UNIT 9 WHO ARE PROTECTED PERSONS UNDER IHL?
WHAT ARE THE PROTECTED OBJECTS UNDER IHL?

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9.1 INTRODUCTION

As we have already discussed in the last unit that who are the participant in the war. In this unit we shall be discussing who are the protected persons and property under the International Humanitarian Law?

9.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the Protected Persons under the IHL and Protected Objects Under the IHL;
- discuss the concept of Cultural Property and the Conventions Established under Hague Convention;
• discuss how the international convention on the prohibition of military or any other hostile uses of environmental modification technique called at; and
• describe ENMOD Convention.

9.3 PROTECTED PERSONS UNDER IHL

The Following persons are protected under the International Humanitarian Law:

The distinction between members of the armed forces and civilians, combatants and non-combatants, has become increasingly blurred in recent conflicts through the participation of civilians as part-time combatants. Nevertheless, it remains one of the purposes of the law of armed conflict to ensure that an individual who belongs to one class or the other shall not be permitted to enjoy the privileges of both. The necessity to draw a distinction between civilians and combatants has been reaffirmed by Protocol I.

9.3.1 Combatants and Non-Combatants

In the past, the expression combatant has been used in several senses but the expression has now acquired a technical meaning under protocol I which defines combatants as being those who have the right to participate directly in his hostilities. Persons who do not have this right are non-combatants.

The Hague rules method of allowing states to decide which members of its armed forces should be treated as non-combatants was thought likely to cause confusion under modern conditions of warfare and has been abolished.

Protocol I provides that all members of the armed forces of a party to a conflict are combatants with the exception only of medical personnel and chaplains. Members of the armed forces who are permanently assigned and exclusively devoted to civil defence organizations are prohibited from participating directly in hostilities and accordingly must be also considered as being non-combatant. However, if they fall into the power of an adverse party, they are entitled to POW status.

A civilian, a person who does not belong to the armed forces is always a non-combatant. He has no right to participate directly in hostilities unless taking part in a levée en masse. Any civilian who does participate by committing hostilities, are medical personnel and chaplains and other members of the armed forces who have lost their combatant status, such as personnel permanently assigned to civil defence duties. However, non-combatants members of the armed forces are legally permitted to defend themselves against acts of violence directed at themselves personally and for this purpose the use of firearms may be justified. Indeed, medical personnel specifically do not lose their protection by being armed and by using arms in their own defence and in the defence of the wounded and sick in their charge.

9.3.2 The Armed Forces

Under the Hague Rules and Geneva Conventions, distinctions were made between forces. Any such distinction in international law has now been abolished by Protocol I. Membership of the armed forces is unaffected by gender, race, manner of joining or nationality. Essential pre-requisites for recognition of an armed force are that it must be:
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a) an organized armed forces, group or unit; and

b) under a command responsible to a party to the conflict for the conduct of its subordinates, even if that Party is represented by a government or authority not recognised by an adverse party, and

c) Subject to an internal disciplinary system which inter alia, enforces compliance with the rules of international law applicable in armed conflict.

The requirement that an armed forces should be under a command responsible to a party to the conflict for the conduct of its subordinate is clearly satisfied if the commander is properly commissioned as an officer, or is otherwise recognized as a commander by the Party concerned. However, particular in the case of resistance movements in occupied territory, formal state recognition is not necessary and an organization may be formed spontaneously and appoint its own officers. The essential feature of this requirement is that the commander should accept both responsibility for the acts of his subordinates and equally his responsibility to, and his duty to obedience to, the orders of the power upon which he depends. Partisans acting on their own individual responsibility do not comply with this requirement, so they are not member of an armed force. In the case of national liberation movements there must be both recognition by the appropriate regional inter governmental organisation and a declaration to be bound by the Geneva Conventions and Protocol I.

To ensure that armed forces comply with the international law of armed conflict, they must be subjected to an effective disciplinary system which enables compliance to be enforced. Any force, groups or unit which in the course of its operations, regularly fails to obey the law would clearly be regarded as not being subject to an effective disciplinary system and it would not be a legally recognisable armed force under international law. The members of such a force would not be entitled to combatant status and would be liable to the trial and punishment in the same way as other non-combatants who participate in hostilities.

9.3.3 Spies

The obtaining of information through the employment of spies is lawful but that does not prevent the punishment, under certain conditions, of individuals captured while procuring intelligence in other than an open manner. Under the Hague Rules as amplified by Protocol I, a spy is any person who, when acting clandestinely on or false pretences, obtains or endeavours to obtain information in the zone of operations of a belligerent or in territory controlled by a belligerent with the intention of communicating it to a hostile party. A person so acting is engaged in espionage. Civilians in occupied territory, even outside the zone of operations, who furnish information to the enemy, while not being ‘spies’ nevertheless usually contravene security laws introduced by the occupying power and may be tried and punished accordingly.

Any member of the armed forces of a party to the conflict, who falls into the power of an adverse party while actually engaging in espionage may be treated as a spy and is not then entitled to the status of POW.

He is nevertheless to be treated humanely and his trial is to respect established judicial safeguards. A spy may not be punished without first having been tried and convicted.
On the other hand a member of the armed forces of a party to the conflict who gather information in territory controlled by an adverse party while wearing the uniform of his own armed forces is not to be regarded as spy. In wearing uniform, he would not be “acting clandestinely or on false pretence.”

Similarly where a member of an armed force who is resident of territory occupied by an adverse power, gathers or attempts to gather military intelligence for his own side within that territory, he is not to be treated as a spy unless:

a) he acts through false pretences or deliberately in a clandestine manner, and

b) he is captured while actually engaging in espionage.

From this it follows that a spy who is resident of occupied territory who has been identified as such but not captured at the time and who is subsequently captured, does not then forfeit any entitlement to POW status on account of his earlier activities.

A member of the armed forces of a party to the conflict who has engaged in espionage and who is resident of the territory occupied by an adverse party, will not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

9.3.4 Mercenaries

Within the definition contained in Protocol I, mercenaries are not entitled as of right to be combatants or POW but could be accorded POW status if the party to the conflict capturing them so desired.

9.4 PROTECTED OBJECTS UNDER IHL

One of the most important concerns regarding protection of the environment is that of the effect of armed conflict. The term ‘Armed Conflict’ most often gives one an image of war, weapons, soldiers, wounded men and tortured, harassed civilians. The first priority when an armed conflict occurs is to save as many human lives as possible and provide protection to civilians, especially women and children, to ensure that the human rights of the affected people are preserved to the greatest extent possible. Protection of the environment and natural resources is generally ranked the lowest on the list of priorities, if indeed such thoughts are placed on the list at all. However, people fail to take into consideration the extent of the dependence by most developing and under-developed nations on natural resources. Combined with the fact that most conflicts today take place either between developing/under-developed nations or within the territories of such nations, this puts forth a very grim face for the future. The need for a solution to this problem is increased by the fact that the number of armed conflicts recorded has increased greatly in the last century.
the end of World War II, more than 160 wars have been recorded. This matter is of extreme importance in places like Africa, which has experienced more than 30 wars since 1970 alone. Another important factor is that today’s conflicts are driven by a variety of motives with a wide range of contributing factors, among them ideology, access to resources, ethnicity, religion, greed, distribution of power among social groups and between countries, weak states, and lack of leadership. Armed conflicts, whether internal or external are generally the effect of combination of many of the above mentioned factors. Recognizing the nature of these conflicts is an important first step in understanding their impacts, both on local populations and on the environment that supports them, and in developing mitigation strategies.

It is an accepted fact, that damage to the Environment during war is inevitable. This damage however need not be so extensive as to completely bar the use of such natural resources. It is for this reason that ‘international humanitarian law’ works towards limiting the damage caused to the environment during any armed conflict. The necessity for such measures is proven by the fact that today some battlefields of the First and Second World Wars, to give only two examples, remain unfit for cultivation or dangerous to the population because of the unexploded devices (especially mines) and projectiles still embedded in the Soil. Environmental damage of a very severe nature could also result in the loss of lives of the sick or wounded people due to a lack of available natural resources.

A brief overview of the history of ‘international humanitarian law’ shows that although the concept of protection and conservation of the environment by itself did not come into existence until the 1970s, various customary and general rules of international law have provided indirect protection to the environment. This can be interpreted by the application of the Rule of Proportionality to the protection of Environment. The indirect application of various treaties also afforded the environment protection to a certain extent.

**9.4.1 Historical Evidences of Destruction of Cultural Property during Armed Conflict**

There are various historical examples that show that warfare has resulted in the destruction of cultural property.

Culture signifies the identity and interests of the people but instead of uniting people it has always contributed as a source of destruction.

Realizing the importance of preservation of world cultural heritage, international community has responded from time to time to such grave acts of depravity. From the Leiber Code to the provisions of the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, (hereinafter referred to as the Hague Convention to the Second Protocol of 1999, the norms and measures of protection to cultural property got crystallized, stabilized and developed. The Leiber Code of 1863 instructed that the property belonging to churches, establishments of education, and museums of the fine arts shall be the victorious considered as public and hence immune from appropriation by the victorious army. Classical works of art, libraries, scientific collections and precious instruments shall be protected against avoidable injuries. Bluntschli, commenting on the code, views that it is the duty of the enemy chief to prevent the pointless destruction of noblest products of the human spirit. Civilization is proud: palaces, castles, ports, docks, bridges, buildings and monuments of all. Henry Dunant, the initiator and one of the founders of the Red
Cross, warned the future generations against outdoing each other in destroying the most beautiful masterpieces of which kind.

Following the Leiber Code, the English, Italian, Spanish, German and Japanese codes stipulated that moveable and immovable properties dedicated to science or art, churches, museums, libraries, collections of art and archives shall be treated as private property and be spared from bombardment. The Brussels Declaration of 1874 not only reiterated these principles but also imposed a duty on the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy before-hand. The Oxford Manual of 1880 went a step ahead in penalizing offender of cultural property. In 1929, the first treaty dedicated solely to the protection of cultural property was developed. The regional treaty entered into force on 26 August 1935 and is open for signature by states of the Pan-American Union. State parties to the Convention are required to send the Pan American Union a list of property to be protected under the Pact.

The Pact confers neutral status in peace and war on, inter alia, historic buildings, cultural institutions and monuments and provides that such property shall be respected and protected. Interesting to note is the fact that the treaty does not explicitly prohibit the looting and pillaging of cultural property. The regional Roerich Pact remains the sole regional international treaty designed specifically to protect cultural property during wartime and may be viewed as a precursor to the Hague Convention of 1954.

History provides various evidences where cultural property has been ruined during armed conflicts. Be it the destruction of Warsaw in the second world war, or the churches, mosques, monasteries in former Yugoslavia or the Budhas of Bamiya, they all had the same fate: destruction during armed conflict.

There are various instances that illustrates that protection of cultural property during armed conflict has been an important concern of the mankind since times immemorial. In Hindu law, a difference has been drawn between military objects which can be targeted during armed conflict and non military objects which cannot be targeted. Similarly, Greek thinkers condemned the destruction of religious and cultural property during armed conflict. They had marked certain sanctuaries such as Delhi, Olympus, Do done etc as sacred. Violence Activities were prohibited within the walls.

In Japan, from the sixteenth century onwards, feudal lords would issue imperative instructions called “sei-satu”, which prohibited their troops attacking temples and shrines in return for the donations that such temples and shrines would make in their favour. Prior to the fifteen century, shrines and temples were always in danger of being attacked, for the purpose of either plundering their wealth, housing troops or using their buildings as castles and forts, even though the population worshipped gods and Buddha and respected shrines and temples, without necessarily feeling that they were legally bound to do so.

Thus, protection of cultural property has always been an important concern but it has faced obliteration due the conflicts between human beings.

At present under international humanitarian law, various conventions have been made for the protection of the cultural property. In this matter, the Hague Convention of 1954, is the most important one.

Protection of cultural property is achieved by means of two complementary rules, each involving a prohibition. It is prohibited to commit any act of hostility against the
protected objects and it is prohibited to use protected objects in support of the military effort.

However, more extensive provision is made by the 1954 Hague Convention for the Protection of Cultural Property during armed conflict. 1977 Additional Protocol-I is expressly stated to be without prejudice to the 1954 Convention.\(^5\) Thus, in the present-day international law the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts, the Regulations for its execution and the Protocol annexed to it comprise the most important instruments for the protection of cultural property.

### 9.4.2 Hague Convention, 1954

Under the 1954 Convention the obligation to safeguard and respect cultural property is placed on both the Party in whose territory it is situated and upon adverse or occupying powers. In the former case the obligation is to refrain from any use of the property for purposes which are likely to expose it to destruction or damage in the event of armed conflicts and in the latter case is to refrain from any act of hostility directed against such property.\(^6\) This obligation can be waived only in cases of imperative military necessity.\(^7\) The Contracting Parties have further undertaken to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against cultural property. This limitation cannot be waived even for reasons of imperative military necessity.

The 1954 Convention also affords special protection to certain designated properties, e.g. refuges intended to shelter movable cultural property, centres containing monuments and other movable cultural property of very great importance. For the special protection of a cultural property a party to the armed conflict is permitted to setup a 'limited number' of shelters for important movable cultural property. Such a centre is designated as under special protection so long it is situated at an adequate distance from any large industrial centres or important military objectives such as an aerodrome, broadcasting station, a port or railway station of relative importance or a main line of communications. It should also not be used for military purpose and so constructed as to be immune from bomb damage.

This arrangement enjoyed only a limited success and only very few applications were received for registration because of the stringent requirements and practical difficulties. The concept of special protection was devised primarily in order to protect a strictly limited number of permanent and temporary shelters and refuges. One of the weaknesses of this provision is that it offers no possibility of according special protection for even the greatest museums of undisputed world importance.

### 9.4.3 Recent Developments under the Second Protocol to the 1954 Hague Convention

The effectiveness of the 1954 Convention became a subject of general concern in the early nineties, during Second Gulf war and the war in the former Yugoslavia.

The Second Protocol is a great improvement over the 1954 Convention. According to Article 3 of the 1954 Convention, States undertake to prepare in time of peace for the safeguarding of the cultural property against the foreseeable effects of armed conflict “by taking such measures as they think appropriate”. The Convention does not further elaborate on this aspect.
The Second Protocol aims to provide more guidance in this respect as it provides specific examples of concrete measures to be taken in time of peace.

- the preparation of inventories
- the planning of emergency measures for protection against fire or structural collapse,
- the preparation of removal of movable cultural property or the provision of adequate in situ protection of such property,
- the designation of competent authorities responsible for the safeguarding of cultural property.

These measures are of great practical importance for the protection of cultural property in the event of armed conflict.

For the better implementation of these measures financial resources and technical experts are required. The Second Protocol provides for the setting up of the Fund for the protection of cultural property in the event of armed conflict as per Article 29 of the Protocol.

In addition, the Second Protocol expands on the rather general provision concerning dissemination contained in the 1954 convention. Again, specific examples of concrete dissemination measures are listed, especially for military and civilian authorities who assume responsibilities with respect to the application of second protocol.

Some of the treaties under IHL are:

- The Hague Convention respecting the Laws and Customs of War on Land (Convention No. IV of 1907)
- The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, adopted in Geneva on 17 June 1925
- The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, adopted on 10 April 1972

In the 1970s, international treaties with the specific purpose of protection of the environment were created. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques ("ENMOD" Convention adopted by the United Nations on 10 December 1976) and Protocol I of 1977 additional to the Geneva Conventions of 1949 are two such examples.

- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques:

It prohibits "military or any other hostile use of environmental modification techniques having widespread, long lasting or severe effects as the means of destruction, damage
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or injury to any other State Party” (Art. 1). The term “environmental modification techniques” refers to “any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the Earth (Art. 2).

This Convention was adopted under United Nations auspices, largely in response to the fears aroused by the use of methods and means of warfare that caused extensive environmental damage during the Viet Nam War.

• Protocol I additional to the Geneva Conventions of 1949:

Article 35, para. 3, stipulates that “it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”

Article 55 provides that:

1) Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2) Attacks against the natural environment by way of reprisals are prohibited

These two treaties prohibit different types of environmental damage. While Protocol I prohibits recourse to environmental warfare, i.e. the use of methods of warfare likely to upset vital balances of nature, the “ENMOD” Convention prohibits what is known as geophysical warfare, which implies the deliberate manipulation of natural processes and may trigger “hurricanes, tidal waves, earthquakes, and rain or snow”. Thus the two treaties are essentially complementary to each other. However certain discrepancies are seen with regard to details such as the definition of various time limits etc. and any future work in the matter must be carried out with the object of using the provisions of the two treaties as complementary to each other in a harmonious manner.

One of the important drawbacks to the above treaties is that there is no provision for the protection of the environment in the course of any non-international armed conflict. Protocol I only applies to International armed conflict and although Protocol II of 1977 applies to non-international armed conflict, there is no mention in Protocol II of any specific measures to protect the environment.

Although the provisions of the Protocol regarding the protection of the Environment are of great significance, it is but a step towards the creation of adequate measures for the conservation and protection of the environment and other natural resources during times of armed conflict.

Today there is also a growing demand for acts against the environment and acts that are in violation of the above treaties to be covered by that area of law which imposes individual criminal responsibility.

Article 8 (b) (iv) of the 1998 Rome Statute of the International Criminal Court which requires the intentional launching of an attack causing environmental damage “clearly excessive in relation to the concrete and direct overall military advantage anticipated” for such an act to qualify as a serious violation. This definition is not very precise,
but it is seen as a positive step that such a crime has been considered punishable by the International Criminal Court. The definition also serves to distinguish between an inadvertent attack as opposed to an intended attack on the environment; a mere inadvertent collateral environmental effect of an attack does not make an attack unlawful: “The effect must have been intended or at least foreseeable”.

Self Assessment Question

2) Explain the concept of Protected Objects under IHL? What are the provisions mentioned under Hague Convention?

9.5 PROTECTION OF CULTURAL PROPERTY DURING ARMED CONFLICT

Culture can be broadly conceptualized as the complex values, customs, beliefs and practices which constitute the way of life of a specific group. The culture and heritage of the family, society or even religious group of a person plays a very important role in the forming of his or her personality, beliefs etc. This culture or heritage is often embodied in the form of a building or structure or even an object that acts as either a place of worship or a historical monument and thus gives such an object/building great value, whether it be historical, educational, spiritual or even economic. Art and Culture today afford us an opportunity to study and understand the origins and the values followed by different groups and societies across the world. The history of each group is displayed in the form of cultural property, whether it is a small artefact such as a beautiful painting or a massive structure such as the Pyramids of Egypt.

But all too often, culture is also manipulated by those who believe that the protection of their identity or interests implies rejecting others. Far from uniting peoples, culture is then used or “misused” to separate and divide. Under such conditions, it is hardly surprising that wars lead to the destruction of monuments, places of worship and works of art numbered among the most precious creations of the human spirit. The destruction of such property is justified as necessary for military operations. That was the argument advanced by the United States for the shelling in February 1944 of the famous abbey of Monte Cassino, in the heart of the German defence system that was blocking the Allied advance on Rome. However, in most cases the destruction is deliberate; the purpose of such destruction is to destroy the identity and morale of the enemy nation. Such destruction arises out of a belief that one’s own values and beliefs are the only right values and any other system of belief must be destroyed. “Delenda est Cartago”, “Carthage must be destroyed”, Cato kept repeating. And that proud city was indeed destroyed. Not a monument, not a temple, not a tomb was spared. Tradition has it that salt was spread on the ruins, so that the very grass would never return. There are many other examples of such destruction, even in recent times, the city of Warsaw was left completely destroyed at the end of the Second World War, the war in Yugoslavia saw the ruin of many monuments, places of worship etc, The Bamiyan Buddhas were destroyed by the Taliban as recently as 2001. There is an urgent need for stringent laws regarding cultural property
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to be implemented. Without such laws we will soon be left a culture-less world, with no history or heritage to show the development of mankind over the thousands of years past.

In the past, many societies have provided for the protection of cultural property, the Hindu Upanishads provided for a distinction between military and non-military objects, the Japanese prohibited their troops from attacking temples and places of worship etc. However, with the advent in technology and modern weaponry, there is a need for an effective international system for the protection of cultural property in times of war.

The Hague Convention Respecting the Laws and Customs of War on Land of 18 October 1907 established the principle of immunity for cultural objects, even in case of siege or bombardment: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes".

The mass destruction caused by the Second World War has shown that this restriction was not strong enough to stop the destruction of Cultural Property. This led to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954.

As not all States are bound by this Convention, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which met in Geneva from 1974 to 1977, inserted an article protecting cultural property in the two Protocols additional to the Geneva Conventions.

Article 53 of Protocol I says:

"Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

a) To commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;

b) To use such objects in support of the military effort;

c) To make such objects the object of reprisals”

Article 16 of Additional Protocol II, which applies to non-international armed conflicts, also prohibits any acts of hostility directed against cultural property and its use in support of the military effort. The Statute of the International Criminal Court, adopted in Rome on 17 July 1998, classes as war crimes: "... Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, [...] provided they are not military objectives”

Although the Hague Convention of 1954 was ratified by 95 countries only, the provisions of the Hague convention have come to be regarded as general principles of Customary International Law. However, with the onset of the war in Yugoslavia and the Second Gulf war, the need for new laws with respect to cultural property
was felt. In 1991, the Government of the Netherlands decided to include a review of the 1954 Convention as part of its contribution to the United Nations Decade of International Law. In the following years, the Government of the Netherlands continued to be the driving force behind the review process, and three expert meetings were organized which resulted in the “Lauswolt document”. In March 1997, twenty government experts met at UNESCO headquarters in Paris to review the Lauswolt document.

On March 26, 1999, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict was adopted. The second protocol to The Hague convention is to be read in addition to the Convention itself. It provides for measures to be taken for the protection of cultural property in times of peace as well as war. This is based on the reasoning that if sufficient measures are taken during times of peace, the further destruction of cultural property during armed conflict can be stopped. The protocol provides that the member countries should undertake: the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse etc.

These measures if taken in peace time can be of great use in the event of an armed conflict. The protocol also provides for the setting up of a fund for the protection of cultural property in times of armed conflict etc. The Second Protocol to the Hague convention also provides that all military and civilian personnel who are given any responsibilities under the protocol itself must be familiar with the protocol and to this effect, the state parties are required to: incorporate guidelines and instructions on the protection of cultural property in their military regulations, develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes etc.

The Second Protocol to The Hague convention seeks to re-affirm the principles of the convention and set forth more stringent rules for the implementation of these principles. Article 4 of the 1954 Convention provides that cultural property shall not be subject to any act of hostility nor used for purposes which are likely to expose it to destruction or damage in the event of armed conflict. It immediately adds, however, that both obligations may be waived in case of “imperative military necessity”. Professor Boylan’s review identified the lack of a clear definition of this exception as a serious weakness with respect to the basic principle of protection contained in the 1954 Convention.

“Imperative military necessity” implies that the cultural property in question must be a military objective and there is no other option but to attack such property. The nature, location, purpose or use of the object has to be such that it makes an “effective contribution to military action”. The military advantage has to be “definite, in the circumstances ruling at the time”. This means that when there is a choice between several military objectives and one of them is a cultural property, the latter shall not be attacked. However, this definition of “imperative military necessity” can still be considered to be vague. The limits to imperative military necessity must be set in a more definite manner. Whether the nature and purpose of the property are to be considered or the location of the property became a subject of great debate. Many countries such as Greece and Egypt argued that location could not be considered as criteria enough to imply military necessity. As a compromise, the second Protocol changed the sentence “which by their use, have become military objects” to “which by their function have become military objects”. This provides that cultural property can be said to be military objects only when they function as military objects. This
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is the sole exception to the rule that cultural property shall not be attacked during armed conflict.

The Second Protocol also provides for a system of “Enhanced Protection” as compared to the system of “Special Protection” provided by the 1954 convention. Under the new system, three criteria have to be met in order for an object to be listed in the newly established List of Cultural Property under Enhanced Protection (the List):

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

The basic protection provided by the two systems is the same; the property should not be attacked, destroyed etc except under certain extreme circumstances. This protection is also afforded by Customary International Law. The advantage of putting property on the List is that an adversary will be particularly aware of it and any attack on the property will have serious consequences for the perpetrator35

The Second Protocol also provides for certain measures such as an advance warning before the attack etc. The concept of Individual Criminal Responsibility is also developed in the Second Protocol. The Protocol Lists the various offences and violations, for which an individual maybe held responsible and punished (Article 15). However implementation of such measures is still on a national level and there is a need for greater development in this area. Another important development that is seen in the Second Protocol is that it applies to both International as well as non-international armed conflicts. The Second Protocol also corrects many of the weaknesses of the 1954 Hague Convention. It is a great step forward towards the providing adequate protection to cultural property in times of armed conflict.

The discussion above shows that in the past decades, since the end of the Second World War, ‘International Humanitarian Law’ has developed greatly. Earlier the focal point of most international laws, conventions and treaties was the effective implementation of Human Rights. It cannot be disputed that the protection of Human Rights is the fundamental reason for the establishment and development of ‘international humanitarian law’. However we see that today, the concept of human rights encompasses much more than mere survival of the race. Human rights today mean the right to live a decent life with a good standard of living. In order to ensure this, there is need for legislation with regard to matters such as protection of environment and cultural property, for without these humans would lead a meaningless life, devoid of any beauty, history or even a sense of identity.

Despite the great progress in international law, there is still a need for protection and preservation of environment and cultural property. Stringent, binding laws are required to be established and it is absolutely necessary that all countries put aside their personal interests in order that a better future might be established for the human race.
9.5.1 Respect for Cultural Property

Article 4 of the 1954 Convention provides that cultural property shall not be subject to any act of hostility nor used for purposes which are likely to expose it to destruction or damage in the event of armed conflict. It, immediately adds, however, that both obligations may be waived in case of “imperative military necessity”. The lack of clear definition of “imperative military necessity” is one of the weaknesses of this Convention.

The restriction of imperative military necessity was first codified in international law in the 1907 Hague Regulations limiting the destruction or seizure of the enemy’s property to that which was imperatively demanded by the necessities of war. The 1954 Convention borrowed this notion as there were few other established limits applicable to the conduct of hostilities.

History has provided us with various instances that the concept of military necessity has not limited the warfare in any way. During Second World War there was a restriction that no property could be destroyed unless there was an imperative military necessity yet entire cities were destroyed.

It appears that the notion of imperative military necessity is too vague to constitute an effective limitation on warfare.

Limiting attacks to military objectives would in large part achieve that goal. The 1954 Convention was adopted way before the Additional Protocols of 1977 of the Geneva Convention of 1949. The 1954 Convention was adopted during the mid of Second World War to protect the cultural property.

In 1977, the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts (Protocol I) did away with the approach. Henceforth, only military objectives – more clearly defined and more carefully selected – were to be made the object of attack. Civilians and civilian objects were not to be made an object of direct attack. This approach is a clear example of how international humanitarian law balances military necessity and humanitarian needs.

The definition of military objectives in Article 52(2) of Additional Protocol I was one of the major achievements of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable to Armed conflict (CDDH), which was convened by the Swiss Government adopted in 1974 and adopted additional Protocol I on 8 June 1977.

The definition of the military objective contains two criteria which have to be fulfilled cumulatively before objects can be destroyed, captured or neutralized. They deal with the nature, location, purpose or use of objects and with the military advantage to be gained by destroying, capturing or neutralizing them. The nature, location, purpose or use of the object has to be such that it makes an “effective contribution to the military action”.

The requirement of the 1954 Convention that the military necessity has to be “imperative” is made sufficiently clear in Article 4 of the Second Protocol by the second condition, namely that no other alternative is available. Military necessity could therefore virtually never be invoked to justify an attack on cultural property standing in the way of advancing army, as there are almost always alternatives to
circumvent the property. This means that when there is a choice between several military objectives and one of them is a cultural property, the latter shall not be attacked. In fact, this provision adds cultural property to the military objectives which, under article 57(3) of Protocol I, should not be attacked.

**Self Assessment Question**

3) How Cultural Property can be Protected under Armed Conflict?

The conditions listed in the 1954 Hague Convention for grant of special protection were considered to be too restrictive and accordingly experts were of the opinion that conditions for obtaining special protection should be more liberal. It was also felt that more objective criteria and simpler registration procedure were necessary for this purpose. Accordingly, the Protocol lists out the criteria for placing a cultural property under “enhanced protection” and procedure for its registration. The term ‘enhanced protection’ has been used to distinguish it from “special protection” as the 1954 Hague Convention continues to remain in force for parties who do not sign the Second Protocol.

The following criteria were agreed for placing a cultural property under enhanced protection - a) cultural heritage of greatest importance for humanity; b) protected by adequate domestic, legal and administrative measures recognising its exceptional cultural and historical value ensuring the highest level of protection; and c) not used for military purposes or to shield military sites. The Party which has control over such cultural property has also to make a declaration that it will not be so used.

Article 11 lists out the procedures for grant of enhanced protection. The right to request for grant of enhanced protection has been given to the party which has jurisdiction or control over the cultural property. Other parties and NGOs with relevant expertise may also recommend to the Committee to include specific cultural property under enhanced protection. In such cases, the Committee may invite a Party to request inclusion of such cultural property in the list.

The Committee is required to inform all Parties about the requests for inclusion of a specific cultural property in the list. Parties may submit representations regarding such a request within sixty days. The decision for inclusion in the list would be taken by the Committee by a majority of four-fifths of the members present and voting. A provision has also been made for grant of a provisional enhanced protection on an emergency basis.

The obligation to ensure the immunity of a cultural property under enhanced protection is placed both on the attacker and the attacked. The parties to a conflict are required, as appropriate, to refrain from making such property the objective of attack or from any use of such property or its immediate surroundings in support of military action.
Cultural property placed under enhanced protection shall lose its protection, if by its use, it becomes a military objective or such protection is cancelled or suspended in accordance with provisions of Article 14.

9.7 THE ENMOD CONVENTION

The Convention on the Prohibition of the Use of Environmental Modification Techniques (ENMOD) 1977, represents a major advance in the law of war, being the first international agreement which directly addresses the use of the environment as a weapon during armed conflicts. The basic obligation of the Convention is set out in Article 1.

Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having, widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.

According to Article 2, the term ‘environmental modification techniques’ refers to “any technique for changing through the deliberate manipulation of natural processes - the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, of outerspace”. In relation to this various phenomena included are earthquakes, tsunamis; an upset in the ecological balance of a region, changes in weather patterns, changes in the climate patterns, changes in ocean currents and changes in the state of the ionosphere.

Article 1 of the ENMOD Convention enjoins states parties not to engage in or encourage others to engage in military or any other hostile use of environmental modification techniques having wide-spread, long lasting, or severe effects on the environment.

The ENMOD Convention is not an environment protection agreement, as it is not intended to per se protect the environment or parts thereof. In fact, it is meant to prevent “destruction, damage or injury to any other State Party”. Since ENMOD was being negotiated at the same time as Additional Protocol I, it is clear that the thresholds in the two instruments, which are framed with similar but not identical wording, are meant to be different. The threshold in ENMOD is defined with disjunctive ‘or’ while in Additional Protocol I the adjective is cumulative ‘and’. It can be inferred that the ENMOD threshold is lower than that of Additional Protocol I.

Self Assessment Question
4) What do you understand by the ENMOD Convention?

9.8 SUMMARY

- In this Unit, we discussed the persons who are protected like Combatant and Non Combatant etc. Then we discussed that how the cultural property can be protected under various Laws of International Humanitarian Law.
• We also discussed the historical background since world war one and two which had talked about the protection of cultural property

• We further discussed the protection of person and property in the present scenario.

9.9 TERMINAL QUESTIONS

1) Who are protected persons under IHL?

2) Explain the grant of ‘enhanced protection’ to the cultural property?

9.10 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 9.3

2) Refer to Section 9.4

3) Refer to Section 9.5

4) Refer to Section 9.7

Terminal Questions

1) Refer to Section 9.3 and 9.4

2) Refer to Section 9.5

9.11 REFERENCES AND SUGGESTED READINGS


