

# POLICY BRIEF



How to protect outstanding cultural heritage from the ravages of war? Utilize the System of Enhanced Protection under the 1999 Second Protocol to the 1954 Hague Convention

By Seán Fobbe

April 2019 | No. 5







## ABOUT THE AUTHOR



Seán Fobbe is Chief Legal Officer of RASHID International, a worldwide network of archaeologists, cultural heritage experts, and other professionals dedicated to safeguarding the cultural heritage of Iraq. He leads a team of elite lawyers in their fight to secure the international rule of law, end the destruction of Iraqi heritage, and establish accountability for international crimes. RASHID International is a registered and audited non-profit organization headquartered in Germany.

Seán graduated from Ludwig-Maximilians-Universität with a degree in law, earning an award for exceptionally outstanding achievements in international law and a coveted general distinction. He specializes in international law, with a focus on international humanitarian law, human rights law, and cultural heritage law.

## ABOUT THE THINK TANK

The Antiquities Coalition unites a diverse group of experts in the global fight against cultural racketeering, the illicit trade in art and antiquities. This plunder for profit funds crime, armed conflict, and violent extremist organizations around the world, erasing our past and threatening our future. Through innovative and practical solutions, we tackle this challenge head on, empowering communities and countries in crisis.

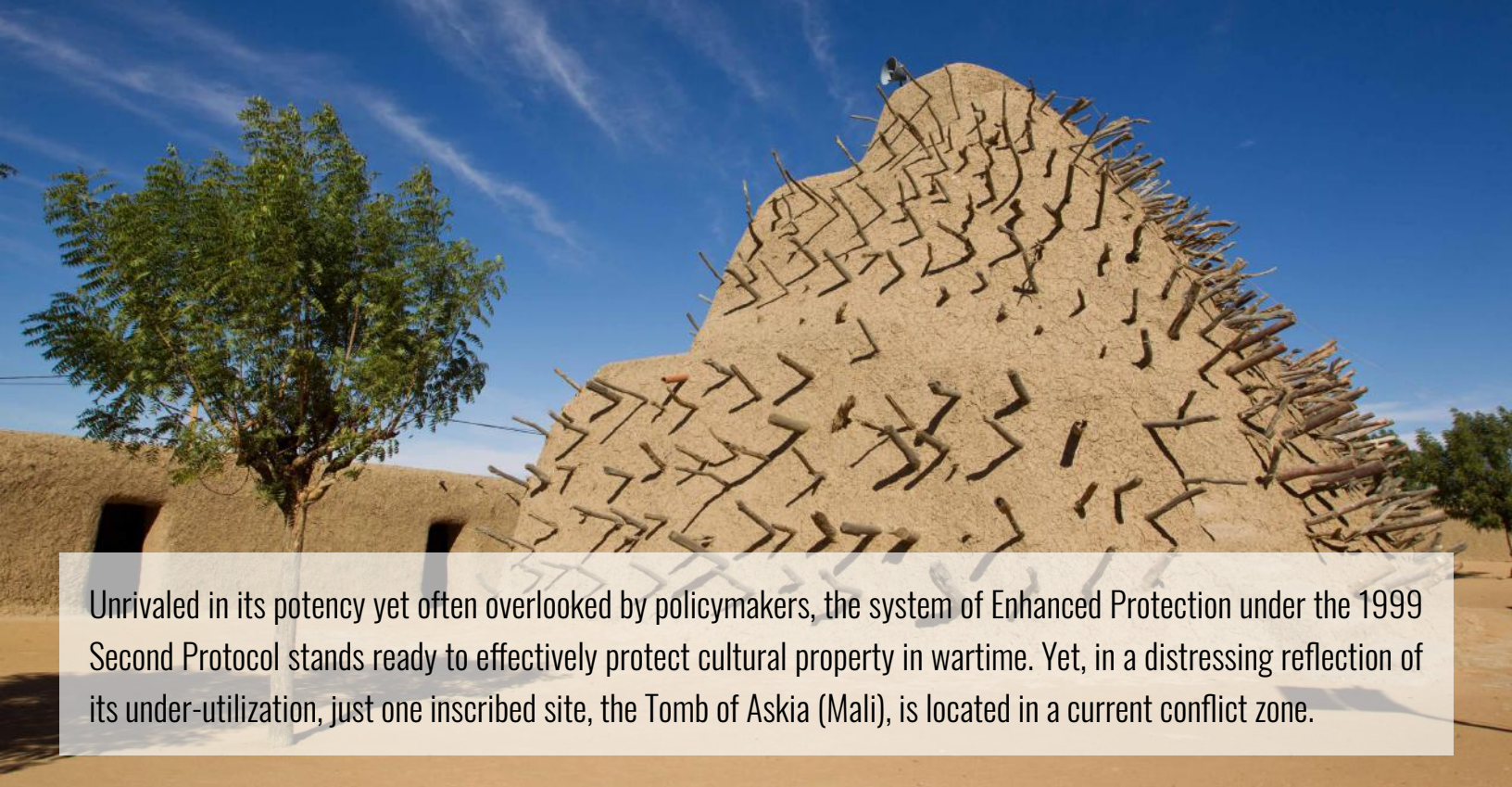
In 2016, as part of this mission, we launched the Antiquities Coalition Think Tank, joining forces with international experts, including leaders in the fields of preservation, business, law, security, and technology. Together, we are bringing high quality, results-oriented research to the world's decision-makers, especially those in the government and private sectors. Our goal is to strengthen policymakers' understanding of the challenges facing our shared heritage, and more importantly, to help them develop better solutions to protect it. However, the views expressed in these policy briefs are the author's own and do not necessarily reflect those of the Antiquities Coalition. We invite you to learn more at [thinktank.theantiquitiescoalition.org](http://thinktank.theantiquitiescoalition.org).

---

### About the Cover

The Castel del Monte is a unique masterpiece of medieval military architecture, located in the Apulia region of southeast Italy and completed in 1240. Blending elements from northern Europe, the Muslim world, and classical antiquity, the castle reflects the humanist and cosmopolitan spirit of its founder, Emperor Frederick II. It is inscribed on both the World Heritage List and the List of Cultural Property under Enhanced Protection.

*Author photo courtesy of [www.economy-business.de](http://www.economy-business.de)*



Unrivaled in its potency yet often overlooked by policymakers, the system of Enhanced Protection under the 1999 Second Protocol stands ready to effectively protect cultural property in wartime. Yet, in a distressing reflection of its under-utilization, just one inscribed site, the Tomb of Askia (Mali), is located in a current conflict zone.

The combined ease of access, strong legal protection, and practical-political impact offered to cultural heritage by the system of Enhanced Protection in wartime is second to none in international law.

## Executive Summary

Cultural heritage around the world continues to be threatened by war. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (‘1954 Hague Convention’) automatically confers protected status on every cultural property “of great importance to the cultural heritage of every people.” This very universality, however, is also its greatest weakness: it does not provide visibility to individual cultural sites or help military planners and field commanders choose priorities. In addition, the system of Special Protection under the 1954 Hague Convention is in a state of relative dormancy due to its requirement that sites be located an adequate distance from military objectives, and because of the politicization of the inscription process during the Angkor debacle of the 1970s. World Heritage status functions as a stop-gap measure for some sites, but is financially infeasible for most States and, in any case, provides no additional legal protection.

The system of Enhanced Protection under the 1999 Second Protocol to the 1954 Hague Convention addresses these shortcomings by uniting three important considerations: wider scope, ease of access, and strong legal protection. This article recommends that States ratify the 1999 Second Protocol, nominate relevant sites and objects for Enhanced Protection, and support the system of Enhanced Protection by providing and requesting financial and technical assistance from the Fund for the Protection of Cultural Property in the Event of Armed Conflict.





## Introduction

War remains a serious threat to cultural heritage around the world, but international law offers a number of effective safeguards to incentivize policymakers and military commanders to incorporate cultural heritage protection into battle and stabilization plans. The most famous and regularly cited international legal instrument protecting cultural heritage in times of war is the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict ('1954 Hague Convention'). With 133 State Parties, it is one of the most widely adopted cultural heritage protection regimes in the world.<sup>1</sup>

Whereas under the system of General Protection cultural property may be exposed or engaged in hostilities in cases of imperative military necessity, the obligation to prevent looting is absolute.

Underpinning the 1954 Hague Convention is an important consideration: the idea that cultural heritage is significant and automatically worthy of legal protection in times of armed conflict, with the caveat that only cultural property “of great importance to the cultural heritage of every people,” repositories for such cultural property, and “centers containing a large amount of cultural property” are protected under the Convention.<sup>2</sup> Consequently, the Hague Convention’s system of General Protection forbids both any “act of hostility directed against such property” and “any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict.”<sup>3</sup> However, this protection is not absolute, and may be unilaterally circumvented by both attackers and defenders in cases of “imperative military necessity.”<sup>4</sup>

Parties to the Hague Convention must furthermore “prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”<sup>5</sup> This provision constitutes a positive obligation to provide security and to prevent third parties, such as local looters and professional thieves, from pillaging museums and other cultural property.<sup>6</sup> The critical difference here is that unlike the prohibition against exposing or engaging cultural property during hostilities, the obligation to prevent *looting* may not be waived due to military necessity. Even if a State Party to the Convention found that it would provide a definite military advantage to loot cultural heritage or to let looting occur, prohibition and obligation stand strong.

The system of General Protection does very little to help military planners and field commanders in choosing priorities, or establish visibility of important cultural sites.

Yet, while universal and automatic protection is part of the significant appeal of the system of General Protection, this very broadness is also its greatest disadvantage as well. While the system does create an unqualified legal obligation to prevent looting, it does very little to help military planners and field commanders to choose priorities, or to heighten the visibility of individual cultural sites. Many countries are host to tens of thousands of registered cultural heritage sites and hundreds of thousands more that are unidentified, all of which are arguably protected under the 1954 Hague Convention.<sup>7</sup> Protecting all of them from acts of hostility might be possible with modern targeting technology and GIS databases, but posting guards to each and every one during active combat operations is an insurmountable difficulty even for the most well-resourced State in the world. Put succinctly: “he who wishes to defend everything, defends nothing.”<sup>8</sup> Apathy is a common response to problems viewed as impossible.

This article explores the various measures taken to counteract this danger. It analyzes the system of Special Protection, outlined in Chapter II of the 1954 Hague



In order to protect cultural property in armed conflict, only the List of World Heritage in Danger under the 1972 World Heritage Convention has played a role in the international arena; yet, it continues to function merely as a stop-gap measure.

The strict technical requirements of the system of Special Protection, in combination with its politicization in the 1970s, have relegated it to relative obscurity.

Convention, as well as the later World Heritage List and the List of World Heritage in Danger, created under the 1972 World Heritage Convention. Both measures could have provided a higher level of wartime protection than that offered by the system of General Protection, yet ultimately fell short. The system of Special Protection, already strict in its legal requirements, was politicized in the 1970s and thus rendered unworkable and dormant for decades. In order to protect cultural property in armed conflict, only the List of World Heritage in Danger under the 1972 World Heritage Convention has played a role in the international arena. While well-intentioned and politically influential, it continues to function merely as a stop-gap measure, and is financially and logistically unrealistic for the vast majority of countries in need.

However, a third, heretofore underutilized tool exists to fill the void left by both systems, and stands ready to effectively protect outstanding cultural property in wartime. This is the system of Enhanced Protection, a potent yet often overlooked mechanism created by the 1999 Second Protocol to the 1954 Hague Convention. The combined ease of access, strong legal protection, and practical-political impact offered by the system of Enhanced Protection is second to none in international law. Making use of it should be a key priority for any policymaker concerned about the protection of outstanding cultural heritage in armed conflict. This article recommends that States ratify the 1999 Second Protocol, nominate relevant sites and objects for Enhanced Protection, and support the system by providing and requesting financial and technical assistance.

## The Failure of the System of Special Protection

Within the 1954 Hague Convention, the system of Special Protection outlined in Chapter II offers a higher level of protection than that offered by the system of General Protection. In principle, a limited number of shelters intended to house movable cultural property, immovable cultural property of “very great importance,” and centers containing monuments are eligible to be placed under Special Protection and thereby gain immunity from acts of hostility or use of the property or its surroundings for military purposes.<sup>9</sup> To qualify for Special Protection, the cultural property in question must be situated an adequate distance away from any large industrial center or important military objective, and may not be used for military purposes. Special Protection may be granted after submission of a request to the UNESCO Director-General by the State Party on whose territory the cultural property is located, pending any objections. If a State Party submits a request in peacetime, but becomes embroiled in an armed conflict before the cultural property is inscribed, the Director-General may provisionally register the cultural property under Special Protection. However, should another State Party object to the request, the requesting party must either pursue arbitration proceedings or withdraw its request.<sup>10</sup>

While the Special Protection system should have enabled heightened protection of designated sites during wartime, it was never widely adopted. Only eighteen sites were ever registered, three of which were removed in 1994, and one in 2000.<sup>11</sup> Until 2015, the Vatican was the only bona fide cultural heritage site on the list, the others being refuges for emergency storage. This general lack of interest in Special Protection can be attributed to a number of obstacles.





The first major obstacle to sites receiving Special Protection is the requirement that they be “situated at an adequate distance” from industrial centers or important military objectives.<sup>12</sup> This condition is impossible to fulfill for many important sites, which are often located in or near cities. Furthermore, to this day, it is unclear what exactly constitutes an “adequate distance” or a “large industrial center.”<sup>13</sup>

The second major obstacle to the popularization of the Special Protection system was the politicization of the nomination and inscription process in the 1970s, which took shape around the site of Angkor Wat. In 1972, war broke out in the Cambodian province of Siem Reap, and the Khmer Republic attempted to place centers containing monuments at Angkor and Roluos, the monuments of Phnom Bok and Phnom Kron, and a refuge for movable cultural property at the Angkor Conservancy headquarters under Special Protection.<sup>14</sup> Angkor Wat, as a site of outstanding universal value not located near any military objectives, should have fulfilled all criteria for Special Protection.<sup>15</sup> However, Cuba, Egypt, Romania and Yugoslavia objected to the Khmer Republic's request on the grounds that they considered the then-government not to be the legitimate representative of the Khmer Republic. The Khmer Republic chose not to pursue the lengthy and costly arbitration procedure that would follow. The Director-General of UNESCO was further blocked from provisionally inscribing the cultural property, as this was only permissible for applications made during times of peace, and the request had been made in the midst of war.<sup>16</sup> This political power play consigned the Special Protection system to irrelevance and obscurity. No further inscriptions were made until 2015, when Mexico succeeded in placing nine cultural heritage sites under Special Protection.



Khmer Rouge troops march on Angkor Wat

Photo courtesy of the Documentation Center of Cambodia (DC-Cam)



## The List of World Heritage in Danger as a Stop-Gap Measure

The upfront cost to place a cultural heritage site on the World Heritage List are immense, and often prohibitive for many low- and middle-income countries.

Following the 1972 Angkor fiasco and the adoption of the World Heritage Convention in the same year, the international community's focus and efforts to protect heritage sites of outstanding value shifted from the 1954 Hague Convention to the 1972 World Heritage Convention, the World Heritage List, and the List of World Heritage in Danger. The List of World Heritage in Danger fulfills many of the functions that the Special Protection system should have: it draws serious international attention to sites threatened by armed conflict; raises the visibility of sites to such a degree that even the uninformed take notice; and greatly increases the political priority of protecting a site for host governments and hostile States, many of whom fear international condemnation.<sup>17</sup>

However, the effort necessary to attain World Heritage status makes it uniquely *unsuited* to the task of protecting cultural heritage in war, and while the List of World Heritage in Danger is a laudable effort, it remains nothing more than a stop-gap measure.

The upfront cost in terms of financial resources, time, and manpower for placing a cultural heritage site on the World Heritage List is massive and prohibitive for many poorer countries. In a 2007 review of U.K. World Heritage nominations, PricewaterhouseCoopers (PwC), found that it took an average of 4.8 years from naming a nomination coordinator to successful inscription on the World Heritage List, an estimated a cost of GBP 420,000 to GBP 570,000 (USD 870,000 to USD 1,180,000) for the bidding process alone, and GBP 13,000 to GBP 615,000 (USD 27,000 to USD 1,270,000) in additional management costs per year, with most sites ranging between GBP 100,000 and GBP 215,000 (USD 207,000 to USD 445,000) per year.<sup>18</sup> These numbers must then be adjusted for purchasing power in low-and middle-income countries.

When Iraq sought to place hundreds of sites on the World Heritage List on an expedited basis prior to the 2003 war, they were told the process would take at least eighteen months.

While the Operational Guidelines allow for expedited emergency listings, these are intended for exceptional circumstances and still require serious resources. For example, Iraq was in contact with UNESCO before the 2003 war and sought to place hundreds of sites on the World Heritage List on an expedited basis. However, Lyndel V. Prott, Director of UNESCO's Division of Cultural Heritage at the time, recounts that the country was turned down and told the process would take at least eighteen months.<sup>19</sup> Though the war-torn states of Libya, Syria, and Yemen added twelve sites to the List of World Heritage in Danger between 2013 and 2016, all of these had already been part of the World Heritage List for at least two years (and often for decades) before they were listed as endangered. The Bamiyan Valley in Afghanistan was placed on both the World Heritage List and the List of World Heritage in Danger in 2003, but this occurred two years *after* the war and the destruction of the Bamiyan Buddhas formed part of the justification of its outstanding universal value.<sup>20</sup> Financial difficulties, lack of expert knowledge in preparing applications, and the difficulty of establishing buffer zones may prevent requesting States from succeeding in placing more sites on the List. Furthermore, once listed, the buffer zones and extensive conservation activities required by the





World Heritage Committee Guidelines are expensive and difficult to implement and maintain, especially in urban areas.<sup>21</sup>

Even a World Heritage site can be attacked or used for military purposes if imperative military necessity is invoked.

Most critically, the World Heritage Convention offers even World Heritage sites no additional legal safeguards during armed conflict beyond those contained in the 1954 Hague Convention. While it is indeed a war crime under customary international law to damage cultural property and World Heritage status is immediate evidence of a site's protected status, even a World Heritage site can be attacked or used for military purposes if imperative military necessity is invoked. In this respect, even sites of outstanding universal value are no more protected than any ordinary site under General Protection.

Movable objects, and therefore most museum collections, are excluded from the protections of the World Heritage List.

Finally, World Heritage status is open only to immovable cultural and natural heritage sites, which themselves must be of outstanding universal value.<sup>22</sup> This requirement excludes all movable objects and many, perhaps most, museums. The National Museum of Iraq, despite containing cultural treasures of arguably outstanding universal value, was never eligible for inscription on its own. Nor were its contents—not the Harp of Ur, the Entemena Statue, the Mask of Warka, the Bassetki Statue, or the Sacred Vase of Warka—treasures of an importance equivalent to any World Heritage site. The British Museum never applied for World Heritage status, despite hosting arguably the world's largest collection of cultural treasures. The Louvre is indeed listed on the World Heritage List as part of the 'Banks of the Seine' ensemble; however, it did not win this distinction due to its astonishing contents, but for its architectural value in concert with its surroundings. The UNESCO description of the Royal Botanic Gardens of Kew references its plant collections, but the outstanding universal value is conferred by its landscape, covering a total 132 hectares.<sup>23</sup> While the Louvre and the Royal Botanic Gardens show that, technically, museums can be part of a World Heritage site, in practice it is very unlikely for them to make the list as sole institutions.

## An Answer to These Problems: the System of Enhanced Protection Under the 1999 Second Protocol

The 1999 Second Protocol to the 1954 Hague Convention addresses many of the shortcomings of both the original 1954 Hague Convention, including those of Special Protection, and the 1972 World Heritage Convention. The Second Protocol expands the provisions of the Hague Convention relating to protection of and respect for cultural property in wartime, thereby providing greater protection than before. It does not replace, but rather complements, the Hague Convention. Of the 133 State Parties to the Hague Convention, eighty-two have ratified the Second Protocol since its adoption in 1999,<sup>24</sup> with new Parties joining each year.

Perhaps most importantly, the Second Protocol includes the system of Enhanced Protection, a measure developed to ensure full and effective protection of specifically designated cultural property in the event of armed conflict. The system of Enhanced Protection unites three important considerations: wider scope, ease of access, and strong legal protection. Currently overlooked even by experts, this potentially powerful system can and should be utilized by policymakers concerned about the protection of outstanding cultural heritage during war.





The System of Enhanced Protection is far more inclusive than either the system of Special Protection or the World Heritage system.

### Wider Scope

In two critical departures from the system of Special Protection and the World Heritage List, the requirements for Enhanced Protection are much more inclusive, thereby greatly increasing the number of potential cultural properties eligible for inscription.<sup>25</sup> First, movable objects may also be eligible. Artistic masterworks, such as the Mona Lisa, could qualify individually. Second, the location requirement that so bedeviled Special Protection is eliminated. Generally speaking, any cultural property as defined by the Hague Convention is suitable, provided that it meets three criteria: it is of the greatest importance for humanity;<sup>26</sup> it is protected by adequate domestic legal and administrative measures recognizing its exceptional value and ensuring the highest level of protection;<sup>27</sup> and it is not used for military purposes or to shield military sites.

### Affordability and Ease of Access

The ease of access of the system of Enhanced Protection is second to none, with explicit safeguards against politicization, and financial and technical assistance available to requesting parties both at peace and at war.

Requests for Enhanced Protection cannot be blocked by dissenting State Parties.

Unlike the system of Special Protection, which was consigned to relative dormancy following the Cold War debacle over Angkor, requests for Enhanced Protection cannot be blocked by dissenting State Parties.<sup>28</sup> A State Party to the Second Protocol with either jurisdiction or control over a given cultural property may submit a request for Enhanced Protection. Since control is sufficient, the legitimacy of territorial claims is not prejudiced. Should dissent arise, in order to further reduce potential for abuse, the objection and arbitration procedure of the Hague Convention is replaced with a standing inter-governmental committee charged with impartially processing and resolving requests for Enhanced Protection by majority vote.

States with limited logistical and financial resources can successfully apply for Enhanced Protection utilizing a specially designated international fund.

In addition, unlike World Heritage status, which requires immense resources to attain, States with limited logistical and financial resources can successfully apply for Enhanced Protection. A special Fund for the Protection of Cultural Property in the Event of Armed Conflict is available to States party to the 1999 Second Protocol, providing financial or other assistance in peacetime, in periods of armed conflict, and in the immediate recovery period following the end of hostilities.<sup>29</sup> In addition, a party to a conflict who is not party to the 1999 Second Protocol, but who accepts and applies the provisions of the Protocol, may also request financial and technical assistance. Priority is given to cultural property under Enhanced Protection and to emergency requests, followed by requests of a preventative nature. The Committee for the Protection of Cultural Property in the Event of Armed Conflict processes all requests for assistance. Decisions are weighted according to the likelihood of assistance acting as a catalyst and multiplier for financial and technical contributions from other sources; the recipient's legislative, administrative, and financial commitment to the activity; the value of the activity; and the cost-effectiveness of the activity.<sup>30</sup> The Fund is voluntarily backed by States, international and non-governmental organizations, public and private bodies, and individuals.

Furthermore, in order to gain Enhanced Protection, even where States cannot afford to institute the “domestic legal and administrative measures recognizing [the cultural property in question’s] exceptional value and ensuring the highest level of protection” required for approval, they may still submit an Enhanced Protection request coupled with a request for international assistance in preparation,



development, or implementation of these measures.<sup>31</sup> On top of this, an emergency procedure for requesting provisional Enhanced Protection is available, during which the requesting Party does not have to fulfill the domestic safeguarding condition or even provide information on it.<sup>32</sup> The Second Protocol Committee is very understanding of the unique challenges faced by different States. In the case of the Tomb of Askia (Mali), Enhanced Protection was granted in December 2016 without the required laws in place. Mali was given eighteen months to adopt the necessary measures, plus a grant from the Fund to assist with the process.<sup>33</sup> In 2018, the Secretariat noted the challenging security situation in Mali, and the Committee extended the deadline by twenty-four months, at the same time highlighting the progress made so far.<sup>34</sup>

Finally, the process is inclusive and should prevent a neo-colonial bias in selection. The Second Protocol Committee is formed according to the principle of equitable geographical representation.<sup>35</sup> In 2019, it was composed of three States from the Asia-Pacific, two from Latin America and the Caribbean, two from Africa, three from Eastern Europe, and only two from the Western European and Others regional group.<sup>36</sup> However, its true advantage lies in its less expensive application process. Even though the World Heritage Committee is also formed according to equitable geographical representation, industrialized States dominate the List and this dominance is due to the cost of the application process.

### Strong Legal Protection

Enhanced Protection offers significant legal safeguards beyond those of General Protection and even Special Protection, including high-level immunity to military action. Under Enhanced Protection, the use of protected property and its surroundings in support of military action is never justified, not even by the most acute military necessity.<sup>37</sup> Cultural property may not be the subject of demolition, no matter what military necessity might dictate.<sup>38</sup>

Protected property gains immunity from all attack, only losing its protection if six cumulative conditions are met.<sup>39</sup> Failing to observe any one of these conditions when attacking property under Enhanced Protection is a war crime under the Second Protocol, triggering universal jurisdiction.<sup>40</sup> It is not necessary for damage to occur; the attack itself is already a criminal offense.<sup>41</sup> It would also represent clear evidence for war crimes under the Rome Statute and customary international law.<sup>42</sup>

## Policy Recommendations and Implications

Just seventeen sites, under the governance of ten countries, are presently registered under Enhanced Protection.<sup>43</sup> Of these, four were registered in 2010, one in 2011, five in 2013, two in 2016, one in 2017, and another four in 2018. Sixteen of these sites were previously registered as World Heritage sites, the National Central Library of Florence being the first non-World Heritage cultural property to be granted Enhanced Protection.<sup>44</sup> Assuming the pace of the past ten years continues (an average of about two sites per year), it would take more than 400 years for the remaining 829 cultural World Heritage sites (which, in principle, are automatically eligible) to receive Enhanced Protection. This does not even scratch the surface of the system's full potential, which is only realized in the protection of non-World Heritage sites and movable objects. It is telling that, with the exception of Lithuania, every State with a site on the List has at one point or another been a member of the

Under Enhanced Protection, the use of protected property and its surroundings in support of military action is never justified, not even by the most acute military necessity.

Assuming the pace of the past decade continues, it would take more than 400 years for the remaining 829 cultural World Heritage sites alone to receive Enhanced Protection.





Second Protocol Committee, which is tasked with processing inscriptions. Currently, the Enhanced Protection system remains a matter for experts only. Progress is being made, most notably championed by UNESCO and Blue Shield International, but it is glacially slow and the world must step up and accelerate the pace of nominations, inscriptions, and overall use and recognition of the system of Enhanced Protection.

Added political-legal pressure and visibility may turn indifference to action.

In the past, some States were hesitant to list sites publicly, as detractors argued that any public list also functions as a “hit list” for malicious actors such as Daesh. However, given the thoroughness with which Daesh purged much of the cultural heritage of Iraq, it is doubtful that they would have needed an international list to help point them to the sites that were well-known locally and nationally.<sup>45</sup> Applying the same reasoning to already published World Heritage sites would be patently absurd. Quite the opposite: no-strike lists are a textbook effort employed by militaries around the world.<sup>46</sup> Furthermore, any movable property inscribed on the List could form part of ‘no-loot lists,’ or lists of cultural property so important that any commander would recognize that he or she needs to step in to prevent them from being stolen. While the legal obligation to prevent theft and looting under Article 4(3) of the 1954 Hague Convention is absolute and should protect all cultural objects, political lethargy and lack of military capability in heritage protection matters are the reality in many States. Added political-legal pressure and visibility may turn indifference into action.

States should therefore:

- Accede to the 1999 Second Protocol to the 1954 Hague Convention in order to make use of the Enhanced Protection system. At present, 133 countries have ratified the 1954 Hague Convention; of these, just eighty-two have ratified the 1999 Second Protocol. The United States is a key absence.
- Promote and submit nominations to the Committee of the Second Protocol for inclusion on the List of Cultural Property under Enhanced Protection and, where necessary, make use of provisions that allow for international assistance during the inscription process, or consider emergency requests when time is of the essence. Cultural World Heritage sites are automatically eligible and should be submitted immediately.
- Militaries around the world should regularly check the List of Cultural Property under Enhanced Protection and incorporate listed property into their planning efforts, especially for ‘no-strike’ and ‘no-loot’ lists.
- Contribute, if able, financial resources to the Fund for the Protection of Cultural Property in Armed Conflict; those without significant financial wherewithal should request resources from the Fund.
- Offer technical assistance to other State Parties under Article 32(4) of the 1999 Second Protocol, including but not limited to preparatory action to safeguard cultural patrimony, creation of national inventories, and preventive and organizational measures for emergency situations.
- Alongside the United Nations and civil society, make every effort to disseminate information about the Enhanced Protection system and its legal implications to policymakers, military and diplomatic personnel, and the general public.



## Conclusion

A grant of Enhanced Protection to a cultural heritage site or object is evidence of its supreme importance to humankind, making it a rallying point for the international community and shifting the political and military calculus of war toward protection from attacks, military use, and looting. Its combination of scope, ease of access, and legal safeguards are second to none in cultural heritage law. The Enhanced Protection List should form an internationally agreed minimum content for no-strike and no-loot lists. The Enhanced Protection List has the potential to assume the same powerful role during wartime that the World Heritage List enjoys during times of peace. The Special Protection system still remains viable for specific-use cases, such as the designation and defense of refuges, and should not be forgotten. However, Enhanced Protection stands ready to effectively protect outstanding heritage sites and should be pursued by policymakers as assiduously as World Heritage nominations.

## Sources and Further Reading

Boylan, Patrick J: “Review of the Convention for the Protection of Cultural Property in Armed Conflict,” CLT-93/WS/12 (UNESCO 1993)

Brodie, Neil, M. Morag Kersel, Christina Luke, and Kathryn Walker Tubb (eds.): “Archaeology, Cultural Heritage and the Antiquities Trade” (University Press of Florida 2006)

Meeting of the Parties to the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict: “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 4 April 2016) [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/1999-SecondProtocol\\_Guidelines\\_2015\\_E.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/1999-SecondProtocol_Guidelines_2015_E.pdf)

O’Keefe, Roger: “The Protection of Cultural Property in Armed Conflict” (Cambridge University Press 2006)

PricewaterhouseCoopers: “The Costs and Benefits of World Heritage Site Status in the UK: Full Report” (UK Department of Culture, Media and Sport, December 2007)

Prott, Lyndel V.: “Protecting Cultural Heritage in Conflict” in: Brodie et al. (eds.): “Archaeology, Cultural Heritage and the Antiquities Trade,” p. 28.

Nováček, Karel et al.: “The Intentional Destruction of Cultural Heritage in Iraq as a Violation of Human Rights: Submission for the United Nations Special Rapporteur in the field of cultural rights” (RASHID International, 2016)





## Endnotes

<sup>1</sup> United Nations Educational, Scientific, and Cultural Organization. “List of State Parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention. The Hague, 14 May 1954.” UNESCO.org. <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E&order=alpha> (accessed February 7, 2019).

<sup>2</sup> Article 1, 1954 Hague Convention

<sup>3</sup> Article 4(1), 1954 Hague Convention. Acts of hostility encompass direct attacks, such as airstrikes, as well as demolitions, for example in order to open up a line of fire for defenders.

<sup>4</sup> Article 4(2), 1954 Hague Convention. The 1954 Hague Convention remains silent on what exactly constitutes imperative military necessity. Customary international law helps us fill in the blanks, suggesting that if cultural property is not a military objective, it may not be attacked, no matter how necessary this may seem to military commanders. This is known as the ‘principle of distinction,’ and is a core tenet of international humanitarian law.

<sup>5</sup> Article 4(3), 1954 Hague Convention

<sup>6</sup> Whether this provision refers to looting by third parties, or to the State’s own forces, is the subject of debate. The author supports the former, and argues that this provision constitutes a positive obligation to provide security and to prevent third parties, such as local looters or professional thieves, from looting cultural property. If the provision were a constraint only on the Party’s own armed forces, the text would read ‘refrain from’ as elsewhere in the Convention. See also O’Keefe, Roger: “The Protection of Cultural Property in Armed Conflict,” p. 133.

<sup>7</sup> Some argue that the system of General Protection applies only to registered sites, but this view is manifestly unsupported by the text of the Convention, which contains no such obligation, and the systematic comparison with Special Protection, which is predicated upon registration.

<sup>8</sup> Friedrich II. von Preußen: “Die Generalprinzipien des Krieges und ihre Anwendung auf die Taktik und Disziplin der preußischen Truppen,” Feldzugspläne, 2. Defensivpläne; Original quote: “Wer alles verteidigen will, verteidigt nichts.”

<sup>9</sup> Articles 8 and 9, 1954 Hague Convention

<sup>10</sup> Article 14, Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict

<sup>11</sup> United Nations Educational, Scientific, and Cultural Organization. (23 July 2015). *International Register of Cultural Property under Special Protection*, CLT/HER/CHP, available from <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Register2015EN.pdf>

<sup>12</sup> Examples listed in the Convention include “an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication.” See Article 8, 1954 Hague Convention.

<sup>13</sup> Many States did not even apply for Special Protection, including Italy (which hoped to register Venice, Vicenza, the center of Florence, Siena, Assisi, Rome within the Aurelian walls, Caserta, and Monreale, but was thwarted), Austria (which drew up a list of twenty-one sites, but proceeded no further), and the former USSR (which did not even attempt registration, explaining that “these traditional cultural centers are also major centers of political and industrial power, and major links in the communications system”). See O’Keefe, Roger: “The Protection of Cultural Property in Armed Conflict,” p. 145-146.

<sup>14</sup> O’Keefe, Roger: “The Protection of Cultural Property in Armed Conflict,” p. 153-154.

<sup>15</sup> Boylan, Patrick: “Review of the Convention for the Protection of Cultural Property in Armed Conflict,” para 6.21.

<sup>16</sup> O’Keefe, Roger: “The Protection of Cultural Property in Armed Conflict,” p. 154.

<sup>17</sup> The List of World Heritage in Danger may include “cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods and tidal waves.” See Article 11, 1972 World Heritage Convention.

<sup>18</sup> PricewaterhouseCoopers: “The Costs and Benefits of World Heritage Site Status in the UK - Full Report”, p. 30, 80-81; US dollar exchange rates were calculated according to the October 2007 rate of 2.07 USD per pound and rounded.

<sup>19</sup> Prot, Lyndel V.: “Protecting Cultural Heritage in Conflict” in: Brodie et al. (eds.): “Archaeology, Cultural Heritage and the Antiquities Trade,” p. 28.

<sup>20</sup> The Buddhas of Bamiyan were destroyed in March 2001, long before the start of the war in October 2001.

<sup>21</sup> For example, this can be seen with the World Heritage site of Erbil Citadel.

<sup>22</sup> Article 1 (“monuments,” “groups of buildings,” “sites”) and Article 11, 1972 World Heritage Convention

<sup>23</sup> United Nations Educational, Scientific, and Cultural Organization. “World Heritage List: Royal Botanic Gardens, Kew.” UNESCO.org <http://whc.unesco.org/en/list/1084> (accessed March 12, 2019).

<sup>24</sup> As of February 2019

<sup>25</sup> Article 10, 1999 Second Protocol and Article 1, 1954 Hague Convention, read in conjunction and contrasted with Article 8(1), 1954 Hague Convention

<sup>26</sup> The criterion “greatest importance for humanity” is far more inclusive than the “outstanding universal value” of the World Heritage Convention. Heritage of “national, regional or universal value” is eligible if it is of “exceptional cultural significance, and/or its uniqueness, and/or if its destruction would lead to irretrievable loss for humanity.” Heritage of “national, regional or universal value” is eligible if it is of “exceptional cultural significance, and/or its uniqueness, and/or if its destruction would lead to irretrievable loss for humanity.” The Guidelines for the Implementation of the 1999 Second Protocol include further clarifications. Together with general protection (“great importance”) and Special Protection (“very great importance”), Enhanced Protection forms a three-tier system of value. Though the value criterion is somewhat stricter than Special Protection, this is offset by the other modifications in scope. See UNESCO Doc. C54/18/13.COM/11 (October 10, 2018), para. 22, and 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, paras. 32 and 33.

<sup>27</sup> Adequate legal and administrative measures are said to at least require “the existence and implementation of national legislation reflecting Chapter 4 of the Second Protocol; the existence of military training plans that include a “cultural property” component; the drawing up of property inventories where applicable; the designation of competent authorities responsible for safeguarding cultural property; and the planning of emergency measures to ensure the protection of property against the risk of fire or building collapse.” See 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, paras 32 and 33.

<sup>28</sup> To guard against politicization of the process and a repeat of the Angkor fiasco, the 1999 Second Protocol states explicitly that “a decision to grant or deny enhanced protection may only be made on the basis of the criteria mentioned in Article 10,” i.e. that the cultural property in question is of the greatest importance for humanity, is protected by adequate domestic legal and administrative measures ensuring the highest level of protection, and is not used for military purposes or to shield military sites. State Parties can no longer ‘object’ but merely offer ‘representations’ which the Committee ‘shall consider’. A two-thirds majority (8 out of 12) is required for a positive outcome, and, in the case of representations made, a four-fifths majority (10 out of 12). See Articles 10(5), 11(5), and 26(2), 1999 Second Protocol.

<sup>29</sup> Article 29, 1999 Second Protocol; United Nations Educational, Scientific, and Cultural Organization, 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two (1954 and 1999) Protocols: The Fund for the Protection of Cultural Property in the Event of Armed Conflict, available from [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Fund-Protection\\_EN-web.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Fund-Protection_EN-web.pdf)

<sup>30</sup> Examples of emergency assistance provided by the Fund include the cases of Libya, which in 2016 was granted \$50,000 to prevent the deterioration, destruction, and looting of cultural property; and Mali, which in 2012 was awarded \$40,500 to protect cultural property in the north of the country and appraise the situation there. Mali was again granted \$40,000 in 2016 to place the Tomb of Askia under Enhanced Protection. Examples of peacetime financial assistance provided by the Fund include the case of El Salvador, which in 2011 was granted \$23,000 in order to publicize the Blue Shield emblem and its role, and identify cultural property to be placed under its protection.

<sup>31</sup> Articles 10(8) and 32, 1999 Second Protocol



<sup>32</sup> Article 11(9), 1999 Second Protocol; 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, para 63.

<sup>33</sup> UNESCO Doc. C54/18/13.COM/9 (2 October 2018), paras 1 and 4.

<sup>34</sup> UNESCO Doc. C54/18/13.COM/9 (2 October 2018), para 7; C54/18/13.COM/Decisions (12 December 2018), DECISION 13.COM 9.

<sup>35</sup> Article 24 (3), 1999 Second Protocol

<sup>36</sup> Members in 2019 were: Argentina, Armenia, Azerbaijan, Belgium, Cambodia, Cyprus, the Czech Republic, Egypt, El Salvador, Italy, Japan and Morocco.

<sup>37</sup> Articles 12 and 13, 1999 Second Protocol when contrasted with Articles 9 and 11, 1954 Hague Convention

<sup>38</sup> O'Keefe, Roger: "The Protection of Cultural Property in Armed Conflict," p. 273

<sup>39</sup> If cultural property has been given Enhanced Protection it may only be the object of attack if all six conditions are met cumulatively: 1. such property has become a military objective; 2. the primary reason of the attack is terminating its military use; 3. all feasible precautions are taken to avoid and/or minimize damage; 4. the attack is ordered at the highest level of operational command; 5. effective advance warning is issued requiring termination of military use; and 6. reasonable time is given to redress the situation. Conditions 4-6 do not apply in cases of immediate self-defense. Unlike cultural property under General Protection, neither location, nature or purpose, but only use can turn such property into a military objective. See Articles 12 and 13, 1999 Second Protocol when contrasted with Articles 9 and 11, 1954 Hague Convention.

<sup>40</sup> Articles 15(1)(b) and 16(1)(c), 1999 Second Protocol

<sup>41</sup> O'Keefe, Roger: "The Protection of Cultural Property in Armed Conflict," p. 278.

<sup>42</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) found that due to the World Heritage status of the Old Town of Dubrovnik, "all the property in the Old Town" was protected under international criminal law. See ICTY, *Prosecutor v Strugar*, IT-01-42-T, Judgment of 31 January 2005, para. 327. The Enhanced Protection criterion "greatest importance for humanity" denotes similar value.

<sup>43</sup> Armenia: Monastery of Geghard and the Upper Azat Valley; Azerbaijan: Walled City of Baku with the Shirvanshah's Palace and Maiden Tower, Gobustan Archaeological site; Belgium: House and Workshop of Victor Horta, Neolithic flint mines at Spiennes Mons, the Plantin-Moretus House-Workshops-Museum Complex and the Business Archives of the Officina Plantiniana; Cambodia: Angkor; Cyprus: Choirokoitia, Painted Churches in the Troodos Region, Paphos; Czech Republic: Tugendhat Villa in Brno; Italy: Castel del Monte, National Central Library of Florence, Villa Adriana; Georgia: Historical Monuments of Mtskheta; Lithuania: Kernave Archaeological Site; Mali: Tomb of Askia

<sup>44</sup> Although it should be noted that it is a component part of a much larger World Heritage site, the Historic Centre of Florence.

<sup>45</sup> For an example of Daesh publishing a list of sites to destroy and making good on its threat, see Nováček, Karel et al.: "The Intentional Destruction of Cultural Heritage in Iraq as a Violation of Human Rights - Submission for the United Nations Special Rapporteur in the field of cultural rights," p. 8-10.

<sup>46</sup> The United States treats "[r]eligious, cultural, historical institutions, and structures" as Category I Protected Objects (most sensitive, core of any no-strike list). See for example Enclosure B in the 2009 instructions from the Chairman of the Joint Chiefs of Staff: [https://www.aclu.org/files/dronefoia/dod/drone\\_dod\\_3160\\_01.pdf](https://www.aclu.org/files/dronefoia/dod/drone_dod_3160_01.pdf)