as defined in the 1954 Hague Convention means movable or immovable property, whether secular or religious and irrespective of origin or ownership, which is of great importance to the cultural heritage of a state. Examples include buildings and other monuments of historic, artistic or architectural significance; archaeological sites; artworks, antiquities, manuscripts, books, and collections of the same; and archives. The term also encompasses buildings for preserving or exhibiting and refuges for sheltering movable cultural property.

44. 'Cultural property', as the term is defined in article 1 of the 1954 Hague Convention, means all property of great importance to a particular state's cultural heritage. Examples of the sorts of property that can be considered cultural property are provided in article 1 of the Convention. They include both immovable cultural property, meaning buildings and other monuments of historic, artistic or architectural significance, as well as archaeological sites, and movable cultural property, by which is meant works of art (such as paintings, drawings, sculptures and so on), antiquities, manuscripts and books, whether individually or in collections, as well as archives. As the definition makes clear, the cultural origin of movable or immovable property, who owns it, and whether it is religious or secular in character makes no difference to whether it can be considered cultural property. The same goes for its state of repair. A ruin is as much cultural property as a pristine palace. It is also irrelevant whether the cultural property is on land or under water. If it is movable or immovable property of great importance to the cultural heritage of a state, it is cultural property.

45. Whether a specific object, structure or site is of such importance is first and foremost a question for the state on whose territory it is situated. If this state, in good faith, considers given movable or immovable property to be of great importance to its cultural heritage, the property is 'cultural property'.

46. The challenge for military planners and forces in the field is that almost no state party to the 1954 Hague Convention indicates explicitly, for the benefit of potential parties to an armed conflict on its territory, all the precise objects, structures and sites that it deems 'cultural property' protected by the Convention and its Protocols. It may be that a state party indicates some immovable or movable cultural property by affixing to it or to a building housing it the distinctive emblem of cultural property

(see §§213–218) or some other recognizable emblem, but in practice no state affixes the emblem to every item of its cultural property, and most states do not use the emblem at all. In the alternative, whether another state considers particular property to be of great importance to its cultural heritage could in principle be ascertained by consulting that state's register of national cultural heritage or similar domestic legal or administrative inventory, in the event that the state adequately maintains one. In practice, however, accessing another state's register or inventory of cultural heritage may prove difficult for military planners and impossible for forces in the field.

47. When in doubt, commanders and other military personnel who identify on the territory of another state movable or immovable property of historic, artistic or architectural significance should proceed on the assumption that it is of great importance to the cultural heritage of that state. In other words, to ensure their state's compliance with the law of armed conflict and to avoid their personal responsibility for war crimes, commanders and other military personnel should treat all objects, structures and sites of historic, artistic or architectural significance on foreign territory as 'cultural property' protected by the 1954 Hague Convention and its two Protocols and by customary international law.

By way of rough guidance, the figures cited by those few states parties to the 1954 Hague Convention that have cited them are in the order of tens of thousands of items of immovable cultural property in each state and, when it comes to movable cultural property, of the contents of between 100 and 250 museums, art galleries, libraries and archives in each state. In other words, the term 'cultural property' as defined in the Convention covers a very large array of immovable and movable property. It is most definitely not confined to a select few masterpieces.

48. Although the relevant provisions of the 1977 Additional Protocols to the Geneva Conventions adopt different terminology, the property of cultural significance protected by them is effectively the same as the 'cultural property' protected by the 1954 Hague Convention and its Protocols.

49. It should be emphasized that, even where they are not 'cultural property' in the formal sense, buildings such as educational institutions, libraries, archives and places of worship and objects such as artworks and books will be protected by the law of armed conflict as, variously, civilian objects, private property and so on.

The term 'cultural property under special protection' refers to cultural property entered on the 'International Register of Cultural Property under Special Protection' pursuant to the 1954 Hague Convention.

50. Article 8 of the 1954 Hague Convention provides that, subject to strict conditions, there may be placed under so-called 'special protection' a limited number of refuges for sheltering movable cultural property, of centres containing a large amount of cultural property (referred to as 'centres containing monuments'), and of

other immovable cultural property of very great importance. Special protection is granted to such property by its entry on the 'International Register of Cultural Property under Special Protection' maintained in accordance with the Convention by the Director-General of UNESCO. The International Register of Cultural Property under Special Protection is readily accessible online.

51. For various reasons, the Convention's system of special protection has never applied to more than a tiny number of refuges and centres containing monuments worldwide. At time of publication, the sum total of the cultural property under special protection comprised one refuge for cultural property in Germany, three in the Netherlands, nine centres containing monuments in Mexico, and the entirety of the Vatican City as a centre containing monuments.

52. It is important to note that, except where they conflict with any special rules applicable only to cultural property under special protection, the provisions of the 1954 Hague Convention, its 1954 First Protocol and its 1999 Second Protocol that serve to protect all objects, structures and sites qualifying as cultural property within the meaning of article 1 of the Convention apply as much to cultural property under special protection as to any other cultural property.

The term 'cultural property under enhanced protection' refers to cultural property entered on the 'International List of Cultural Property under Enhanced Protection' pursuant to the 1999 Second Protocol.

53. In accordance with chapter 3 of the Second Protocol to the 1954 Hague Convention, a select range of 'cultural heritage of the greatest importance to humanity' may, under certain conditions and on the basis of a decision ultimately taken by the Committee for the Protection of Cultural Heritage in the Event of Armed Conflict (see §§232–233), be placed under a special regime of what is called 'enhanced protection'. Cultural property is granted enhanced protection through its entry on what is referred to as the 'International List of Cultural Property under Enhanced Protection'. The International List of Cultural Property under Enhanced Protection is accessible online (see Appendix II).

54. Since the system of enhanced protection is relatively new, at time of publication only ten sites in total, in five states parties, had been entered on the International List of Cultural Property under Enhanced Protection. These comprised two sites in Azerbaijan, three in Belgium, three in Cyprus, one in Italy, and one in Lithuania.

55. It is important to note that, except where they conflict with any special rules applicable only to cultural property under enhanced protection, the provisions of the 1954 Hague Convention, its 1954 First Protocol and its 1999 Second Protocol that serve to protect all objects, structures and sites qualifying as cultural property within

the meaning of article 1 of the Convention apply as much to cultural property under enhanced protection as to any other cultural property.

III.

PREPARATORY MEASURES

A. MILITARY REGULATIONS OR INSTRUCTIONS

States parties to the 1954 Hague Convention must introduce in peacetime into their military regulations or instructions provisions designed to ensure observance of the Convention and must foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples. States not parties to the Convention should do the same.

States parties to the 1999 Second Protocol must, as appropriate, incorporate into their military regulations guidelines and instructions on the protection of cultural property in armed conflict. States not parties to the Protocol should do the same.

56. Article 7(1) of the 1954 Hague Convention requires states parties in time of peace to introduce into their military regulations or instructions the necessary provisions to ensure observance of the Convention. It equally requires them to foster in the members of their armed forces 'a spirit of respect for the culture and cultural property of all peoples'. Article 30(3)(*a*) of the 1999 Second Protocol to the Convention requires states parties, 'as appropriate', to incorporate into their military regulations what are referred to as 'guidelines or instructions' not just on the Second Protocol but, more generally, on the protection of cultural property in armed conflict. These obligations are crucial, since in most instances it is the armed forces that will ultimately execute the provisions of the 1954 Hague Convention and its 1999 Second Protocol and, more generally, the rules of LOAC for the wartime protection of cultural property.

57. Where states are not parties to the 1954 Hague Convention or 1999 Second Protocol, best practice suggests that they nonetheless do what article 7(1) of the former and article 30(3)(*a*) of the latter prescribe, given the very great practical importance of such measures.

58. Of particular importance in terms of provisions necessary for the observance of the 1954 Hague Convention, the 1999 Second Protocol and other rules of LOAC for the protection of cultural property in armed conflict is the promulgation within military forces and the inculcation by commanders into their subordinates of 'rules of

engagement' (ROE). ROE take different forms within the military doctrine of different states, appearing, for example, as executive orders, deployment orders, operational plans or standing directives. What all ROE have in common, however, is that they are issued by competent military authorities for the purpose of delineating the circumstances in which military forces may be engaged and the limitations within which they must operate in the achievement of their objectives. ROE, which must be in accordance with both LOAC and national law, provide authorization for and impose restrictions on, among other things, the use of armed force, the positioning and posture of forces, and the employment of specific capabilities.

59. Best practice dictates that competent military authorities issue and implement ROE specifically designed to protect cultural property, both immovable and movable, whenever their military forces are deployed on operations. There are many historical examples of the promulgation of ROE for the protection of cultural property during military operations.

60. When it comes to fostering in the members of their armed forces 'a spirit of respect for the culture and cultural property of all peoples', competent military authorities have a range of methods at their disposal.

An innovative means of fostering in members of the armed forces a spirit of respect for the culture and cultural property of all peoples is the decks of playing cards produced and distributed by the US Department of Defense, by the Government of the Netherlands and the Netherlands National Commission for UNESCO, and by the Norwegian Directorate for Cultural Heritage, the Norwegian Armed Forces, the Arts Council Norway and ICOM Norway. Bearing photographs of movable and immovable cultural property from around the world, the cards carry a variety of messages, both practical and inspirational, the latter including:

Cultural heritage has universal value. It is our common duty to protect it.

It is important to understand the past – your own as well as others'

Cultural property matters to the local community. Show respect and be respected in return!

How would you feel if someone damaged this painting?

Another means might be the display of posters to the same effect in the mess halls of field bases.

While in occupation of part of Iraq during 2003 and 2004, Polish forces were given regular awareness training by embedded archaeologists, with lectures and multimedia presentations on Iraqi history and culture, along with the distribution of a brochure on the cultural heritage of the country.

61. Where feasible and appropriate, military forces deployed in an unfamiliar cultural environment should be encouraged to visit or otherwise communicate with local communities so as to gain an appreciation of their culture, including of their cultural heritage. Prior to deployment, some form of 'cultural awareness training' should be provided. As well as imperilling cultural property, unwitting disrespect for

the culture within which military forces are operating poses a threat to soldiers' lives and ultimately to mission success.

B. MILITARY TRAINING

States parties to the 1954 Hague Convention must include the study of the Convention in their programmes of military training. States not parties to the Convention should do the same.

States parties to the 1999 Second Protocol must, as appropriate, develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime military training and educational programmes on the protection of cultural property in armed conflict. States not parties to the Protocol should do the same.

62. Article 25 of the 1954 Hague Convention and article 30(3)(*b*) of its 1999 Second Protocol oblige states parties to provide their armed forces with peacetime training and other education in the protection of cultural property in armed conflict. So crucial are measures of this sort to protecting cultural property in wartime and to avoiding the prosecution of military personnel for war crimes that states not parties to these treaties are well advised to provide such training and education too.

63. There are many examples of best practice in the training and education of military forces in the protection of cultural property in armed conflict.

Various states lead the way in the education and, in some cases, training in the field of their armed forces in the protection of cultural property in armed conflict. Examples include Austria, most recently with its Directive for the Military Protection of Cultural Property and the Military Safeguarding of Cultural Heritage (December 2009); Belgium, with its course on protected places and property for advisors on the law of armed conflict ('*Les lieux et biens protégés*', CDCA-DCA-07, May 2011); El Salvador, with its instruction manual on the protection of cultural property in the event of armed conflict ('*Protección de los bienes culturales en caso de conflict armado. Convención de La Haya y sus dos protocolos. Versión Didáctica*', November 2000); Italy, most recently with its Directive on the Protection of Cultural Property in the Event of Armed Conflict (SMD-UGAG-002/12, 2012); and France, with its Handbook on the Protection of Cultural Property in the Event of Armed Conflict (PFT. 5.3.2 (EMP 50.655), 2015).

The Netherlands, Norway and the US, in addition to more formal education and training of their armed forces on the protection of cultural property in armed conflict, have distributed decks of playing cards (see §60) bearing photographs of cultural property and legal reminders, such as:

Libraries, archives and museums are protected by international law.

Buying looted artefacts is illegal. They will be confiscated and you risk a criminal record.

Cultural property under water is protected by law and should not be removed!

International law requires military personnel to protect cultural heritage.

The US has also produced a pocket guide for its military personnel on heritage preservation. US forces trained at Fort Drum, NY, are exposed before deployment to a 'no digging' environment and are given an opportunity amid replica archaeological and other cultural features to practise lawful responses to enemy use of cultural property.

One British defence estate team includes archaeological 'off limits' areas in its military training programme and has constructed a mobile museum for practice in looting scenarios.

During the Polish occupation of part of Iraq in 2003 and 2004, embedded archaeologists provided military forces with regular instruction in the relevant international law; distributed a brochure detailing, among other things, appropriate conduct in the vicinity of archaeological sites and historic monuments, as well as the legal consequences of buying artefacts and taking them out of Iraq; and trained military police in the prevention and suppression of illicit traffic in Iraqi antiquities, including by teaching them to identify certain types of objects.

64. For its part, UNESCO has developed a range of training materials for military and associated personnel on the protection of cultural property in both armed conflict and stabilization missions. These include inserts for military manuals on the 1999 Second Protocol and a booklet for military and police personnel forming part of the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) entitled *Protecting the Cultural Heritage of Mali* (2013).

65. UNESCO, the International Committee of the Red Cross (ICRC) and some national committees of the Blue Shield (see §§229–231 and 234–238) are also available to provide instruction to military forces on the protection of cultural property in armed conflict. States lacking the expertise or capacity to educate or train their armed forces adequately in this respect are advised to contact UNESCO, the ICRC or, where one exists, their national committee of the Blue Shield for assistance.

C. SPECIALIST MILITARY SERVICES OR PERSONNEL

States parties to the 1954 Hague Convention must plan or establish in peacetime services or specialist personnel within their armed forces tasked with securing respect for cultural property in the event of armed conflict and with co-operating with the civilian authorities responsible for safeguarding it. States not parties to the Convention should endeavor to do the same.

66. Article 7(2) of the 1954 Hague Convention obliges states parties, in time of peace, to plan or establish services or specialist personnel within their armed forces

whose responsibility it is to secure respect for cultural property in the event of armed conflict and to co-operate with the civilian authorities responsible for safeguarding it. So great is the practical importance of close military liaison with expertise of this sort that states not parties to the 1954 Hague Convention should endeavour as a matter of best practice to plan or establish within their armed forces similar corps tasked with the protection of cultural property in the event of armed conflict.

67. The reference to 'safeguarding' in article 7(2) is to measures taken to spare cultural property from the foreseeable effects of armed conflict, such as emergency protection against fire or structural collapse and the removal or provision for adequate *in situ* protection of movable cultural property. The 'civilian authorities responsible for safeguarding' cultural property include the competent national authorities in occupied territory.

68. There is no requirement that the relevant services be permanently constituted, provided that a state plans in peacetime for their establishment in the event of armed conflict. Similarly, there is no need for any specialist military personnel responsible for securing respect for cultural property in the event of armed conflict to be full-time military professionals. A state may prefer to assign the role to reservists or to persons enlisting on the outbreak of conflict, especially where such personnel are archaeologists or other relevant cultural heritage professionals in their civilian life. Nor is it necessary for such military personnel to be members of the army, navy or air force. They may instead belong to a militarized law-enforcement arm such as the *Arma dei Carabinieri* in Italy, the *Gendarmerie* in France or the *Guardia Civil* in Spain. Moreover, there is no reason why a state may not assign certain tasks, such as advising military planners on targeting, to personnel from one service and other tasks, such as guarding museums and archaeological sites in occupied territory, to another. Compelling considerations of expertise and experience may in practice dictate this. In short, a state is free to organise such services and personnel as it sees fit.

The best-known historical example of a specialised service and personnel of the sort envisaged by article 7(2) of the 1954 Hague Convention was the American Commission for the Protection of Artistic and Historic Monuments in Europe ('Roberts Commission') in the Second World War and its Monuments, Fine Arts and Archives (MFA&A) officers, or 'monuments men'. The Roberts Commission furnished the General Staff of the US Army with museums officials and art historians to be trained, commissioned as specialist officers, and attached to army staffs to advise commanding officers of the location of and care to be given to artistic and historic objects, buildings and sites in territory immediately ahead of or occupied by US forces. The aim was to avoid unnecessary destruction of or damage to cultural property, as well as to prevent and, where necessary, put a stop to and punish theft or vandalism of such property by US troops or the local populace. An equivalent branch was set up within the British Army under Lt Col Sir Leonard Woolley, Archaeological Advisor to the Director of Civil Affairs in the War Office, who as a civilian archaeologist had led the excavations at Ur, in Iraq, in the 1920s. It was neither the US nor the UK, however, but Germany that had pioneered such a service, with the establishment during the First World War of a *Kunstschutz* (art protection) corps, headed by a leading professor of art history.

The *Kunstschutz* was also active in western and southern Europe during the Second World War, stepping in at times to try to check the plunder of cultural property by other German units.

69. Services and personnel tasked with securing the protection of cultural property in armed conflict can be found today in the armed forces of a variety of states.

Members of the *Carabinieri Tutela Patrimonio Culturale* (*Carabinieri* headquarters for the Protection of Cultural Property or 'TPC'), a specialized unit within the *Arma dei Carabinieri*, Italy's militarized police force, have been deployed with success in conflict zones, among them Kosovo and Iraq, to prevent looting and vandalism of cultural sites and to recover stolen artefacts.

The Austrian army's liaison officers for the military protection of cultural property (LO/milPCP), whose functions are outlined in Austria's Directive for the Military Protection of Cultural Property and the Military Safeguarding of Cultural Heritage (December 2009) and in directives on the army's civil-military liaison service (ZMVD), provide another example of best practice.

Both the US and Poland have relied to effect in the field on the embedding within their military forces of professional archaeologists.

70. When deployed on mission, the military services and personnel in question should liaise not only with the competent civilian authorities but also with other local heritage professionals and with local communities so as the better to ensure the protection of cultural property during operations.

IV.

PROTECTION OF CULTURAL PROPERTY DURING HOSTILITIES

A. IDENTIFYING CULTURAL PROPERTY

71. The most fundamental preconditions to protecting cultural property during hostilities are to identify what and where the cultural property to be protected is and to communicate this information effectively to those engaged in the planning and execution of military operations.

72. The practical task of identifying cultural property in given territory is distinct from the legal inquiry into precisely which objects, structures and sites of historic, artistic or architectural significance in that territory are of sufficient importance to qualify for protection as 'cultural property'. It may be self-evident to military forces once its existence and location are known that a certain museum, for example, is important enough to the cultural heritage of the state in question to be protected legally as 'cultural property', but those military forces must first be aware of the existence and location of the museum. The most essential task faced by military forces when seeking to protect cultural property during hostilities is therefore to ascertain whether and precisely where there exist in given territory objects, structures and sites of historic, artistic or architectural significance.

73. There is a variety of ways in which military forces might go about ascertaining the existence and location of cultural property.

74. It may be that a state party to the 1954 Hague Convention indicates some cultural property, immovable or movable, by affixing to it or to a building housing it the distinctive emblem of cultural property (see §§213–218). In practice, however, no state affixes the emblem to every item of its cultural property, and most states do not use the emblem at all. Moreover, the distinctive emblem is useless where it is not visible, to the naked eye or with technological aid, to military forces.

75. Military planners may instead have access to some sort of register, schedule or inventory in which a state lists all items of immovable cultural property and all repositories of movable cultural property that go to make up its national cultural heritage. This will be the case more often in relation to the cultural heritage of the military forces' own state than in relation to the cultural heritage of other states. That said, some states have in the past forwarded to UNESCO, at least on the outbreak of hostilities, registers of their national cultural heritage for distribution to other states,

and military forces should always check with the relevant civilian authorities whether any such register has been received or is otherwise available.

76. It may equally be, and may be expected to be the case as regards the cultural heritage of the military forces' own state, that geographical coordinates or other indicators are provided to enable military planners to have at least a rough basis on which to proceed. In rare instances, an example being El Salvador, a state may provide UNESCO with maps of at least some cultural sites for dissemination internationally. In other instances, as with the Libya 'watch list' prepared in 2011 by the general secretariat of the International Council of Museums (ICOM) or the unofficial 'no-strike' list for Aleppo disseminated in July 2013 by Heritage for Peace and UK Blue Shield, non-governmental organizations may make publicly available online lists and locations of particularly significant immovable cultural property.

> In 2012, the Malian Ministry of Culture, with the support of UNESCO, produced a booklet entitled *Passeport pour le patrimoine* (November 2012), containing descriptions, maps, photographs and geographical coordinates of protected historic structures and sites in northern Mali. Although not aimed specifically at members of the armed forces, the booklet represents a useful resource for the identification of cultural property protected by the 1954 Hague Convention and other rules of international humanitarian law.

77. At the very least, the existence and approximate coordinates of any cultural sites inscribed on the World Heritage List will be readily available online via the website of the World Heritage Convention, although the List does not encompass collections of movable cultural property. *A fortiori*, the existence and general location of any cultural property entered on the International Register of Cultural Property under Special Protection or on the International List of Cultural Property under Enhanced Protection will be readily available online (see §§50–55 and Appendix II). Also available online via the website of the World Heritage Convention are the 'tentative lists' forwarded to the World Heritage Committee by state parties to the Convention (see Appendix II). It pays to reiterate, however, that the cultural sites on these different lists and registers form only a tiny fraction of the immovable cultural property protected in each state during armed conflict by the 1954 Hague Convention and its Protocols, by customary international humanitarian law and by customary international criminal law. It is also important to stress that any coordinates provided will be insufficient for the purposes of targeting. Their value lies more in providing a general indication of the location of the sites in question.

78. Beyond these scenarios, best military practice in identifying cultural property comes in different forms, depending largely on the phase of military operations during which it is undertaken.

79. Pre-mission preparation involves as wide and thorough consultation as feasible—in liaison with any specialist services or personnel established within the armed forces—between, on the one hand, military planners and, on the other, civilian experts in archaeology, history, art history and architecture, curators of museums,

galleries, libraries, archives and scientific collections, professional associations of the same, and appropriate intergovernmental and non-governmental organizations. It requires full use of available human intelligence, as well as available satellite imaging, such as that provided pursuant to the memorandum of understanding of 2015 between UNESCO and the United Nations Operational Satellite (UNOSAT) programme of the United Nations Institute for Training and Research (UNITAR), along with any other available remote imaging, such as that offered by unmanned aerial vehicles ('drones'). The aim is to create in advance as detailed a map and dossier as possible of the 'cultural terrain' in which the campaign will unfold, to facilitate military preparation for the protection over the course of the conflict of the cultural property identified, whether from aerial or artillery attack, from accidental damage during the construction of a field base or from looting by criminal gangs.

80. But information gathering is only the first step. Information gathered must be communicated in accessible, utilizable form to those engaged in the planning and execution of military operations. How this is done will depend largely on the military operation in question. In the case of targeting decisions, best practice involves the compilation and entry into any relevant military databases of official 'no-strike' lists (see §98). In the case of planning for ground attack and subsequent belligerent occupation, it may involve the preparation and distribution of detailed, specially marked maps.

> In collaboration with regional subject-matter experts and environmental geographic information system (GIS) analysts, US military archaeologists prepared special archaeological maps of Afghanistan and Iraq for use by military forces, while the US Air Force language centre translated into English an atlas produced by Iraq's State Board of Antiquities.

81. Information gathered and made available to military planners should, where possible, include an indication of the comparative historic, artistic or architectural significance of the object, structure or site, to assist in any necessary prioritization, as well as in assessing whether the military advantage anticipated in any proposed attack would be excessive in relation to the cultural value represented by any foreseeable incidental damage to cultural property. Best practice involves the inclusion of such information in the 'collateral damage estimation' relied on by targeting decision-makers (see §121).

82. Once troops are on the ground or warships in the water, it may become necessary to identify further cultural property whose existence, location or character as cultural property was not known in advance. Verifying the character of an object, structure or site as cultural property may be required when it comes to objects, structures and sites whose historic, artistic or architectural significance is not obvious, such as earthworks of archaeological or other historic value (for example, burial tumuli, irrigation channels or defensive dykes), standing stones, indigenous cultural objects or sites, or even the contents of some collections or archives. The task of assessing the cultural significance of an object, structure or site across which military

forces come and in respect of which they are uncertain is one for experts. The same goes for ascertaining the precise geographical extent of archaeological or other historic sites, the perimeters of which may not have been adequately indicated by the competent national authorities. Those military forces with specialist services or personnel responsible for the protection of cultural property should have recourse in the first instance to these. These services and personnel may in turn find it necessary or advisable to call in help from civilian professionals. In all instances, it is good practice to seek the advice or other assistance of UNESCO or some other appropriate organization or institution. But experts are not the only persons on whom military forces might usefully rely for the identification of cultural property. Local communities, including their religious and other leaders, are a valuable source of information on the location and significance of cultural property, from historic structures to collections of manuscripts and archives.

B. TARGETING IN RELATION TO CULTURAL PROPERTY

83. The integration of cultural property considerations into targeting decisions is both an international legal obligation and a practical necessity. In legal terms, it involves two distinct questions. First, military decision-makers must assess whether specific cultural property may itself be attacked. The legal starting position, and in the vast majority of cases the endpoint, is that targeting cultural property is prohibited. Secondly, military decision-makers must assess whether any attack on an otherwise-lawful military objective, such as a military installation, may be expected to cause incidental damage to nearby cultural property that would be excessive in relation to the concrete and direct military advantage anticipated from neutralising the objective. Both rules are backed up by further rules pertaining to the execution of attacks.

84. Only through the establishment and disciplined observance of formal targeting processes can the following suite of rules on targeting ensure the protection of cultural property during attack, whether by air, sea or land.

(*i*) Making cultural property the object of attack

(a) General rules

It is prohibited to attack cultural property unless it becomes a military objective and there is no feasible alternative for obtaining a similar military advantage.

85. One of the most fundamental rules dictating respect for cultural property during hostilities is that parties to a conflict are prohibited from making cultural property the object of attack, by land, sea or air, unless the property constitutes at the time a

military objective and there is no feasible alternative available for obtaining a similar military advantage. There is no legal justification whatsoever for attacking cultural property when it is not at the time of attack a military objective or when there exists some feasible other means for gaining a military advantage equivalent to that envisaged in an attack on the property. Intentional unlawful attacks on cultural property constitute war crimes, and perpetrators have been convicted of such crimes by both international and national criminal courts and tribunals.

86. An 'attack', within the meaning of the law of armed conflict, means an act of violence against the adversary, whether in offence or defence. The rule on making cultural property the object of attack relates to situations where the cultural property is not under the territorial or physical control of the attacking party.

87. A 'military objective' is defined by the law of armed conflict 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'. As the definition makes clear, the test is twofold. To constitute a military objective, cultural property must not only make an effective contribution to military action by means of one or more of its nature, location, purpose or use but, in addition, the destruction, capture or neutralization of that property must, at the time of the attack, promise a definite military advantage to the attacking party. The definition also emphasizes, through the words 'effective' and 'definite' respectively, that the contribution made to military action by the cultural property and the military advantage offered by its targeting must both be concrete, not just theoretical or speculative. The reference too is to military 'action', meaning actual combat, rather than to the broader notion of the military 'effort'. In other words, the cultural property must, by its nature, location, purpose or use, contribute to the fighting. It is crucial to stress as well that whether the destruction, capture or neutralization of the cultural property offers a definite military advantage to the attacker may change and that the question must be answered by strict reference to the circumstances ruling at the time of the attack.

88. Cultural property may constitute a military objective in certain circumstances, although these circumstances will be rare. Very specific cultural property, namely historic fortresses, historic barracks, historic arsenals and other historic property constructed for military ends, might be said to make, by its nature, an effective contribution to military action. If it is decommissioned, however, such property is better characterized by its nature as a historic monument, rather than military property; and if it is still in service, any effective contribution it may make to military action will be through its use, rather than its nature. Similarly, while the vast majority of cultural property cannot make an effective contribution to military action through its purpose, meaning its 'future intended use', a historic bridge, historic railway station or historic port could conceivably do so. Generally speaking, however, one would not expect infrastructure built in and for another age to play a genuine military role today. As for location, it is not unimaginable that the position of cultural property on the

battlefield could serve to block an attacking party's line of fire. That said, any contribution this makes to the adversary's military action is arguably better seen as arising from the cultural property's passive or *de facto* use. In the final analysis, it is principally through its use, if it all, that cultural property might realistically be expected to make an effective contribution to military action. In other words, use in support of military action is the principal justification that a party to an armed conflict might be expected to invoke in order to justify attacking cultural property. It is inconceivable today that a party would cite the nature of cultural property to this end, scarcely imaginable that it would cite its purpose, and highly unlikely that it would cite its location.

89. It is important to note that the posting of armed guards on or near cultural property for the purpose of its protection does not amount to its use in support of military action. Although the 1954 Hague Convention makes the point expressly only in relation to cultural property under special protection, the principle is a general one, applicable to all cultural property.

90. There are various ways in which an adversary might conceivably make use of cultural property in support of military action. The most obvious is by taking up position within immovable cultural property, for example by using a historic hilltop fortress as a defensive redoubt or to reconnoitre the battlefield or by placing a sniper in a medieval bell-tower or minaret. Another is by relying on immovable cultural property for access to or from an offensive or defensive position, for example by using a historic bridge or railway station for reinforcement or resupply. Another still is by storing weapons, other military hardware or ammunition in a museum, gallery or historic house.

91. In all such situations, however, it is important to reiterate three points.

92. First, a party's use of cultural property in support of military action does not of itself make it lawful for an opposing party to attack that property. Cultural property put to such use is capable of becoming a military objective only if it makes an effective contribution to military action.

93. Secondly, whatever contribution cultural property might make to military action and however it might make it, such property will constitute a military objective only if its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

94. Finally, whether cultural property constitutes at the time a military objective is itself only the first of two hurdles to overcome before making it the object of attack will be lawful. Even if cultural property is a military objective, its attack will be permitted only if there is no feasible alternative for obtaining a similar military advantage. In short, attacking cultural property is a last resort. So, for example, where the adversary has taken up position in immovable cultural property, it may be possible simply to bypass the property, or to impose a *cordon sanitaire* around it and wait for

the opposing forces inside to surrender, or to deploy snipers to neutralize the threat posed by armed individuals without damaging the cultural property. Where the adversary is using a historic bridge or railway station for reinforcement or resupply, it may be possible to destroy or sufficiently degrade instead the approach roads or surrounding railway tracks. In other words, military forces must think long, hard and laterally about the feasibility of alternative courses of military action before directing an attack against cultural property.

Parties to the conflict must do everything feasible to verify that objectives to be attacked are not cultural property.

95. The qualified prohibition on attacking cultural property depends in practice for its implementation on verifying that any objective to be attacked is not cultural property. As such, parties to an armed conflict are obliged to do everything feasible to this end.

96. The feasibility of measures to verify that objectives to be attacked are not cultural property will depend on the circumstances. What is reasonably open to military forces by way of target verification may differ as between a planned attack, where rich veins of intelligence may be to hand, and the immediate return of fire in self-defence. Likewise, the absence of ground-to-air and air-to-air defence may make feasible low-altitude, daytime aerial reconnaissance of potential objectives, whereas fierce anti-aircraft fire or fighter defence in the vicinity of a proposed target may compel recourse to other means for confirming its character. Whatever the variables, however, military forces must do everything they reasonably can to ensure that they do not attack cultural property unless, under the circumstances prevailing at the time, such property legally constitutes a military objective. This requires doing everything feasible to review and assess all available information regarding the target.

97. Essential to verifying, in the context of planned attacks, that objectives to be attacked are not cultural property is the establishment and routine use of targeting processes. A targeting process is a standardized, step-by-step procedure by which military decision-makers take targeting decisions during operations.

98. A crucial stage of any targeting process is ‘target development’, at which point military planners may place *a priori* restrictions on target selection. One such targeting restriction is what is referred to as a ‘no-strike’ list (or NSL), by which military planners rule out in advance attacks on specific structures or sites, among them those protected under LOAC or any applicable ROE and those whose attack would for other reasons be undesirable in all circumstances.

99. Best practice dictates that particularly significant cultural property be placed on a no-strike list to be utilized by military planners during target selection.

No-strike lists for cultural property have been used with success in military operations in Iraq, Libya, Syria and Mali, all of them countries rich in cultural sites.

The compilation of such lists should, where feasible, involve input from appropriate cultural heritage professionals and other experts, such as archaeologists, historians of art and architecture, and museum curators, as well as from appropriate non-governmental organizations, among them any relevant national committee for the Blue Shield, and UNESCO.

The target planning process during Operation Unified Protector, in which a coalition of states conducted air strikes on ground targets in Libya, provides an example of good practice in the preparation and implementation of no-strike lists for cultural property. Relying on personal contacts, among them civilian experts, defence intelligence officials gathered initial information on cultural property to be included on such a list. In parallel, and in collaboration not only with Libyan historians and archaeologists but also with a range of intergovernmental, governmental and non-governmental organizations, civilian experts from the US Committee of the Blue Shield (USCBS) compiled a detailed list of Libyan cultural sites deserving of protection. This list was transmitted to defence intelligence targeteers and uploaded into the target database. The sites on the USCBS list, along with other sites of cultural significance already in the database, were then placed on the official no-strike list relied on during the targeting process. Subsequently, a few days after the launch of the operation, the Director-General of UNESCO transmitted by letter to the Secretary General of NATO a supplementary list of Libyan cultural property worthy of protection.

It is highly desirable that any civilian expert involvement be integrated into the target planning process as standard, rather than done on an *ad hoc* basis.

Parties to the conflict must cancel or suspend an attack if it becomes apparent that the objective is cultural property.

100. Even the best available target intelligence can be wrong. There are circumstances too when an initial decision to launch an attack is taken under severe constraints of time, with insufficient opportunity for the fullest gathering of information. In either scenario, subsequent target verification may reveal that the objective to be attacked is cultural property. In such cases, the attacking party is obliged to cancel or suspend the attack.

101. The obligation to cancel or suspend an attack if it becomes apparent that the objective is cultural property compels the choice of means and methods of attack capable of cancellation or suspension. If a forward military observer becomes aware that existing target intelligence is mistaken, it must be technically possible for those directing or executing the attack to call it off—for example, by countermanding previous orders, holding fire or detonating remotely-controlled ordnance before it reaches its target—or at the very least to suspend it. The same obligation also presupposes ROE, special instructions (SPINs) or the equivalent that require, for

example, pilots not to complete their mission when what was thought to be a military objective turns out to be protected cultural property.

Where cultural property becomes a military objective and there is no feasible alternative to attacking it, any decision to attack the property by a party to the conflict bound by the 1999 Second Protocol must be taken by an officer commanding a force equivalent in size to at least a battalion, unless circumstances do not permit.

The same should apply where a party to the conflict not bound by the 1999 Second Protocol decides to attack cultural property.

102. Where cultural property becomes a military objective and there is no feasible alternative to attacking it, article 6(*c*) of the 1999 Second Protocol, applicable to both IAC and NIAC, has the effect of requiring that any decision by a state party or non-state armed group fighting a state party to attack the property must be taken by an officer commanding a force equivalent in size to at least a battalion. The logic of the rule is that the higher the level of decision-making, the greater not only the access to relevant information but also the appreciation of the competing considerations and the experience of the decision-maker. Article 6(*c*) relaxes this procedural requirement, however, where circumstances do not permit.

103. The practical importance of the rule laid down in article 6(*c*) is such that the same should apply as a matter of best practice where a party to an armed conflict is not bound by the 1999 Second Protocol.

Where cultural property becomes a military objective and there is no feasible alternative to attacking it, any party to the conflict bound by the 1999 Second Protocol that decides to attack the property must give advance warning whenever circumstances permit.

The same should apply where a party to the conflict not bound by the 1999 Second Protocol decides to attack cultural property.

104. Where cultural property becomes a military objective and there is no feasible alternative to attacking it, article 6(*d*) of the 1999 Second Protocol, applicable to both IAC and NIAC, requires that any attack against the property be preceded whenever circumstances permit by a warning. The logic of the rule is twofold. First, where the cultural property is being used in support of military action, an advance warning grants the adversary an opportunity to cease such use, with the consequence that the property will no longer constitute a military objective and must be spared attack. Secondly, in any event, advance warning grants the adversary an opportunity to take practical measures to minimize damage to the cultural property or to any movable

cultural property housed in it, including by removing the latter to a place of safety or providing for its adequate *in situ* protection (see §§145–149).

105. The practical importance of the rule laid down in article 6(*d*) is such that the same should apply as a matter of best practice where a party to an armed conflict is not bound by the 1999 Second Protocol.

(*b*) *Special rule for cultural property under enhanced protection*

Parties to the conflict bound by the 1999 Second Protocol are prohibited from making cultural property under enhanced protection the object of attack unless:

- **by its use it becomes a military objective;**
- **the attack is the only feasible means of terminating such use;**
- **all feasible precautions are taken in the choice of means and methods of attack to avoid or in any event minimise damage to the cultural property; and**
- **unless the requirements of immediate self-defence do not permit, 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, and reasonable time is given to the opposing forces to redress the situation.**

106. Articles 12 and 13 of the Second Protocol to the 1954 Hague Convention provide cultural property covered by the regime of enhanced protection established under chapter 3 of the Protocol with a higher level of legal protection from attack than that enjoyed by other cultural property, although this protection is not absolute. Best practice suggests further that those few items of cultural property covered by the regime of special protection established under the 1954 Hague Convention itself should be treated in attack the same way as cultural property under enhanced protection.

107. Whereas other cultural property may, as a matter of law, become a military objective by any one or more of its nature, location, purpose or use (see §§87–94), cultural property under enhanced protection is legally capable of constituting a military objective only by means of its use. That is, even where its nature, location or purpose might be said to make an effective contribution to military action and its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage, cultural property under enhanced protection may not be considered a military objective and, as a consequence, may not be attacked.

108. By the same token, cultural property under enhanced protection will legally constitute a military objective if, by its use, it makes an effective contribution to

military action and its total or partial destruction, capture or neutralization, in the circumstances prevailing at the time of the attack, offers a definite military advantage. Such property, however, must still not be attacked unless the attack is the only feasible means of terminating this use and all feasible precautions are taken in the choice of means and methods of attack to avoid or, failing this, minimise damage to the property. Even then, except where the requirements of immediate self-defence do not permit, the attack must be ordered at the highest operational level of command, the attacking party must notify the opposing forces of its intention to attack the property unless the latter terminate their use of the property to military ends, and the attacking party gives the opposing forces a reasonable period of time in which to terminate this use.

109. The term 'highest operational level of command' refers to the highest level of military decision-making with respect to combat operations. What precise level this is will depend on the facts, although comparison with the rule applicable to cultural property not under enhanced protection indicates that it must be higher than an officer commanding a force equivalent in size to a battalion.

110. As for what precisely is a reasonable period of time in which to terminate the use of the cultural property, this too will depend on the facts, although any period allowed must be realistic.

(c) Special rule for transport of cultural property

Parties to the conflict are prohibited from making means of transport engaged exclusively in the transfer of cultural property the object of attack.

111. One way of protecting movable cultural property from the foreseeable effects of armed conflict is to transfer it from the vicinity of military objectives to a place of safety within or outside the state in which the property is situated (see §§145–149). Article 12 of the 1954 Hague Convention makes provision in this connection, specifying that, at the request of the state party concerned, cultural property may be transported under a special, internationally-supervised regime. In accordance with article 12(3), states parties are absolutely prohibited from making means of transport engaged exclusively in the transfer of cultural property the object of attack. It is not just states parties to the Convention, however, that are prohibited from attacking means of transport, whether by land, sea or air, of cultural property. Since the movable cultural property being transported can never make an effective contribution to military action, it—and by extension any vehicle while transporting it—can never be considered a military objective. As a consequence, any party to an international or non-international armed conflict, regardless of whether it is a state party to the 1954 Hague Convention, is absolutely prohibited from making means of transport engaged exclusively in the transfer of cultural property the object of attack. This prohibition,

moreover, applies to any means of transport engaged exclusively in the transfer of cultural property, whether or not it benefits from the regime of transport provided for in article 12 of the Convention, which, as it is, has never formally been used.

(*ii*) Incidental damage to cultural property in the course of attack

It is prohibited to launch an attack that may be expected to cause incidental damage to cultural property that would be excessive in relation to the concrete and direct military advantage anticipated.

112. Incidental (or 'collateral') damage inflicted in the course of attacks on otherwise-lawful targets, such as troop concentrations and military installations, has historically posed the single greatest threat to cultural property during armed conflict, at least since the rise of modern forms of bombardment. One of the most significant advances in the legal protection of cultural property in wartime is therefore the rule prohibiting attacks that may be expected to cause incidental damage to cultural property that would be excessive in relation to the concrete and direct military advantage anticipated. In certain cases, such attacks may constitute war crimes.

113. The prohibition embodies a rule of what is referred to as proportionality, meaning that any incidental damage to cultural property anticipated in the course of an attack against a military objective must not be out of proportion to the military advantage offered by the destruction, capture or neutralization of the objective. As the words 'concrete and direct' indicate, what must be weighed against the anticipated incidental damage to the cultural property is the tangible, not theoretical or speculative, military benefit envisaged.

114. As applied to cultural property, this proportionality calculus involves qualitative as much as quantitative considerations. The measure of incidental damage to be caused to cultural property is a question not just of cubic metres but also, crucially, of the cultural value of the object, building or site likely to be harmed. In this light, it is significant that movable or immovable property qualifying as cultural property is by definition of great importance to the cultural heritage of the state on whose territory it is situated (see §§44–45). It is perhaps even more significant that the preamble to the 1954 Hague Convention—as echoed in resolution 20 (IV) of the Diplomatic Conference of Geneva that adopted the 1977 Additional Protocols and in countless statements by states, international organizations and international judicial organs—declares that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind' and that 'the preservation of the cultural heritage is of great importance for all peoples of the world'. Since elements of this cultural heritage are often irreplaceable, only the promise of very considerable concrete and direct military advantage, in many cases overwhelming, will in practice be enough to justify an attack that is likely to cause incidental damage to cultural property.

An example of the application of the prohibition on disproportionate incidental damage to cultural property came during the first Gulf War in 1991, when Iraq positioned two fighter aircraft next to the ancient ziggurat at Ur. Coalition commanders decided not to attack the aircraft 'on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple'.

115. What goes for cultural property generally in relation to incidental damage goes even more so for cultural property under enhanced protection, which, in the words of article 10(*a*) of the 1999 Second Protocol, is by definition 'cultural heritage of the greatest importance for humanity'.

Parties to the conflict must take all feasible precautions in the choice of means and methods of attack to avoid or in any event minimise incidental damage to cultural property.

116. Refraining from attacks expected to cause excessive incidental damage to cultural property rests in practice on suitable means and methods of attack. In a reflection of this, parties to an armed conflict are obliged to take all feasible precautions in their choice of means and methods of attack to avoid or in any event minimise incidental damage to cultural property. Just as with measures to verify that objectives to be attacked are not cultural property (see §§95–99), the feasibility of precautions in the choice of means and methods of attack to avoid or at least minimise 'collateral' damage to cultural property will depend on the circumstances.

117. The reference to means of attack is to the choice of weapon. In this regard, feasible precautions in attack to avoid or minimise incidental damage to cultural property include the deployment, where available, of precision-guided munitions, of munitions with a small blast and fragmentation radius, and so on. When it comes to anti-submarine warfare near underwater cultural property, the obligation to take feasible precautions in the choice of means of attack compels the use of torpedoes, where available, in preference to depth charges.

118. The reference to methods of attack is to the manner in which the attack is conducted. In this context, precautions in attack to avoid or minimise incidental damage to cultural property might include low-altitude aerial raids by daylight, assault at close quarters instead of bombardment, the use of snipers rather than explosives or automatic-weapon fire to neutralise enemy combatants, and so on, where this does not pose an unacceptable risk of military casualties.

119. As with the obligation to verify that objectives to be attacked are not cultural property (see §§95–99), compliance by military forces with both the prohibition on disproportionate incidental damage to cultural property and the obligation to take all feasible precautions in the choice of means and methods of attack to avoid or

minimise incidental damage to cultural property calls, in the context of planned attacks, for the establishment and routine use of targeting processes.

120. In the case of incidental damage, an important element of any targeting process at target-development stage is the targeting restriction referred to as a 'restricted-target' list (or RTL). A restricted target is an otherwise-lawful military objective whose attack is subject to some restriction, often on account of its proximity to objects protected under LOAC or applicable ROE. A typical restriction of this sort is that any attack on the target must employ a specific weapon, to avoid or at least minimize incidental damage.

> Restricted-target lists incorporating cultural property considerations have been used with success in military operations in Iraq, Libya, Syria and Mali, all of them countries rich in cultural sites.

121. More generally, best military practice at both the target-development and capabilities-analysis stage involves the employment of rigorous collateral damage methodology in the form of an empirical 'collateral damage estimation' (CDE), which typically takes into account factors such as the type of weapon (including data on its accuracy, yield, and blast and fragmentation radius), the flight path of air-delivered weapons, the configuration of the objective, the materials from which it is constructed, the proximity to the objective of persons or objects protected under LOAC or applicable ROE, and other relevant data on such persons or objects. CDEs improve both target selection and damage mitigation by enabling commanders to weigh in more informed and precise fashion the military advantage to be gained by neutralizing an objective against the risk and likely gravity of collateral damage. The results of the CDE may determine the level of command at which a targeting decision is made. On reviewing a CDE, a commander may decide not to attack an objective at all or to attack it using specific means (such as precision-guided munitions for pinpoint accuracy or penetrator or delay-fuse munitions to limit blast and fragmentation damage) or specific methods (such as a particular angle of attack).

> When military objectives in Rome were bombed from the air during the Second World War, the missions were entrusted to the more accurate US bomber aircraft, rather than to British planes, and were flown by specially-selected, experienced crews.
>
> Through the use of precision munitions and targeting, coalition forces were able in 2011 to destroy in an aerial attack a radar installation placed by Libyan government forces on top of the ancient Roman fortification at Rasaimergib, near Leptis Magna, without damaging the fortification.
>
> Further best practice came in Mali in 2013 when insurgent fighters took up position in a house adjacent to the Djinguereber mosque in Timbuktu, a World Heritage site. Government forces and their allies decided against an airstrike out of concern for damaging the mosque. Instead a 122mm howitzer was brought in and specially positioned in such a way so as to be able to destroy the house without harming the mosque. The operation was successful.

122. Best practice demands that the proximity and significance of cultural property form integral and duly-weighted elements of any CDE. Only through the routine availability to and appropriate assessment by targeting decision-makers of the location, configuration, construction, and historical, artistic or architectural importance of nearby cultural property can incidental damage to such property be avoided or in any event minimised. Indeed, best practice strongly suggests that the proximity to a military objective of cultural property be grounds for placing the objective on a restricted-target list, according to which any attack on the objective must be conducted under stringent conditions as to means and method.

Parties to the conflict must cancel or suspend an attack if it becomes apparent that it may be expected to cause incidental damage to cultural property that would be excessive in relation to the concrete and direct military advantage anticipated.

123. As with the obligation to cancel or suspend an attack if it emerges that the objective is cultural property (see §§100–101), the obligation to cancel or suspend an attack if it becomes apparent that it may be expected to cause incidental damage to cultural property that would be excessive in relation to the concrete and direct military advantage anticipated necessitates the choice of means and methods of attack capable of cancellation or suspension. The obligation also calls for appropriate ROE, SPINs or the equivalent.

When military objectives in Rome were bombed from the air during the Second World War, crews were under strict instructions to return to base without dropping their bombs in the event that the target was obscured.

124. It is worth emphasizing that not only do the above rules on incidental damage apply as much to cultural property under enhanced protection as to any other cultural property but also that cultural property under enhanced protection is by definition ‘of the greatest importance to humanity’.

C. DESTRUCTION OF OR DAMAGE TO CULTURAL PROPERTY UNDER OWN CONTROL

(*i*) General rule

It is prohibited to destroy or damage cultural property under one's own control unless this is imperatively required by military necessity.

125. Destruction of or damage to cultural property under military forces' own control is prohibited unless imperatively required by military necessity. The rule relates to the defensive demolition of cultural property, whether to impede the progress of pursuing enemy columns, to clear a line of fire or to deny cover to enemy fighters, as well, *a fortiori*, as to any destruction of or damage to cultural property for motives other than military. Wanton destruction of or wanton damage to cultural property, meaning destruction or damage motivated by no military rationale whatsoever, is absolutely prohibited. Also prohibited is destruction or damage motivated by an insufficiently compelling military rationale and destruction or damage the extent of which goes beyond what prevailing military exigencies demand. Destruction of cultural property not justified by military necessity constitutes a war crime, and perpetrators have been convicted of such offences by both international and national criminal courts and tribunals.

126. Imperative military necessity implies the existence of no feasible alternative for obtaining a similar military advantage. As famously emphasized by General Eisenhower in relation to what is now termed cultural property, military necessity is not the same as military convenience, a view consistently reiterated in the military manuals and practice of states. Again, military forces must give serious, concerted and imaginative thought to feasible alternative courses of military action before destroying or damaging cultural property under their control. Indeed, today it will be only in exceptional cases, if at all, that a party to an armed conflict engages in defensive demolitions of cultural property.

127. Imperative military necessity also serves to calibrate the extent of any destruction or damage compelled by military considerations. Harm to cultural property occasioned by the invocation of military exigencies must be only to the degree that it is imperatively necessary. Military forces must make every feasible effort, both before and in the execution of any defensive demolition of cultural property, to minimise damage to it.

Where a party to the conflict bound by the 1999 Second Protocol invokes military necessity to destroy or damage cultural property under its control, the decision must be taken by an officer

commanding a force equivalent in size to at least a battalion, unless circumstances do not permit.

The same should apply where a party to the conflict not bound by the 1999 Second Protocol invokes military necessity to destroy or damage cultural property under its control.

128. See §§104–105, *mutatis mutandis*.

(*ii*) Special rule for cultural property under enhanced protection

Parties to the conflict bound by the 1999 Second Protocol are prohibited from destroying or damaging cultural property under enhanced protection under their own control.

129. When the military forces of a party to the conflict bound by the 1999 Second Protocol find themselves in control of cultural property under enhanced protection, they are absolutely prohibited from destroying or damaging it. In contrast to the legal situation as regards other cultural property (see §§125–127), no claim of military necessity is capable in law of justifying the defensive demolition or other deliberate destroying or damaging of any cultural property under military forces' own control that enjoys enhanced protection. Wanton destruction of or damage to such property is forbidden *a fortiori*.

D. USE OF CULTURAL PROPERTY OR ITS IMMEDIATE SURROUNDINGS

(*i*) General rule

It is prohibited to make any use of cultural property or its immediate surroundings for purposes likely to expose it to destruction or damage in the event of armed conflict unless this is imperatively required by military necessity.

130. A further fundamental rule on respect for cultural property during hostilities prohibits parties to a conflict from making any use of cultural property or its immediate surroundings for purposes likely to expose the property to destruction or damage unless such use is imperatively required by military necessity. This means that there is no legal justification for any wartime use of cultural property or its immediate surroundings that is likely to expose the property to destruction or damage where there

is no military advantage in doing so or where there exist feasible alternative means for obtaining a similar military advantage.

131. The rule is more than just a qualified prohibition on the use of cultural property or its immediate surroundings for hostile purposes.

132. The reference to any use for purposes likely to expose the property to destruction or damage means that the rule extends to the *de facto* or passive use of cultural property in any manner likely to draw fire on it. The rule therefore prohibits the deliberate interposition of cultural property in the line of fire, for example by retreating to a position obscured by a historic structure from the opposing party's view. The rule also serves to forbid the effective incorporation of a historic structure or site into a defensive line, as with the German 'Gustav line' around the abbey at Monte Cassino during the Second World War.

133. Nor is it just use for combat purposes that the rule prohibits. If it is likely that the use of a building of cultural significance as, for example, a field headquarters or armoury will expose it to attack, such use is forbidden. The rule would also prohibit parking military aircraft in the immediate surroundings of cultural property in the hope of shielding them from attack, as Iraq did during the first Gulf War in 1991.

134. Its use need not even expose cultural property to attack for it to violate the rule. The rule prohibits any use likely to expose cultural property to damage during armed conflict, with the result that the likelihood of more than *de minimis* deterioration of the fabric of a structure of historic, artistic or architectural significance, and *a fortiori* the risk of its vandalism or pillage, through its use as a headquarters, billet or the like is enough to render such use impermissible. The same goes for positioning a camp on an archaeological site. *A fortiori*, cultural property should not be used for target practice. Additionally, the reference to the property's immediate surroundings entails an obligation to refrain in the vicinity of archaeological sites from landing helicopters, with their damaging rotor wash; from using heavy vehicles and positioning heavy containers; from engaging in earthworks, such as levelling ground, digging trenches, latrines and pits for fuel tanks, and filling sandbags and 'hescos'; from detonating captured ordnance; and so on. The reference to the immediate surroundings equally entails a prohibition at sea on any potentially damaging wartime use of the waters above and seabed around underwater cultural property. This has implications for, among other things, warships dropping anchor and the activities of submarines.

135. In all of this, however, it is important to recall that any such use of cultural property is not prohibited insofar as it is imperatively required by military necessity, meaning that it offers a definite military advantage and no feasible alternative exists for obtaining a similar military advantage. While such circumstances are imaginable, they are likely to be rare, given the range of feasible alternatives commonly open to military forces.

136. Just as the posting of armed guards on or near cultural property for the purpose of its protection cannot render the property a military objective, so too does it not constitute use of the property for purposes likely to expose it to destruction or damage in the event of armed conflict. Although the 1954 Hague Convention makes the point expressly only in relation to cultural property under special protection, the principle is a general one, applicable to all cultural property.

137. For more on this rule in the context of belligerent occupation, see §§182–184.

Where a party to the conflict bound by the 1999 Second Protocol invokes military necessity to use cultural property for purposes likely to expose it to destruction or damage in the event of armed conflict, the decision must be taken by an officer commanding a force equivalent in size to at least a battalion, unless circumstances do not permit.

The same should apply where a party to the conflict not bound by the 1999 Second Protocol invokes military necessity to use cultural property for purposes likely to expose it to destruction or damage in the event of armed conflict.

138. See §§104–105, *mutatis mutandis*.

(*ii*) Special rule for cultural property under enhanced protection

Parties to the conflict bound by the 1999 Second Protocol are prohibited from any use of cultural property under enhanced protection or its immediate surroundings in support of military action.

139. In contrast again to the situation in relation to other cultural property (see §§130–137), it is absolutely forbidden for parties to the conflict bound by the 1999 Second Hague Protocol to make any use of cultural property under enhanced protection or its immediate surroundings in support of military action. No considerations of military necessity may legally justify such use. Best practice suggests further that those few items of cultural property covered by the regime of special protection established under the 1954 Hague Convention itself should be treated in terms of their use the same way as cultural property under enhanced protection.

140. The prohibition on the use of cultural property under enhanced protection in support of military action applies to any party to the conflict bound by the 1999

Second Hague Protocol, even if it is only the state party with control over the property at the time of the grant of enhanced protection that article 10(*c*) requires, as a precondition to this grant, to have made a declaration confirming that the property will not be so used.

141. The expression 'military action' refers to combat. In other words, the absolute prohibition on the use of cultural property under enhanced protection and its immediate surroundings extends only to use in support of the fighting. But this does not mean that parties to the conflict bound by the 1999 Second Hague Protocol are permitted to use cultural property under enhanced protection for other purposes likely to expose it to destruction or damage in the event of armed conflict. The general rules applicable to all cultural property pick up where any special rules applicable to cultural property under enhanced protection leave off. As a consequence, just as with all other cultural property, parties to an armed conflict are prohibited—in addition to the absolute prohibition on its use in support of military action—from any other use of cultural property under enhanced protection that is likely to expose it to destruction or damage in the event of armed conflict unless such use is imperatively required by military necessity, meaning that there are no feasible alternative means for obtaining a similar military advantage.

E. DANGERS TO CULTURAL PROPERTY RESULTING FROM MILITARY OPERATIONS

Parties to the conflict must, to the maximum extent feasible, take the necessary precautions to protect cultural property under their control against the dangers resulting from military operations.

142. It is not just the case that parties to an armed conflict must refrain from destroying or damaging cultural property under their control unless imperative military necessity requires. Each party is also under a positive obligation to take the necessary active measures, to the maximum extent feasible, to protect cultural property under its control against the dangers resulting from military operations conducted by its own forces or the adversary's. While similar to the obligation for the safeguarding of cultural property from the foreseeable effects of armed conflict in article 3 of the 1954 Hague Convention, as elaborated on in article 5 of the 1999 Second Protocol, the obligation to take the necessary measures to protect cultural property under one's control against the dangers resulting from military operations is more expansive. It is not confined to cultural property within a state's own territory, and it is more general.

143. The restriction of the obligation to what is feasible does not mean that a party may do nothing or may make a merely token effort positively to safeguard cultural

property. The obligation is a real one, even if its application may vary with the urgency of the military situation and with logistical capacity.

144. The general obligation is fleshed out in two further, specific obligations (see §§145–151), although the latter do not exhaust the possible applications of the general rule.

Parties to the conflict must, to the maximum extent feasible, remove cultural property from the vicinity of military objectives or provide for its adequate *in situ* protection.

145. In an application of the general obligation to take, to the maximum extent feasible, the necessary precautions to protect cultural property under their control against the dangers arising from military operations, parties to an armed conflict must, again to the maximum extent feasible, either remove cultural property from the vicinity of military objectives or provide for its adequate *in situ* protection. Fulfilment of this obligation will neither necessarily nor ideally fall to military forces. Any decisions required may and preferably should ultimately be taken by civilian authorities, and any measures of removal or *in situ* protection required may and should end up being taken by those authorities or other experts. But military forces may find themselves faced in the first instance at least with the obligation's demands and may be called on to assist in their execution.

146. Again, the limitation of the obligation to what is feasible does not mean that a party to a conflict is free to do nothing or to make no more than a cosmetic effort. The obligation is a genuine one, even if what it requires may vary with the military situation and capacity.

147. When military forces find themselves in control of collections or stores of movable cultural property, the fragility of such property and the specialised nature of the requisite knowledge and skills dictate that the decision whether to transport the property to somewhere safer or to provide for its on-site protection be taken, where feasible, in close consultation with the appropriate civilian authorities; with experts, among them any specialist service or personnel tasked within the party's military forces with the protection of cultural property; with any relevant intergovernmental or non-governmental organization; or with a combination of these. The same goes for the organization and execution of any removal or, alternatively, of any measures of on-site protection, including of immovable cultural property. Of particular importance in this regard are the services of UNESCO (see §§229–231). Relevant too is article 1(vi) of a memorandum of understanding of 29 February 2016 between UNESCO and the International Committee of the Red Cross (ICRC), which states that the ICRC 'may assist in rescuing specific cultural property at imminent risk, for example by facilitating the evacuation of collections and/or providing supplies and equipment needed to undertake emergency safeguarding measures'. Such assistance must be at

the request of UNESCO or a party to the conflict, must have the agreement of all parties to the conflict, and must be provided in close consultation with concerned local actors, including the competent national authorities.

148. Where, in rare cases, the decision to remove cultural property to a place of safety or to provide for its *in situ* protection or any decision as to the organization and execution of removal or *in situ* protection falls to military forces themselves, it should be taken at as high a level of operational command as is feasible under the circumstances. In only the most urgent situations, moreover, should military forces themselves attempt the removal to a place of safety or *in situ* protection of cultural property, and in such cases extreme care must be taken. Movable cultural property, especially old books and manuscripts, is as easily damaged through inexpert handling and care as through military operations.

There are many examples—from the Spanish Civil War and Second World War to the more recent conflicts in Afghanistan, Iraq, Libya, Mali and Syria—of the successful wartime removal of movable cultural property from the vicinity of military objectives, on occasion abroad. The same goes for *in situ* protection both of movable cultural property, such as via storage in basement vaults, and of immovable cultural property, for example by means of sandbagging, the deposit of piles of earth to absorb percussion, and the boarding-up of windows. In most cases, however, critical decisions were taken and the execution of the move undertaken or closely supervised by the competent civilian authorities and technical experts, rather than by military forces.

149. France, Switzerland, the UK and the US have made legal provision for the housing in their respective territories of movable cultural property removed for safekeeping from foreign conflict zones. But it is highly unlikely that military forces themselves would be called on to decide whether to take advantage of such extraterritorial ‘safe havens’.

Parties to the conflict must, to the maximum extent feasible, avoid locating military objectives near cultural property.

150. As a necessary precaution to protect cultural property under their control against the dangers resulting from opposing forces’ military operations, parties to an armed conflict must, to the maximum extent feasible, avoid locating military objectives near such property. In other words, to the extent that the military situation and other relevant factors admit, a party must refrain from positioning in the vicinity of cultural property any foreseeable military target, such as a machine-gun nest, artillery piece, missile launcher, tank, armoury, field base, staff headquarters, military airstrip, military aircraft, naval dock, naval vessel, radar station, or radio or mobile telecommunications tower, to name only a few. As to what is to be considered ‘near’ cultural property, there is no hard and fast distance. It is a question of reasonableness in each case, and will depend to an extent on the ordnance that one might expect to be deployed against a particular objective.

151. Once more, the qualification 'to the maximum extent feasible' does not justify military forces in simply shrugging their shoulders and placing military objectives wherever is convenient. Although what the obligation calls for may vary with the facts, it remains a legal obligation.

F. MISAPPROPRIATION AND VANDALISM OF CULTURAL PROPERTY

152. International law imposes two distinct but related obligations on parties to an armed conflict in respect of the misappropriation and vandalism of cultural property during hostilities. The parties are prohibited from engaging in any form of misappropriation or vandalism of cultural property themselves. In addition, the parties are obliged to prohibit, to prevent and, where necessary, to put a stop to any form of misappropriation or vandalism of such property by others. Both rules represent increasingly significant protections for cultural property during modern armed conflict, whether international or non-international. Both are vital to mission success.

153. The treaty text from which the statement of the first rule below derives, namely article 4(3) of the 1954 Hague Convention, makes legally superfluous reference to 'theft, pillage [or] misappropriation' of cultural property. The inclusion of the three terms where the last alone would have sufficed—theft and pillage both being forms of misappropriation—was for no more than the avoidance of doubt. It was intended to ensure that all kinds of wrongful taking of cultural property, however named, were covered.

(*i*) By military forces themselves

All forms of theft, pillage or other misappropriation and of vandalism of cultural property are prohibited.

154. Parties to a conflict are absolutely prohibited during hostilities from engaging in all forms of theft, pillage or other misappropriation and of vandalism of cultural property. No pretext of military necessity can legally justify such conduct by the military forces of any party to a conflict. Conduct of this sort constitutes a war crime.

155. Commanders must make this prohibition and its consequences clear to their subordinates through such measures as the promulgation of general orders, and must ensure that the prohibition is rigorously enforced through disciplinary sanctions and, in appropriate cases, through the referral of the matter to the relevant military or civilian criminal justice authorities for the purpose of prosecution. In particular, commanders must spell out in no uncertain terms that what a soldier may view as the harmless taking of a souvenir or as innocent graffiti is in fact a violation of the laws of armed conflict for which that soldier may face a war crimes prosecution. Commanders are also advised to impress on subordinates that strict refrainment from all forms of

theft, pillage or other misappropriation and of vandalism of cultural property is an essential element of mission success, since such acts are guaranteed to inflame local resentment and may end up publicised by national and international media with damaging consequences for global public opinion. Soldiers should be told to report any finds of movable cultural property to the relevant authorities.

156. For more on this rule in the context of belligerent occupation, see §§185–186.

(*ii*) By others

Parties to the conflict must prohibit, prevent and, if necessary, put a stop to all forms of theft, pillage or other misappropriation and of vandalism of cultural property by others, including by organized criminal groups.

157. In addition to their obligation to refrain themselves from all forms of theft, pillage or other misappropriation and of vandalism of cultural property, parties to an armed conflict are obliged during hostilities to prohibit, to prevent and, if necessary, to put a stop to the commission of all such acts by others, including by organized criminal groups.

158. It pays to emphasize that the obligation to prohibit, prevent and, if necessary put a stop to all forms of theft, pillage or other misappropriation and of vandalism of cultural property by others is not limited to belligerent occupation (see §§187–194). First, it applies during international armed conflict in respect of territory held by foreign military forces but not yet under sufficient control to give rise to belligerent occupation. A state may not justify its failure to prohibit, prevent or put a stop to theft, pillage or other misappropriation and of vandalism of cultural property by whomsoever on the ground that belligerent occupation is yet to commence. That said, what measures are to be considered reasonable and within the power of military forces may vary as between, on the one hand, territory under unconsolidated control where hostilities continue and, on the other hand, occupied territory. Secondly, the obligation to prohibit, to prevent and, if necessary, to put a stop to all forms of theft, pillage or other misappropriation and of vandalism of cultural property by others applies during non-international armed conflict, in which the concept of belligerent occupation does not exist.

159. The obligation to prohibit all forms of theft, pillage or other misappropriation and of vandalism of cultural property by others is a strict one. There is no excuse for a party to an armed conflict not to forbid the commission of such acts by anyone within its present area of operations. In contrast, the obligations to prevent and, if necessary, to put a stop to others' theft, pillage or other misappropriation and of vandalism of cultural property are obligations of best endeavours or, synonymously, due diligence, meaning that the party's obligation is no more than to take all necessary and reasonable measures within its power to prevent or stop such acts. The fact that

organized criminals or anyone else misappropriate or vandalise cultural property does not of itself indicate that the party to the conflict has failed in its legal duty. At the same time, the obligation on a party to an armed conflict is certainly no less than to take all necessary and reasonable measures within its power to prevent or, if need be, to stop others from misappropriating or vandalising cultural property. A party breaches its international obligations if its military forces fail to do everything they can to these ends.

160. Commanders should impress on subordinates that preventing and, if necessary, putting a stop to all forms of theft, pillage or other misappropriation and of vandalism of cultural property by others is an essential element of mission success. Looting of cultural property is a source of income for hostile non-state armed groups and terrorist organizations, while vandalism of cultural property can embitter and prolong an armed conflict. Military personnel must treat suppressing such acts with the seriousness it deserves.

161. For more on this rule in the context of belligerent occupation, see §§187–194.

G. REPRISALS AGAINST CULTURAL PROPERTY

It is prohibited to make cultural property the object of reprisals.

162. In the past, one way of compelling opposing military forces to comply with LOAC was by engaging in reprisals. A reprisal was a measure which, on its face, was itself a violation of LOAC but which was justified as a matter of international law if it was taken for the purpose of inducing the adversary to comply with the laws of war and if it was not disproportionate. So, for example, if one state bombarded an undefended town in another state, killing thousands of civilians, the second state might execute a hundred prisoners of war from the military forces of the first state as a means of 'encouraging' the first state to abide by the rules on bombardment. Over time, however, reprisals have been gradually outlawed under LOAC. Now, just as measures of reprisal against prisoners of war and others are absolutely prohibited, so too is it absolutely prohibited to make cultural property the object of reprisals. No considerations of supposed military necessity can legally justify such measures, which in many instances will constitute war crimes.

V.

PROTECTION OF CULTURAL PROPERTY DURING BELLIGERENT OCCUPATION

A. CONCEPT, COMMENCEMENT AND TERMINATION

163. 'Belligerent occupation', often referred to simply as 'occupation', is a distinct legal state within IAC that comes into being when part or the whole of the territory of a state falls under the control and is placed under the governing authority of the military forces of another state. This legal state brings with it both rights and duties under LOAC for the occupying power. These rights and duties are in no way a consequence of the transfer to the occupying power of sovereign title to the territory occupied. Belligerent occupation is not the same as conquest, which, as it is, is no longer a lawful means for a state to acquire title to the territory of another. On the contrary, international law imposes duties on an occupying power in a reflection of the occupant's status as no more than the territory's custodian, in the temporary displacement of the governing authority of the sovereign, and international law vests rights in an occupying power chiefly to enable it to perform this custodianship role. Belligerent occupation is, in effect, a holding pattern, pending the restoration of the sovereign's governing authority.

164. Whether a legal state of belligerent occupation arises is an objective question of international law, the answer to which depends on whether the international legal test for belligerent occupation is met on the facts (see §§167–169). It is immaterial for these purposes whether the occupying power considers itself a mere occupant or something else. The occupying power may well view the territory as its own or as independent territory. What matters, however, is not the subjective view of the occupying power but the objective position under international law. If, as a matter of international law, the situation is one of belligerent occupation, the occupying power will bear the corresponding obligations and rights under LOAC, regardless of whether it accepts them or not.

165. There are various situations of displacement or complement of sovereign authority over territory which, while not amounting under international law to belligerent occupation, bear factual similarities to it. Examples include Security Council-mandated stabilization operations in which one or more foreign military contingents are deployed in the territory of a UN member state in support of a temporary UN civil administration or similar civilian mission. As a matter of international law, the law of belligerent occupation does not apply to such operations.

There is no reason, however, why national military contingents deployed on such operations may not—subject to the terms of the Security Council mandate and of any necessary consent on the part of the territorial state—base their conduct, *mutatis mutandis*, on the rules of LOAC governing belligerent occupation, including the rules on the protection of cultural property.

166. It ought to go without saying but may pay to underline that belligerent occupation cannot, by definition, exist in the context of NIAC.

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

167. According to customary international law, territory is considered occupied when it is actually placed under the authority of the hostile army. Putting it another way, a legal state of belligerent occupation commences when the governing authority of the territorial sovereign, a previous belligerent occupant or some other force in previous control of the territory is displaced by the governing authority of the military forces of a foreign state. No formal act is required. It is a simple question of fact. If the hostile army is in actual control of the territory to the exclusion on the ground of any rival governing authority, the territory is under belligerent occupation within the meaning of international law. Occupation starts the moment such control is established and ends the moment it is relinquished or lost.

168. Since occupation is defined by reference to the establishment of territorial control, it extends geographically only to the territory where this authority has been established and can be exercised. One consequence is that pockets of ongoing or renewed hostilities can be interspersed within surrounding occupied territory.

169. The ousting of previous governing authority does not necessarily mean the breakdown of local administration. It may well be that the competent local administrative authorities, including those in charge of the conservation and protection of cultural property, remain in place and continue to function. What belligerent occupation means is that, for the duration of the occupation, these authorities cease to take their orders from the ousted political authorities.

B. GENERAL OBLIGATIONS OF OCCUPYING POWER

An occupying power must take all measures within its power to restore and to ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the occupied territory.

170. The general obligations of an occupying power are twofold and proceed from the premise that the occupant is no more than a temporary custodian of the territory and its inhabitants. Both of these general obligations have implications when it comes to the protection and preservation of cultural property in occupied territory.

171. Taking the second general obligation first, an occupying power must respect, unless absolutely prevented, the laws in force in the occupied territory. In the context of cultural property, this means that, unless absolutely prevented from doing so, the occupying power must leave in place and abide by any laws for the protection and preservation of immovable or movable cultural property applicable in the territory (including in its internal waters and, where the requisite control is exercised, its territorial sea) prior to the onset of the occupation. This logically implies that the occupant must allow the competent local authorities to fulfil any duties or exercise any rights they may have under such laws.

172. A corollary of this general obligation is that an occupying power must, unless absolutely prevented from doing so, comply with any existing laws regulating the authorization of archaeological excavations in the territory. Where a legal regime on archaeological excavations is in place, an occupant may not engage in or sponsor digs in the territory except in accordance with the applicable law. Nor may it usurp the authority of the competent local authorities by purporting to authorize digs itself. The same is the case, *mutatis mutandis*, for any existing laws on the export, other removal or transfer of ownership of cultural property and on the alteration or change of use of cultural property.

173. The first general obligation requires an occupying power to take all measures within its power to restore and ensure, as far as possible, public order and civil life in the territory. This too has implications for the protection of cultural property.

174. To begin with, an occupying power must ensure, as far as possible, that any existing laws prohibiting misappropriation or vandalism of cultural property in the territory (including in its internal waters and, where relevant, its territorial sea) are enforced. The same goes for laws for the preservation more broadly of cultural property, such as local planning laws regulating construction on or near sensitive sites, laws on the upkeep and alteration of historic buildings, laws pertaining to the authorization of archaeological excavations, and laws governing the trade in art and antiquities, including export controls. Putting it simply, where the second general obligation requires an occupying power, unless absolutely prevented from doing so, to leave in place and abide by the territory's cultural property laws itself, the first general obligation requires it to ensure, as far as possible, that others abide by them too. What this means in practice will depend on the circumstances. It may involve as little as not interfering with the competent administrative authorities, police and courts in their enforcement of the applicable cultural property laws. It may involve assisting them. It may even, *in extremis*, require the occupant to enforce the cultural property laws itself by way of inspecting premises, seizing cultural property of doubtful provenance,

arresting suspects and, in the event of the failure of the local courts adequately to discharge their functions, prosecuting persons in its military courts.

175. Additionally, the first general obligation permits, where necessary, the occupying power to promulgate laws itself for the maintenance of public order and civil life, including laws for the protection and preservation of the cultural property of the occupied territory (including of its internal waters and, where relevant, its territorial sea). *A fortiori*, the first general obligation on occupying power permits the promulgation of any laws necessary to acquit the specific obligations with respect to cultural property in occupied territory placed by international law on an occupying power. Examples include the customary and treaty-based obligation to prohibit all forms of theft, pillage, misappropriation or vandalism of cultural property (see §§187–194); the customary and treaty-based obligation to prohibit any illicit export, other removal or transfer of ownership of cultural property (see §§203–205); the treaty-based obligation to prohibit any archaeological excavation, except where the excavation is strictly required to safeguard, record or preserve cultural property (see §§206–209); and the treaty-based obligation to prohibit any alteration to or change of use of cultural property that is intended to conceal or destroy cultural, historical or scientific evidence (see §§210–212).

C. OBLIGATIONS IN COMMON WITH HOSTILITIES

176. Many of the obligations binding during hostilities on the parties to the conflict are equally binding during belligerent occupation on the occupying power. The same goes, *mutatis mutandis*, for much best practice. In both regards, most of what has been said above in Part IV is applicable, with the necessary modifications, here.

(*i*) Identifying cultural property

177. Just as in the context of hostilities (see §§71–82), the most basic preconditions to protecting cultural property during belligerent occupation are to identify what and where the cultural property to be protected is and to communicate this information effectively to those engaged in the military aspects of the occupation.

> During the European campaigns of the Second World War, US commanders were issued with zone handbooks containing sections listing objects, structures and sites of cultural significance. In the case of occupied Germany, Supreme Headquarters Allied Expeditionary Forces (SHAEF) promulgated an 'Official List of Protected Monuments in Germany', followed by an 'Official List (SHAEF List Revised) of Protected Structures or Installations of Architectural, Artistic, Historical or Cultural Importance in the United States Zone of Germany', along with Army Services Force Manual M336–17, entitled 'Atlas on Churches, Museums, Libraries and other Cultural Institutions in Germany'.

178. As during hostilities (see §82), assessing the cultural significance of an object, structure or site across which military forces come and in respect of which they are

uncertain is a job for experts, as is ascertaining the geographical extent of archaeological or other historic sites whose perimeters may be ill-defined. To these ends, occupying forces should have recourse in the first instance to the competent national authorities, meaning the civilian authorities of the displaced sovereign responsible for the preservation and management of the cultural heritage in question. If these authorities are unavailable, the task should fall to any specialist service or personnel within the occupying forces for the protection of cultural property. These services and personnel may in turn find it advisable to call in help from civilian professionals, such as archaeologists and art historians, and local communities, including their religious and other leaders. It is also good practice to seek the advice or other assistance of UNESCO or some other appropriate organization or institution.

(*ii*) Destruction of or damage to cultural property

179. Cultural property in occupied territory is by definition under the control of the military forces of the occupying power. As a result, the occupying power is prohibited from destroying or damaging such property unless this is imperatively required by military necessity (see §§125–127). Just as during hostilities, any destruction of cultural property in occupied territory that is not justified by military necessity constitutes a war crime. Perpetrators have been convicted for such destruction by both international and national criminal courts and tribunals.

180. Where an occupying power is bound by the 1999 Second Protocol, any decision to invoke military necessity to justify destroying or damaging cultural property must be taken by an officer commanding a force equivalent in size to at least a battalion, unless circumstances do not permit (see §128). The same should apply as a matter of best practice where an occupying power is not bound by the Protocol.

181. When it comes to cultural property under enhanced protection, an occupying power bound by the 1999 Second Protocol is absolutely prohibited from destroying or damaging it (see §129). No considerations of military necessity can justify such destruction or damage. The same should apply as a matter of best practice in relation to cultural property under special protection.

(*iii*) Use of cultural property or its immediate surroundings

182. The prohibition on making any use of cultural property or its immediate surroundings for purposes likely to expose the property to destruction or damage unless such use is imperatively required by military necessity (see §§130–137) takes on a particular practical significance during belligerent occupation, when military forces are more likely to look to accommodate headquarters or troops in available buildings or to construct camps, with the attendant earthworks, use of heavy machinery, movement of motor vehicles and helicopters, and other activities posing a risk to the preservation of cultural property. As during hostilities, any use of cultural

property or its immediate surroundings during belligerent occupation that is likely to lead to a deterioration in its state of preservation or that presents a risk of vandalism or pillage is prohibited, except in rare cases where this use is imperatively required by the exigencies of the military situation.

183. Ensuring that cultural property and its immediate surroundings are not used during belligerent occupation for purposes likely to destroy or damage the property calls for foresight and planning on the part of commanders. Prevention of such use may require commanders to place buildings and sites off-limits to troops.

Eisenhower's General Order No 68 of 29 December 1943 (see §42) provided in part:

1. Buildings.

(*a*) No building listed in the sections 'Works of Art' in the 'Zone Hand-Books' of Italy issued by the Political Warfare Executive to all Allied Military Government officers will be used for military purposes without the explicit permission of the Allied Commander-in-Chief or of the General Officer Commanding-in-Chief, 15th Army Group in each individual case.

(*b*) Commanders concerned are authorised, as a further measure of security, to close and put out of bounds for troops any of the buildings listed in AMG 'Zone Hand-Book' that they deem necessary.

Notices to that effect will be affixed to the buildings, and guards provided to enforce them if necessary.

(*c*) Allied Military Government officers are prepared to furnish commanders with a list of historical buildings other than those listed in the AMG 'Zone Hand-Book'. These buildings are of secondary importance and may be used for military purposes when deemed necessary. Commanders are reminded that buildings containing art collections, scientific objects … should not be occupied when alternative accommodations are available.

These stipulations were restated in an analogous military directive issued on 26 May 1944.

184. Avoidable damage to cultural property, especially of a religious character, by occupying forces arouses anger among local populations, thereby posing a risk to those forces' security. Commanders must do everything within their power to emphasize the need to operate mindfully around buildings and sites of historical, artistic or architectural significance, including archaeological sites, and around museums, galleries, libraries and other collections.

(*iv*) Misappropriation and vandalism of cultural property

(a) By military forces themselves

185. All forms of theft, pillage or other misappropriation and of vandalism of cultural property by military forces are absolutely prohibited during belligerent occupation, as they are during hostilities (see §§154–156). All intentional acts of this sort constitute war crimes. Commanders must make this prohibition and its consequences clear to their subordinates through such measures as the promulgation of general orders, and must ensure that the prohibition is rigorously enforced through disciplinary sanctions and, in appropriate cases, through the referral of the matter to the relevant military or civilian criminal justice authorities for the purpose of prosecution. They may need to place buildings and sites of cultural significance off-

limits to their forces.

> Eisenhower's General Order No 68 of 29 December 1943 (see above §42) provided in part:
>
> 2. Looting, Wanton Damage and Sacrilege.
>
> The prevention of looting, wanton damage and sacrilege of buildings is a command responsibility. The seriousness of such an offence will be explained to all Allied personnel.
>
> These stipulations were restated in an analogous military directive of 26 May 1944.

186. As during hostilities (see §155), commanders of occupying forces must spell out in unambiguous terms that what a soldier may view as the harmless taking of a souvenir or as innocent graffiti is in fact a violation of the laws of armed conflict for which that soldier may face a war crimes prosecution. Commanders should also emphasize to subordinates that strict refrainment from all forms of theft, pillage or other misappropriation and of vandalism of cultural property is an essential element of mission success, since such acts are guaranteed to inflame local resentment and may end up publicised by national and international media with damaging consequences for global public opinion. Soldiers should be told to report any finds of movable cultural property to the relevant authorities.

(b) By others

187. As well as refraining themselves from all forms of theft, pillage or other misappropriation and of vandalism of cultural property in occupied territory, occupying forces must prohibit, prevent and, if necessary, put a stop to the commission of such acts by others, including by organized criminal groups (see §§157–161). In the event that a belligerent occupant of coastal territory exercises the requisite control over the adjacent territorial sea, it will be obliged to prohibit, prevent and, if necessary, put a stop to all forms of theft, pillage or other misappropriation and of vandalism of any underwater cultural property on the territorial seabed.

188. The general obligation on a belligerent occupant to take all measures within its power to restore and ensure, as far as possible, public order and civil life in the territory already requires it to ensure, to the extent possible, that any existing laws prohibiting misappropriation or vandalism of cultural property in the territory (including in its internal waters and, where relevant, its territorial sea) are enforced and permits it, where necessary, to promulgate laws itself to this end (see §175). The specific rules on the protection of cultural property during belligerent occupation go one step further, however, by requiring, not just permitting, the occupying power to prohibit all forms of theft, pillage or other misappropriation and of vandalism of cultural property. This obligation represents an exception to the occupying power's general obligation to leave undisturbed the existing legal regime in the territory. The resulting prohibition may in practice be additional to any similar prohibition found in the law already in force in the territory. The difference is that it can be enforced in the military courts of the occupying power, instead of in the local courts.

189. The further obligations on an occupying power to prevent and put a stop to all forms of theft, pillage or other misappropriation and of vandalism of cultural property mean that occupying forces must take all necessary and reasonable measures within their power to these ends. They must, in other words, do everything they can. As during hostilities (see §160), commanders should underline to subordinates that preventing and, if need be, putting a stop to all forms of theft, pillage or other misappropriation and of vandalism of cultural property in occupied territory is an essential element of mission success.

190. Preventing and putting a stop to theft, pillage or other misappropriation and of vandalism of cultural property during belligerent occupation demand measures on the part of commanders such as declaring off-limits to the public and posting armed guards on museums, galleries, libraries and other collections, as well as archaeological sites and historic buildings; mounting patrols to deter and, if necessary, stop looting; outlawing the sale and purchase within the territory of local antiquities, artworks, manuscripts and so on; inspecting premises, including the homes, of persons suspected of stealing, illicitly excavating or illicitly dealing in movable cultural property; and seizing cultural property suspected of having been stolen, illicitly excavated or illicitly dealt in. In the event that a belligerent occupant of coastal territory exercises the requisite control over the territorial sea, the measures required to prevent and, if necessary, put a stop to all forms of theft, pillage or other misappropriation and of vandalism of any underwater cultural property on the territorial seabed might include, as necessary and feasible, the imposition of maritime exclusion zones around wrecks and submerged structures and the institution of regimes of visit and search at sea and of inspections in port.

During the Second World War, British and US military governments in occupied territory, in the exercise of their rights and fulfilment of their general obligations as occupying powers, promulgated regulations for the protection of immovable and movable cultural property from the local populace and other civilians. On 24 November 1943, for example, the British Military Administration in the occupied Italian colonies of Tripolitania and Cyrenaica, in modern-day Libya, issued a Proclamation on Preservation of Antiquities, vesting in the military government temporary rights over all antiquities in the territories and forbidding their unlicensed excavation, removal, sale, concealment or destruction.

Various national contingents in occupation of parts of Iraq took effective measures over late 2003 and throughout 2004 (and, beyond the context of belligerent occupation, subsequently) to prevent and put a stop to clandestine excavation of archaeological sites. Spanish troops, for example, surrounded the entirety of the site at Tell Nuffar (ancient Nibru/Nippur) with seven kilometres of wire entanglements and maintained regular helicopter overflight of the area, as did later Polish forces, who similarly fenced off and patrolled archaeological sites under their control. Dutch forces ensured the renewed and continued payment, by the Dutch ministry of defence and the *Deutsches Archäologisches Institut*, of the traditional Bedouin custodians of Warka (ancient Uruk) so as to facilitate their guarding of the site, and stepped in themselves at one point to detain looters and seize and return their spoils. The deployment by Italy of the *Carabinieri Tutela Patrimonio Culturale* (see §69) prevented looting and

vandalism of archaeological sites in Dhi Qar province and led to the recovery of stolen artefacts.

191. Prevention of misappropriation and vandalism of cultural property in occupied territory can also benefit from communication and cooperation between occupying forces and the local populace, including its civic and religious leaders. Local people and their leaders may be prepared to provide intelligence on such acts, especially when those involved are outsiders, and to bring social pressure to bear on any persons within their communities known or suspected to be involved in them. This is likely especially to be the case where occupying forces do all they can to protect the local cultural heritage and exhibit cultural sensitivity when guarding buildings and sites, especially religious ones, and searching premises, especially homes.

192. A simple but important way in which occupying forces can help to prevent all forms of misappropriation of cultural property is by not providing thieves and traffickers with a market. Military forces in occupied territory should refrain from buying movable cultural property, and commanders should make clear to their subordinates the possibility and in many cases probability that purchasing a 'souvenir' undermines their own security and the security of the inhabitants of the territory, whose welfare is their responsibility. Commanders should also seize and, where possible, return to its rightful owner any trafficked cultural property purchased by their troops.

193. Preventing and putting a stop to theft, pillage or other misappropriation and of vandalism of cultural property during belligerent occupation calls for foresight and thoughtful planning on the part of commanders in advance of the establishment of control over the territory. Military forces need to identify ahead of time and move swiftly to secure any buildings and sites at risk of looting or vandalism. This may involve considering whether and which religious or other minorities may be targeted in the course of any temporary unrest.

By December 1943, US Monuments, Fine Arts and Archives (MFA&A) officers had drawn up plans for the rapid protection of historic buildings on the fall of Rome to Allied forces. On Rome's eventual capture in June 1944, an MFA&A officer entered the city before US troops.

194. Occupying forces can assist in putting a stop to and, in the longer term, preventing misappropriation of cultural property during belligerent occupation by reporting any known theft of artworks and antiquities to UNESCO, which publicizes international alerts regarding stolen cultural property; to INTERPOL, which maintains a database of stolen works of art; and to the International Council of Museums (ICOM), which disseminates 'Red Lists' of cultural objects at risk of illegal sale or purchase.

D. OBLIGATIONS UNIQUE TO BELLIGERENT OCCUPATION

(*i*) Support for competent authorities

195. As a function of one of its general obligations under the law of belligerent occupation (see §171), an occupying power must, unless absolutely prevented from doing so, leave intact and free to function any administrative authorities responsible for cultural property in the territory. This means that, subject to the specific obligations with respect to cultural property imposed by international law on the occupying power, the task of conserving cultural property in the territory continues to fall during belligerent occupation to the competent authorities of the occupied territory. The occupying power, however, must do more than simply let these authorities get on with their job. It has two positive obligations in this regard.

An occupying power must as far as possible support the competent authorities of the occupied territory in safeguarding and preserving cultural property.

196. Going beyond its obligation to refrain from hampering their work, an occupying power must, as far as possible, actively support the competent authorities in safeguarding and preserving cultural property in the territory.

Title 18 ('Monuments, Fine Arts and Archives') of the Military Government Regulations promulgated in the aftermath of the Second World War by the Office of Military Government (OMG) for Germany obliged the OMG of the various *Länder* within the US Zone of Occupation to make available to the competent German authorities, if requested by them, 'such assistance in the protection of cultural structures as appear[ed] appropriate'.

National contingents in occupation of parts of Iraq actively supported local authorities over 2003 and 2004 (and, outside the context of belligerent occupation, later) in the protection of the country's archaeological sites and the rehabilitation of its antiquities services. Archaeologists embedded within Polish forces, for example, assessed—including from the air and via satellite imagery—and reported on the condition of various sites to, among others, the Iraqi Ministry of Culture and the State Board of Antiquities and Heritage (SBAH). They also assisted in the re-establishment, training and equipping, including with new stations and observation towers, of the Iraqi archaeological police ('Facility Protection Service' or FPS) and in repairing and equipping regional offices of the SBAH and training staff. Italy's *Carabinieri Tutela Patrimonio Culturale* also cooperated closely with the regional direction of the SBAH and trained persons responsible for protecting sites. For their part, Dutch forces supported unofficial but no less important local heritage 'authorities' by reinstating and maintaining for the duration of their deployment the payment of the traditional Bedouin custodians of Warka (Uruk).

197. 'Safeguarding' refers to measures to protect cultural property from the foreseeable effects of armed conflict, for example by removing it from the vicinity of current or potential military operations or by providing for its *in situ* protection (see

§§145–149). The occupying power must, as far as possible, assist the competent authorities of the occupied territory in their efforts to move cultural property away from the danger zone or to reinforce and insulate it on site.

198. ‘Preserving’ refers to measures taken after the cessation of active hostilities to maintain the state of cultural property in the occupied territory, measures that would ordinarily be considered peacetime measures. The occupying power must, as far as possible, assist the competent authorities in implementing the legislative and administrative regime in force in the territory for the preservation of cultural property. This includes, for example, helping to ensure compliance with local planning laws regulating construction on or near sensitive sites, laws on the upkeep and alteration of historic buildings, laws pertaining to the authorization of archaeological excavations, and laws governing the trade in art and antiquities, including export controls.

199. A crucial element of support for the competent authorities in preserving cultural property in occupied territory is the coordinated and orderly handover at the close of occupation of any archaeological or other cultural sites previously under the control of the occupying power. A seamless transition from foreign military to local civilian custodianship is essential if misappropriation and vandalism of cultural property is to be prevented.

Where it proves necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and where the competent authorities of the occupied territory are unable to take such measures, the occupying power must as far as possible, and in close cooperation with the competent authorities, take the most necessary measures of preservation.

200. The competent authorities of the occupied territory may find themselves faced with the logistical and technical challenge of preventing the deterioration of cultural property damaged in the course of hostilities. A historic building, harmed in the fighting, may be at risk of collapse or its interiors exposed to the elements. Scorched manuscripts may threaten to disintegrate. But the competent authorities may lack the capacity to do what is needed to preserve this cultural property. In these circumstances, the occupying power is legally obliged, as far as possible, and in collaboration with the competent authorities, to take measures strictly essential to this end. The form these measures take should be determined only in close consultation with the competent authorities, who might usefully be encouraged also to request technical assistance from UNESCO and relevant non-governmental organizations. It is only in the most urgent situations of imminent collapse that one might conceive of structural intervention by the occupying power.

(*ii*) Prohibition and prevention of certain acts

201. The general obligation on a belligerent occupant to take all measures within its power to restore and ensure, as far as possible, public order and civil life in the territory already requires it to ensure, as far as possible, the enforcement within the territory of any existing laws regulating the export, other removal or transfer of ownership of cultural property; of any existing laws regulating archaeological excavations (including in the territory's internal waters and, where the requisite control is exercised, its territorial sea); and of any existing laws regulating the alteration or change of use of cultural property (including again in the territory's internal waters and, where relevant, its territorial sea) (see §174). The same general obligation also already permits the occupying power, where necessary, to promulgate such laws itself (see §175). The specific rules on the protection of cultural property during belligerent occupation go one step further, however, by requiring, not just permitting, the occupying power to prohibit in relation to the territory the illicit export, other removal or transfer of ownership of cultural property; to prohibit any archaeological excavation in the territory (including in its internal waters and, in relevant cases, its territorial sea), except where this is strictly required to safeguard, record or preserve cultural property; and to prohibit any alteration to or change of use of cultural property in the territory (including in its internal waters and, where relevant, territorial sea) that is intended to conceal or destroy cultural, historical or scientific evidence. Like the obligation to prohibit in occupied territory all forms of theft, pillage or misappropriation and of vandalism of cultural property (see §§187–194), these obligations represent exceptions to the occupying power's general obligation to leave undisturbed the existing legal regime in the territory. Again, the resulting prohibitions may in practice be additional to any similar prohibition found in the law already in force in the territory. The difference is that they can be enforced in the military courts of the occupying power, instead of in the local courts.

202. In addition to prohibiting these various acts, the occupying power is obliged to prevent in relation to the territory the illicit export, other removal or transfer of ownership of cultural property; to prevent any archaeological excavation in the territory that is not strictly required to safeguard, record or preserve cultural property; and to prevent any alteration to or change of use of cultural property in the territory that is intended to conceal or destroy cultural, historical or scientific evidence. As with the obligation to prohibit all forms of theft, pillage or misappropriation and of vandalism of cultural property in the territory (see §§187–194), the further obligation to prevent the acts in question means that occupying forces must take all necessary and reasonable measures within their power to this end. In other words, they must do everything they can. Commanders are advised again (see §160) to highlight to subordinates that preventing such acts is an essential element of mission success.

(a) Illicit export, other removal or transfer of ownership of cultural property

An occupying power must prohibit and prevent in relation to the occupied territory any illicit export, other removal or transfer of ownership of cultural property.

203. Within the confines of occupied territory, the criminal traffic in movable cultural property that begins with its theft, pillage or other misappropriation usually ends with its illicit export or other removal from the territory, perhaps passing on the way via one or more dishonest transfers of ownership intended to disguise an object's provenance. Hand in hand, then, with its obligation to prohibit, prevent and, if necessary, put a stop to all forms of misappropriation of cultural property, an occupying power is obliged to prohibit and prevent any illicit export, other removal or transfer of ownership of cultural property by anyone. *A fortiori*, it must not engage in any such acts itself. By 'illicit' is meant contrary to the domestic law in force in the territory or to international law or otherwise under compulsion.

204. In practical terms, preventing the illicit export or other removal of cultural property from occupied territory logically requires the occupying forces to institute and maintain a regime of inspections at border posts, ports and airports and to seize any cultural property either lacking the requisite certification or otherwise suspected of being destined for illicit export or other removal. Any such property should, where possible, be returned to its rightful owner. Insofar, moreover, as the obligation to prevent the illicit export or other removal of cultural property from the territory presupposes an obligation on the occupying power not to engage in such acts itself, commanders must seek to ensure that military personnel do not smuggle artworks and artefacts out of the country, if need be by instituting baggage and body checks of those departing on leave or at the end of their deployment.

During the occupation of Iraq, the commander of Multinational Division–Central South issued a supplement to his Order No 19 of late 2003 in which he explained and emphasized to military personnel the international sanctions against the illicit traffic in Iraqi cultural property.

205. As with the misappropriation of cultural property in occupied territory (see §§187–194), occupying forces can assist in preventing illicit export or other removal of cultural property from occupied territory by reporting any known theft of artworks and antiquities to UNESCO, INTERPOL and ICOM.

(b) Archaeological excavations

States parties to the 1999 Second Protocol in occupation of the whole or part of the territory of another state party must prohibit and

prevent any archaeological excavation in the occupied territory, except where the excavation is strictly required to safeguard, record or preserve cultural property.

States not parties to the 1999 Second Protocol in occupation of the whole or part of the territory of another state should do the same.

Any archaeological excavation in the occupied territory must, unless circumstances do not permit, be carried out in close cooperation with the competent authorities of the territory.

206. Article 9(1)(*b*) of the 1999 Second Protocol to the 1954 Hague Convention requires an occupying power that is party to the Protocol to prohibit and prevent any archaeological excavation in the occupied territory (including in its internal waters and, where the requisite control is exercised, its territorial sea), except where this is strictly required to safeguard, record or preserve cultural property. *A fortiori*, an occupying power must not engage in any such acts itself. The obligation goes beyond clandestine archaeological excavations, which as it is will usually fall within the prohibition on all forms of theft, pillage or other misappropriation and of vandalism of cultural property in occupied territory. Article 9(1)(*b*) of the Second Protocol extends to archaeological excavations undertaken publicly. It encompasses too digs authorized by the competent national authorities, including digs in progress. While this may seem odd, the rule is a precautionary one. It is premised on the calculation that the only guarantee of preventing illicit archaeological excavations in occupied territory is to ban all archaeological excavations for the duration of the occupation.

207. Where an occupying power is not party to the Second Protocol, best practice suggests that it should nonetheless do what article 9(1)(*b*) directs.

208. Measures to prevent archaeological excavations in the territory might include declaring off-limits and posting armed guards on archaeological sites on land and imposing maritime exclusion zones around wrecks and other archaeological sites under water.

209. The exception for archaeological excavations that are strictly required to safeguard, record or preserve cultural property allows an occupying power to permit the continuation of digs in progress insofar as this is necessary to record finds already unearthed and to prepare the site for suspension of the work. It also allows the occupying power to authorize new digs insofar as they are essential to protect and record any finds thrown up by military operations or otherwise uncovered over the course of the occupation. This latter point is backed by the Recommendation on International Principles Applicable to Archaeological Excavations, adopted by the General Conference of UNESCO in 1956, which states that, in the event of chance finds being made, particularly during military works, the occupying power should take all possible measures to protect these finds. The Recommendation adds that any such

finds should be handed over, on the termination of hostilities, to the competent authorities of the territory previously occupied, together with all documentation relating to them. For its part, article 9(2) of the Second Protocol adds that any archaeological excavation that does take place in occupied territory must, unless circumstances do not permit, be carried out in close cooperation with the competent national authorities of the occupied territory.

(c) Alteration and change of use of cultural property

States parties to the 1999 Second Protocol in occupation of the whole or part of the territory of another state party must prohibit and prevent any alteration to or change of use of cultural property that is intended to conceal or destroy cultural, historical or scientific evidence.

States not parties to the 1999 Second Protocol in occupation of the whole or part of the territory of another state should do the same.

Any alteration to or change of use of cultural property in the occupied territory must, unless circumstances do not permit, be carried out in close cooperation with the competent authorities of that territory.

210. Article 9(1)(*c*) of the 1999 Second Protocol to the 1954 Hague Convention requires an occupying power that is party to the Protocol to prohibit and prevent any alteration to or change of use of cultural property in the territory (including in its internal waters and, where relevant, territorial sea) that is intended to conceal or destroy cultural, historical or scientific evidence. *A fortiori*, an occupying power must not engage in any such acts itself. Alteration of cultural property involves changes to the fabric of the object, structure or site.

211. Where an occupying power is not party to the Second Protocol, best practice is to do nonetheless what article 9(1)(*c*) provides.

212. Only those alterations to or changes of use of cultural property in occupied territory that are intended to destroy or conceal cultural, historical or scientific evidence fall within the occupying power's obligations of prohibition and prevention. Where, however, any permissible alteration or change of use takes place, article 9(2) of the Second Protocol specifies that it must, unless circumstances do not permit, be carried out in close cooperation with the competent national authorities of the occupied territory.

VI.

DISTINCTIVE MARKING OF CULTURAL PROPERTY

A. MARKING OF CULTURAL PROPERTY TO FACILITATE RECOGNITION

(*i*) Cultural property in general

To facilitate its recognition, states may mark cultural property with the distinctive emblem of cultural property used once.

213. The 1954 Hague Convention creates what is referred to as the 'distinctive emblem' of cultural property. In the technical heraldic language of article 16(1) of the Convention, the emblem comprises a shield, pointed below, per saltire blue and white. In layperson's terms, the emblem takes the form of a shield consisting of a royal-blue square, one of the angles of which forms the point of a shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle. An image of the emblem can be found in appendix III to this manual. The emblem is not to be confused with the emblem of the World Heritage Convention, which is also depicted in appendix IIII. Commanders should ensure that their subordinates recognize the distinctive emblem of cultural property.

214. When used alone, the distinctive emblem indicates the general level of protection afforded under international law to all objects, structures and sites qualifying as cultural property. In principle, a single emblem may be placed on both immovable and movable cultural property, but practicality and aesthetics militate against its use on movables, which is extremely rare. Commanders should ensure that their subordinates understand the significance of the display on cultural property of the distinctive emblem used once.

215. As provided in article 6 of the 1954 Hague Convention, states parties to the Convention are expressly permitted to affix the emblem to or otherwise depict it on cultural property so as to facilitate the property's recognition as cultural property. Distinctive marking of cultural property is not, however, obligatory. States parties may but are not required to indicate cultural property by means of the emblem. In practice, moreover, distinctive marking of cultural property is rare. The consequence for military forces of the fact that the use of the emblem is optional is crucial. It means that just because cultural property is not marked does not mean that it is not protected by the Convention. Even less does it mean that the property is not protected by customary international law. In short, while the presence of the emblem on an object,

structure or site should be taken by military forces to indicate that the object, structure or site is protected as cultural property, the absence of the emblem says nothing either way.

216. It is not unlawful for a state not party to the Convention to mark cultural property with the emblem. But again it is not obligatory. As such, military forces should again treat the absence of the emblem as neither here nor there.

217. Article 17(4) of the 1954 Hague Convention stipulates that the distinctive emblem may not be placed on immovable cultural property unless at the same time there is displayed an authorization duly dated and signed by the competent authority of the state party in question. The display of such authorization is even rarer than the use of the emblem itself.

218. If undertaken at all, the marking of cultural property with the distinctive emblem tends to be done by the relevant civilian authorities. It is not out of the question, however, that military forces, whether during hostilities or belligerent occupation, may wish to place the emblem on at least certain cultural property under their control or on perimeter fencing around it as a means of indicating that the property is out of bounds to their own troops, to the local populace and others, or to both. They may equally wish to mark cultural property as a precaution against the dangers arising from military operations more broadly. Where they wish to mark cultural property with the emblem, military forces should seek the advice and assistance of any specialist service or personnel responsible within their ranks for the protection of cultural property, of relevant civilian cultural heritage professionals or of UNESCO. UNESCO has in the past provided military forces with copies of the emblem for this purpose.

(*ii*) Cultural property under special protection

During armed conflict, states parties to the 1954 Hague Convention must mark cultural property under special protection with the distinctive emblem of cultural property repeated three times in a triangular formation (one shield below).

219. Article 10 of the 1954 Hague Convention stipulates that, during an armed conflict, immovable cultural property under special protection must, not just may, display the distinctive emblem repeated three times in a triangular formation (one shield below), as per article 17(1)(*a*). An image of the emblem repeated three times can be found in appendix III to this manual. This display, like any display of the emblem, must, strictly speaking, be accompanied by an authorization duly dated and signed by the Party's competent authority. Commanders should ensure that their subordinates understand the significance of the display on immovable cultural property of the distinctive emblem of cultural property repeated three times. Whether

the marking during armed conflict of cultural property under special protection falls in practice to military forces or to civilian authorities depends on the state party in question.

(*iii*) Transport of cultural property

During armed conflict, states parties to the 1954 Hague Convention must mark transport engaged exclusively in the transfer of cultural property with the distinctive emblem of cultural property repeated three times in a triangular formation (one shield below).

220. Article 12(2) of the 1954 Hague Convention stipulates that states parties to the 1954 Hague Convention must mark transport engaged exclusively in the transfer of cultural property with the distinctive emblem of cultural property repeated three times in a triangular formation (one shield below). An image of the emblem repeated three times can be found in appendix III to this manual. Commanders should ensure that their subordinates understand the significance of the display on means of transport of the distinctive emblem of cultural property repeated three times. Whether the marking during armed conflict of means of transport engaged exclusively in the transfer of cultural property falls in practice to military forces or to civilian authorities depends on the state party in question.

(*iv*) Cultural property under enhanced protection

During armed conflict, states parties to the 1999 Second Protocol are encouraged to mark cultural property under enhanced protection with the distinctive emblem for cultural property under enhanced protection.

221. The 1999 Second Protocol makes no specific provision for distinctive marking of cultural property under enhanced protection. But in 2015 the states parties to the Second Protocol created a distinctive emblem for cultural property under enhanced protection. An image of the distinctive emblem for cultural property under enhanced protection can be found in appendix III to this manual. Commanders should ensure that their subordinates understand the significance of the display on cultural property of the distinctive emblem for cultural property under enhanced protection. Whether the marking during armed conflict of cultural property under enhanced protection falls in practice to military forces or to civilian authorities depends on the state party in question.

222. The marking during armed conflict of cultural property under enhanced protection with the distinctive emblem for cultural property under enhanced protection is not obligatory. States parties may but are not required to indicate cultural property under enhanced protection by means of the emblem. As a consequence, the fact that cultural property under enhanced protection does not bear the emblem does not mean that it does not enjoy enhanced protection under the Second Protocol.

B. MISUSE OF DISTINCTIVE EMBLEM AND SIMILAR SIGNS

The misuse during armed conflict of the distinctive emblem of cultural property is prohibited.

The use during armed conflict for any purpose whatsoever of a sign resembling the distinctive emblem of cultural property is also prohibited.

223. It is prohibited for military forces to misuse the distinctive emblem of cultural property during armed conflict, including belligerent occupation. In certain cases it may even amount to a war crime. A typical misuse of the emblem is its display on an object, structure or site that is not cultural property in an effort to shield it from attack by the adversary. It is also prohibited to use any sign resembling the distinctive emblem of cultural property.

224. Commanders should ensure that the value of these rules is made clear to their subordinates. Both the abuse of the emblem and the use of similar emblems undermine the protection of cultural property in armed conflict. Abuse risks bringing the emblem into disrepute even when it is used on genuine cultural property, while the use of similar emblems is liable to lead to confusion in the minds of military forces.

VII.

PERSONNEL ENGAGED IN THE PROTECTION OF CULTURAL PROPERTY

A. RESPECT FOR PERSONNEL ENGAGED IN THE PROTECTION OF CULTURAL PROPERTY

Personnel engaged in the protection of cultural property must, as far as is consistent with the interests of security, be respected. Where they and the cultural property for which they are responsible fall into the hands of an opposing party to the conflict, they must be allowed to continue to carry out their duties.

225. As far as is consistent with the security of the opposing party, all personnel engaged on behalf of a party to the conflict in the protection of cultural property must be respected. This means several things. First, such personnel must not be made the object of attack or of any other act of hostility by the opposing party unless and for as long as they take direct part in hostilities. Secondly, if they fall into the hands of the opposing party, they must not be detained, unless the interests of security genuinely compel this, and must under no circumstances be mistreated. Lastly, and as made clear in an explicit elaboration on the general obligation of respect, they must be permitted to continue to carry out their duties if both they and the cultural property for which they are responsible fall into the hands of the opposing party. The personnel to whom these rules relate comprise both those civilian authorities of a party to the conflict engaged in the protection of cultural property and any specialist personnel within that party's armed forces tasked with the same.

B. IDENTIFICATION OF PERSONNEL ENGAGED IN THE PROTECTION OF CULTURAL PROPERTY

Personnel engaged in the protection of cultural property may wear an armlet bearing the distinctive emblem of cultural property, issued and stamped by the competent authorities of the state concerned. They must carry a special identity card bearing the distinctive

emblem. They must not, without legitimate reason, be deprived of their identity card or the right to wear the armlet.

226. In accordance with article 21 of the Regulations for the execution of the 1954 Hague Convention, personnel engaged in the protection of cultural property may wear an armlet bearing the distinctive emblem of cultural property, issued and stamped by the competent authorities of the state on whose behalf they are engaged, and must carry a special identity card bearing the emblem and the embossed stamp of the competent authorities. They may not, without legitimate reason, be deprived of this card or of the right to wear the armlet. The precise appearance of the card is a matter for each state, although the information it contains is specified in article 21 of the Regulations.

VIII.

ASSISTANCE IN THE PROTECTION OF CULTURAL PROPERTY

A. ASSISTANCE AND MILITARY FORCES

227. A variety of bodies, both intergovernmental and non-governmental, along with individual states, are capable of providing assistance to military forces, both in peacetime and after the outbreak of hostilities, with a view to the protection of cultural property in armed conflict.

228. Military forces faced with technical challenges on the ground or educational and training needs in relation to the protection of cultural property in armed conflict may benefit from the assistance of these bodies and states. Whether they request such assistance themselves or, as is more likely, through the relevant civilian authorities will depend on their state.

B. ASSISTANCE FROM RELEVANT BODIES

(*i*) UNESCO

229. When it comes to assistance in the protection of cultural property in armed conflict, international law and practice accord a special place to the United Nations Educational, Scientific and Cultural Organization (UNESCO).

230. Article 23(1) of the 1954 Hague Convention and article 33(1) of the 1999 Second Protocol provide that states parties to the respective instruments may call on UNESCO, including in peacetime, for technical assistance in organizing the protection of their cultural property in the event of armed conflict or in connection with any other problem arising out of the application of the Convention or its Regulations or of the Second Protocol, as the case may be. Article 23(2) of the Convention and article 33(3) of the Second Protocol go further by authorizing UNESCO to make proposals to states parties on such matters on its own initiative. In the specific case of non-international armed conflicts, article 19(3) of the Convention and article 22(7) of the Second Protocol authorize UNESCO to offer its services to the parties to any non-international armed conflict to which the respective instruments apply. But UNESCO's authority with respect to the protection of cultural property in armed conflict is not limited to situations to which the Convention and Second Protocol apply. In accordance with

article I(2)(*c*) of its Constitution, the member states of UNESCO, an intergovernmental organization, confer on it a mandate for 'assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science'. As the practice of the Organization and its member states shows, this mandate empowers UNESCO take measures outside the formal scope of the Hague regime to promote and facilitate the protection of cultural property in armed conflict, both international and non-international. Indeed, in late 2015, the Organization's General Conference adopted a strategy for the reinforcement of UNESCO's action for the protection of culture and the promotion of cultural pluralism in the event of armed conflict (UNESCO doc. 38C/49).

231. Examples of the kind of technical assistance in the protection of cultural property in armed conflict that UNESCO can provide are cited in article 33(1) of the Second Protocol, which mentions preparatory action in peacetime to safeguard cultural property, preventive and organizational measures for emergency situations, and the compilation of national inventories of cultural property. Others can be found in Table 3 of Annex III to the Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (UNESCO doc. CLT-09/CONF/219/3 REV. 4, 22 March 2012) and in the strategy for the reinforcement of UNESCO's action for the protection of culture and the promotion of cultural pluralism in the event of armed conflict adopted by the UNESCO General Conference in 2015 (see §230). Of particular relevance to the protection of cultural property once armed conflict has broken out are the services of the Emergency Preparedness and Response Unit (CLT/EPR), established within UNESCO's Culture Sector. But UNESCO's services in peacetime education and training of military forces should not be overlooked either.

(*ii*) The Committee for the Protection of Cultural Property in the Event of Armed Conflict

232. The Committee for the Protection of Cultural Property in the Event of Armed Conflict, an intergovernmental committee established pursuant to the 1999 Second Protocol, performs a range of functions in connection with the Protocol, most of which are of no direct concern to military forces. The Committee is supported by a Fund for the Protection of Cultural Property in the Event of Armed Conflict also created under the Protocol.

233. Among its various tasks, which include the grant of enhanced protection, the Committee receives and considers requests for international assistance in support of emergency or other measures for the protection of cultural property during hostilities or for its immediate recovery on the close of hostilities. Examples of the sorts of technical and consultative measures contemplated can be found in Table 2 of Annex III to the Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed

Conflict (UNESCO doc. CLT-09/CONF/219/3 REV. 4, 22 March 2012), as well as in the report submitted to the Committee on the use of the financial assistance granted to Mali from the Fund in connection with the non-international armed conflict in that state (see UNESCO doc. CLT-13/8.COM/CONF.203/5, 24 September 2013). Any state party to the Second Protocol may request international assistance from the Committee, as may any party to an armed conflict which is not a party to the Second Protocol but which accepts and applies its provisions during the conflict in accordance with article 3(2) of the Protocol. Such requests would be expected to be made by the relevant civilian authorities, not by military forces themselves.

(*iii*) The International Committee of the Red Cross (ICRC)

234. The International Committee of the Red Cross (ICRC), the leading organization for the promotion of respect for LOAC, plays its part in the protection of cultural property in armed conflict.

235. In addition to promoting implementation of and compliance with, *inter alia*, the treaty-based and customary rules of LOAC on the protection of cultural property, including through military education and training, the ICRC enjoys advisory status before the Committee for the Protection of Cultural Property in the Event of Armed Conflict. It also has a relevant role to play on the ground on the outbreak of armed conflict. Subject to the consent of the parties to the conflict, it may undertake humanitarian activities in favour of the victims of armed conflict, among them those whose objects, structures and sites of cultural significance are imperilled or have been damaged, destroyed or unlawfully taken. For example, in 1956, during Israel's occupation of the Sinai, the ICRC sent a delegate to check on the state of the ancient monastery of St Catherine and its residents.

236. Article 1(vi) of the memorandum of understanding agreed between UNESCO and the ICRC in 2016 recognizes a particular role for the ICRC in the provision of assistance for the protection of cultural property from the dangers arising from military operations. Article 1(vi) states that the ICRC 'may assist in rescuing specific cultural property at imminent risk, for example by facilitating the evacuation of collections and/or providing supplies and equipment needed to undertake emergency safeguarding measures'. Such assistance must be at the request of UNESCO or a party to the conflict, must have the agreement of all parties to the conflict, and must be provided in close consultation with concerned local actors, including the competent national authorities.

(*iv*) Non-governmental organizations

237. A range of non-governmental organizations (NGOs) are involved one way or another in the protection of cultural property in armed conflict. These include the International Committee of the Blue Shield (ICBS) and its constituent bodies, *viz*

Coordinating Council of Audiovisual Archives Associations (CCAAA), the International Council on Archives (ICA), the International Council of Museums (ICOM), the International Council on Monuments and Sites (ICOMOS) and the International Federation of Library Associations and Institutions (IFLA), as well as the International Centre for the Study of the Preservation and Restoration of Cultural Property (the Rome Centre or ICCROM), all of which enjoy advisory status before the Committee for the Protection of Cultural Property in the Event of Armed Conflict. Relevant too are the various national Blue Shield committees. Other, less institutionalized associations include Heritage for Peace.

238. What assistance these NGOs can offer military forces in connection with the protection of cultural property in armed conflict varies, from the names of relevant experts to education and training of military forces to satellite imagery of cultural property in conflict zones and 'no strike' lists.

C. ASSISTANCE VIA INTERSTATE COOPERATION

239. A state needs no permission to offer technical or other assistance to another state with a view to the protection of cultural property in armed conflict. Nor does a state need permission to ask for such assistance. For its part, the 1999 Second Protocol encourages states parties to provide technical assistance of all kinds, through the Committee for the Protection of Cultural Property in the Event of Armed Conflict (see §§232–234), to any state party or party to a conflict that requests it, as well as to provide technical assistance otherwise to states parties either bilaterally or multilaterally.

240. What technical assistance another state can offer for the protection of cultural property in armed conflict will depend on the state.

241. In 2015, in response to UNESCO's 'Unite4Heritage' campaign for the protection of cultural heritage in crisis areas, a 'Unite4Heritage' Task Force was established within the Italian *Arma dei Carabinieri*, whose *Tutela Patrimonio Culturale* (TPC) headquarters has experience in deployment to conflict zones for the purposes of protecting cultural property from looting and vandalism and of recovering stolen items (see §§69 and 190). The Task Force is composed of both TPC officers and civilian experts from the fields of archaeology, architecture, art history, conservation, restoration, museums studies, libraries and archives studies, geology and seismology. In early 2016, Italy and UNESCO agreed a memorandum of understanding setting out modalities for the deployment of the 'Unite4Heritage' Task Force, known colloquially as the 'blue helmets for culture'. The role envisaged for the Task Force is to deploy, where it is safe to do so, to areas affected by manmade crises or natural disasters in order to protect and preserve cultural heritage, including from illicit traffic, and to build local capacity to safeguard cultural heritage from future risks.

APPENDIX I

EXECUTIVE SUMMARY

◆ DEFINITION OF 'CULTURAL PROPERTY' ◆

The term 'cultural property' as defined in the 1954 Hague Convention means movable or immovable property, whether secular or religious and irrespective of origin or ownership, which is of great importance to the cultural heritage of a state. Examples include buildings and other monuments of historic, artistic or architectural significance; archaeological sites; artworks, antiquities, manuscripts, books, and collections of the same; and archives. The term also encompasses buildings for preserving or exhibiting and refuges for sheltering movable cultural property.

The term 'cultural property under special protection' refers to cultural property entered on the 'International Register of Cultural Property under Special Protection' pursuant to the 1954 Hague Convention.

The term 'cultural property under enhanced protection' refers to cultural property entered on the 'International List of Cultural Property under Enhanced Protection' pursuant to the 1999 Second Protocol.

◆ PREPARATORY MEASURES ◆

A. MILITARY REGULATIONS OR INSTRUCTIONS

States parties to the 1954 Hague Convention must introduce in peacetime into their military regulations or instructions provisions designed to ensure observance of the Convention and must foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples. States not parties to the Convention should do the same.

States parties to the 1999 Second Protocol must, as appropriate, incorporate into their military regulations guidelines and instructions on the protection of cultural property in armed conflict. States not parties to the Protocol should do the same.

B. MILITARY TRAINING

States parties to the 1954 Hague Convention must include the study of the Convention in their programmes of military training. States not parties to the Convention should do the same.

C. SPECIALIST MILITARY SERVICES OR PERSONNEL

States parties to the 1999 Second Protocol must, as appropriate, develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime military training and educational programmes on the protection of cultural property in armed conflict. States not parties to the Protocol should do the same.

◆ PROTECTION OF CULTURAL PROPERTY ◆ DURING HOSTILITIES

B. TARGETING IN RELATION TO CULTURAL PROPERTY

(*i*) Making cultural property the object of attack

(a) General rules

It is prohibited to attack cultural property unless it becomes a military objective and there is no feasible alternative for obtaining a similar military advantage.

Parties to the conflict must do everything feasible to verify that objectives to be attacked are not cultural property.

Parties to the conflict must cancel or suspend an attack if it becomes apparent that the objective is cultural property.

Where cultural property becomes a military objective and there is no feasible alternative to attacking it, any decision to attack the property by a party to the conflict bound by the 1999 Second Protocol must be taken by an officer commanding a force equivalent in size to at least a battalion, unless circumstances do not permit.

The same should apply where a party to the conflict not bound by the 1999 Second Protocol decides to attack cultural property.

Where cultural property becomes a military objective and there is no feasible alternative to attacking it, any party to the conflict bound by the 1999 Second Protocol that decides to attack the property must give advance warning whenever circumstances permit.

The same should apply where a party to the conflict not bound by the 1999 Second Protocol decides to attack cultural property.

(*b*) *Special rule for cultural property under enhanced protection*

Parties to the conflict bound by the 1999 Second Protocol are prohibited from making cultural property under enhanced protection the object of attack unless:

— by its use it becomes a military objective;
— the attack is the only feasible means of terminating such use
— all feasible precautions are taken in the choice of means and methods of attack to avoid or in any event minimise damage to the cultural property; and
— unless the requirements of immediate self-defence do not permit, 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, and reasonable time is given to the opposing forces to redress the situation.

(c) Special rule for transport of cultural property

Parties to the conflict are prohibited from making means of transport engaged exclusively in the transfer of cultural property the object of attack.

(*ii*) Incidental damage to cultural property in the course of attack

It is prohibited to launch an attack that may be expected to cause incidental damage to cultural property that would be excessive in relation to the concrete and direct military advantage anticipated.

Parties to the conflict must take all feasible precautions in the choice of means and methods of attack to avoid or in any event minimise incidental damage to cultural property.

Parties to the conflict must cancel or suspend an attack if it becomes apparent that it may be expected to cause incidental damage to cultural property that would be excessive in relation to the concrete and direct military advantage anticipated.

C. DESTRUCTION OF OR DAMAGE TO CULTURAL PROPERTY UNDER OWN CONTROL

(*i*) General rule

It is prohibited to destroy or damage cultural property under one's own control unless this is imperatively required by military necessity.

Where a party to the conflict bound by the 1999 Second Protocol invokes military necessity to destroy or damage cultural property under its control, the decision must be taken by an officer commanding a force equivalent in size to at least a battalion, unless circumstances do not permit.

The same should apply where a party to the conflict not bound by the 1999 Second Protocol invokes military necessity to destroy or damage cultural property under its control.

(*ii*) Special rule for cultural property under enhanced protection

Parties to the conflict bound by the 1999 Second Protocol are prohibited from destroying or damaging cultural property under enhanced protection under their own control.

D. USE OF CULTURAL PROPERTY OR ITS IMMEDIATE SURROUNDINGS

(*i*) General rule

It is prohibited to make any use of cultural property or its immediate surroundings for purposes likely to expose it to destruction or damage in the event of armed conflict unless this is imperatively required by military necessity.

Where a party to the conflict bound by the 1999 Second Protocol invokes military necessity to use cultural property for purposes likely to expose it to destruction or damage in the event of armed conflict, the decision must be taken by an officer commanding a force equivalent in size to at least a battalion, unless circumstances do not permit.

The same should apply where a party to the conflict not bound by the 1999 Second Protocol invokes military necessity to use cultural property for purposes likely to expose it to destruction or damage in the event of armed conflict.

(*ii*) Special rule on cultural property under enhanced protection

Parties to the conflict bound by the 1999 Second Protocol are prohibited from any use of cultural property under enhanced protection or its immediate surroundings in support of military action.

E. DANGERS TO CULTURAL PROPERTY RESULTING FROM MILITARY OPERATIONS

Parties to the conflict must, to the maximum extent feasible, take the necessary precautions to protect cultural property under their control against the dangers resulting from military operations.

Parties to the conflict must, to the maximum extent feasible, remove cultural property from the vicinity of military objectives or provide for its adequate *in situ* protection.

Parties to the conflict must, to the maximum extent feasible, avoid locating military objectives near cultural property.

F. MISAPPROPRIATION AND VANDALISM OF CULTURAL PROPERTY

(*i*) By military forces themselves

All forms of theft, pillage or other misappropriation and of vandalism of cultural property are prohibited.

(*ii*) By others

Parties to the conflict must prohibit, prevent and, if necessary, put a stop to all forms of theft, pillage or other misappropriation and of vandalism of cultural property by others, including by organized criminal groups.

G. REPRISALS AGAINST CULTURAL PROPERTY

It is prohibited to make cultural property the object of reprisals.

◆ PROTECTION OF CULTURAL PROPERTY ◆ DURING BELLIGERENT OCCUPATION

A. CONCEPT, COMMENCEMENT AND TERMINATION

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

B. GENERAL OBLIGATIONS OF OCCUPYING POWER

An occupying power must take all measures within its power to restore and to ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the occupied territory.

C. OBLIGATIONS UNIQUE TO BELLIGERENT OCCUPATION

(*i*) Support for competent authorities

An occupying power must as far as possible support the competent authorities of the occupied territory in safeguarding and preserving cultural property.

Where it proves necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and where the competent authorities of the occupied territory are unable to take such measures, the occupying power must as far as possible, and in close cooperation with the competent authorities, take the most necessary measures of preservation.

(*ii*) Prohibition and prevention of certain acts

(a) Illicit export, other removal or transfer of ownership of cultural property

An occupying power must prohibit and prevent in relation to the occupied territory any illicit export, other removal or transfer of ownership of cultural property.

(b) Archaeological excavations

States parties to the 1999 Second Protocol in occupation of the whole or part of the territory of another state party must prohibit and prevent any archaeological excavation in the occupied territory, except where the excavation is strictly required to safeguard, record or preserve cultural property.

States not parties to the 1999 Second Protocol in occupation of the whole or part of the territory of another state should do the same.

Any archaeological excavation in the occupied territory must, unless circumstances do not permit, be carried out in close cooperation with the competent authorities of the territory.

(c) Alteration and change of use of cultural property

States parties to the 1999 Second Protocol in occupation of the whole or part of the territory of another state party must prohibit and prevent any alteration to or change of use of cultural property that is intended to conceal or destroy cultural, historical or scientific evidence.

States not parties to the 1999 Second Protocol in occupation of the whole or part of the territory of another state should do the same.

Any alteration to or change of use of cultural property in the occupied territory must, unless circumstances do not permit, be carried out in close cooperation with the competent authorities of that territory.

◆ DISTINCTIVE MARKING OF CULTURAL PROPERTY ◆

A. MARKING OF CULTURAL PROPERTY TO FACILITATE RECOGNITION

(*i*) Cultural property in general

To facilitate its recognition, states may mark cultural property with the distinctive emblem of cultural property used once.

(*ii*) Cultural property under special protection

During armed conflict, states parties to the 1954 Hague Convention must mark cultural property under special protection with the distinctive emblem of cultural property repeated three times in a triangular formation (one shield below).

(*iii*) Transport of cultural property

During armed conflict, states parties to the 1954 Hague Convention must mark transport engaged exclusively in the transfer of cultural property with the distinctive emblem of cultural property repeated three times in a triangular formation (one shield below).

(*iv*) Cultural property under enhanced protection

During armed conflict, states parties to the 1999 Second Protocol are encouraged to mark cultural property under enhanced protection with the distinctive emblem for cultural property under enhanced protection.

B. MISUSE OF DISTINCTIVE EMBLEM AND SIMILAR SIGNS

The misuse during armed conflict of the distinctive emblem of cultural property is prohibited.

The use during armed conflict for any purpose whatsoever of a sign resembling the distinctive emblem of cultural property is also prohibited.

◆ PERSONNEL ENGAGED IN THE PROTECTION ◆ OF CULTURAL PROPERTY

A. RESPECT FOR PERSONNEL ENGAGED IN THE PROTECTION OF CULTURAL PROPERTY

Personnel engaged in the protection of cultural property must, as far as is consistent with the interests of security, be respected. Where they and the cultural property for which they are responsible fall into the hands of an opposing party to the conflict, they must be allowed to continue to carry out their duties.

B. IDENTIFICATION OF PERSONNEL ENGAGED IN THE PROTECTION OF CULTURAL PROPERTY

Personnel engaged in the protection of cultural property may wear an armlet bearing the distinctive emblem of cultural property, issued and stamped by the competent authorities of the state concerned. They must carry a special identity card bearing the distinctive emblem. They must not, without legitimate reason, be deprived of their identity card or the right to wear the armlet.

APPENDIX II

REGISTERS AND LISTS

International Register of Cultural Property under Special Protection

http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Register2015EN.pdf

International List of Cultural Property under Enhanced Protection

http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/19542P-enhanced-protection-list-en_20140320.pdf

World Heritage List

http://whc.unesco.org/en/list/

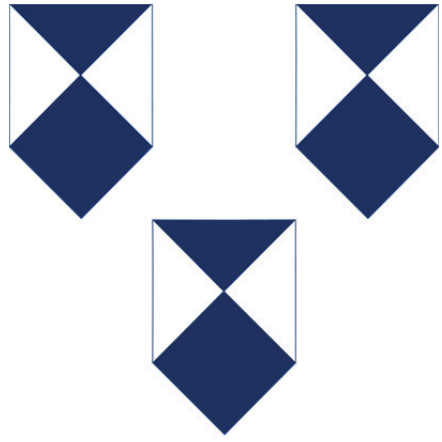
APPENDIX III

EMBLEMS

DISTINCTIVE EMBLEM OF CULTURAL PROPERTY

shading = royal blue

DISTINCTIVE EMBLEM OF CULTURAL PROPERTY REPEATED THREE TIMES IN A TRIANGULAR FORMATION (ONE SHIELD BELOW)



shading = royal blue

DISTINCTIVE EMBLEM OF CULTURAL PROPERTY UNDER ENHANCED PROTECTION

inner shading = royal blue

outer shading = red

WORLD HERITAGE EMBLEM

APPENDIX IV

CRIMINAL CASES ON THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONLFICT

INTERNATIONAL

International Military Tribunal, Nuremberg

Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946, Misc No 12 (1946), Cmd 6964 (charges including, in relation to four accused, war crimes and crimes against humanity for destruction and misappropriation of cultural property in occupied territories)

International Criminal Tribunal for the former Yugoslavia (ICTY)

Prosecutor v Blaškić, IT-95-14-T, Trial Chamber, Judgment, 3 March 2000 (charges including war crimes and crime against humanity of persecution for intentional and discriminatory destruction and misappropriation of cultural property in Bosnia-Herzegovina, one count being vacated in *Prosecutor v Blaškić*, IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004)

Prosecutor v Kordić and Čerkez, IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001 (charges including war crimes and crime against humanity of persecution for intentional and discriminatory destruction of cultural property in Bosnia-Herzegovina, one count being overturned in *Prosecutor v Kordić and Čerkez*, IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004)

Prosecutor v Plavšić, IT-00-39&40/1-S, Trial Chamber, Sentencing Judgment, 27 February 2003 (charges including war crimes and crime against humanity of persecution for intentional and discriminatory destruction of cultural property in Bosnia-Herzegovina)

Prosecutor v Naletilić and Martinović, IT-98-34-T, Trial Chamber, Judgment, 31 March 2003 (charges including war crimes and crime against humanity of persecution for intentional and discriminatory destruction of cultural property in Bosnia-Herzegovina)

Prosecutor v Stakić, IT-97-24-T, Trial Chamber, Judgment, 31 July 2003

(charges including crime against humanity of persecution for intentional and discriminatory destruction of cultural property in Bosnia-Herzegovina)

Prosecutor v Jokić, IT-01-42/1-S, Trial Chamber, Sentencing Judgment, 18 March 2004 (charges including war crimes for intentional attack on World Heritage site of Old Town of Dubrovnik)

Prosecutor v Deronjić, IT-02-61-S, Trial Chamber, Sentencing Judgment, 30 March 2004 (charges including crime against humanity of persecution for intentional and discriminatory destruction of cultural property in Bosnia-Herzegovina)

Prosecutor v Babić, IT-03-72-S, Trial Chamber, Sentencing Judgment, 29 June 2004 (charges including crime against humanity of persecution for intentional and discriminatory destruction of cultural property in Croatia)

Prosecutor v Brđanin, IT-99-36-T, Trial Chamber, Judgment, 1 September 2004 (charges including war crimes for intentional destruction of cultural property in Bosnia-Herzegovina)

Prosecutor v Strugar, IT-01-42-T, Trial Chamber, Judgment, 31 January 2005 (charges including war crimes for intentional attack on World Heritage site of Old Town of Dubrovnik)

Prosecutor v Hadžihasanović and Kubura, IT-01-47-T, Trial Chamber, Judgment, 15 March 2006 (charges including war crimes for intentional destruction of cultural property in Bosnia-Herzegovina)

Prosecutor v Krajišnik, IT-00-39-T, Trial Chamber, Judgment, 27 September 2006 (charges including crime against humanity of persecution for intentional and discriminatory destruction of cultural property in Bosnia-Herzegovina)

Prosecutor v Martić, IT-95-11-T, Trial Chamber, Judgment, 12 June 2007 (charges including war crimes for intentional destruction of and damage to cultural property in Croatia)

Prosecutor v Milutinović et al., IT-05-87-T, Trial Chamber, Judgment, 26 February 2009 (subsequently listed as *Prosecutor v Šainović* et al.) (charges including crime against humanity of persecution for intentional and discriminatory destruction of cultural property in Kosovo)

Prosecutor v Đorđević, IT-05-87/1-T, Trial Chamber, Judgment, 23 February 2011 (charges including crime against humanity of persecution for intentional and discriminatory destruction of cultural property in Kosovo)

Prosecutor v Stanišić and Župljanin, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013 (charges including crime against humanity of persecution for intentional and discriminatory destruction of cultural property in Bosnia-Herzegovina)

Prosecutor v Prlić et al., IT-04-74-T, Trial Chamber, Judgment, 29 May 2013 (charges including war crimes for intentional destruction of cultural property in Bosnia-Herzegovina, including Old Bridge at Mostar, case on appeal at time of writing)

Prosecutor v Šešelj, IT-03-67-T, Trial Chamber, Judgment, 31 March 2016 (charges including war crimes and crime against humanity of persecution for intentional and discriminatory destruction of cultural property in Bosnia-Herzegovina, case on appeal at time of writing)

Prosecutor v Karadžić, IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016 (charges including crime against humanity of persecution for intentional and discriminatory destruction of cultural property in Bosnia-Herzegovina, case on appeal at time of writing)

International Criminal Court (ICC)

Prosecutor v Al-Mahdi, ICC-01/12-01/15-171, Trial Chamber, Judgment and Sentence, 27 September 2016 (charge of war crimes for destruction of cultural property, including World Heritage-listed shrines, in Mali)

NATIONAL

Trial of Karl Lingenfelder, Permanent Military Tribunal, Metz, 11 March 1947, 9 Law Reports of Trials of War Criminals 67 (charge of war crimes for intentional destruction of cultural property in occupied territory)

Prosecutor v MP et al., Zadar District Court, K 74/96, 24 July 1997 (charges including war crimes for intentional attack on historic centre of Zadar, including the intentional attacks on pre-Romanesque church of Saint Donatius and Romanesque cathedral of Saint Anastasia)

Recent conflicts in Iraq, Syria, Libya, Yemen and Mali, along with a range of ongoing military occupations, have again highlighted the need to translate into practice the rules of international law for the protection of cultural property in armed conflict.

This manual serves as a practical guide to the implementation by military forces of these rules. It combines a military-focused account of the international legal obligations of states and individuals with suggestions as to best practice at the different levels of command and during the different phases of military operations by land, sea or air.

United Nations
Educational, Scientific and
Cultural Organization

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