SECOND PROTOCOL TO THE HAGUE CONVENTION OF 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

COMMITTEE FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

Eleventh meeting
UNESCO Headquarters
8 – 9 December 2016

Item 7 of the provisional agenda:
Procedure for the granting of enhanced protection: methodologies for the evaluation of the conditions set forth by Article 10 of the 1999 Second Protocol

This document is part of the follow up of Committee decision 10.COM 3. It analyses the considerations made up until now concerning the development of methodologies for the evaluation of the conditions set out in article 10 of the 1999 Second Protocol.

Draft decision: paragraph 29.
INTRODUCTION

1. At the tenth meeting, the committee for the protection of cultural property in the event of armed conflict (“the Committee”) adopted decision 10.COM3 which asked the President of the Committee to continue to carry out the consultations required to assist the Secretariat in writing a preliminary draft of statutory modifications to the Guidelines. The Committee asked the Secretariat to continue the work which had been started and to submit this draft at their eleventh meeting accordingly.

2. Setting up a methodology for the objective evaluation of the conditions set out in article 10 of the Second Protocol has been at the center of Committee debates since the eighth meeting (in December 2013). The Secretariat presented the current state of affairs for this issue in the document CLT-15/10.COM/CONF.203/3 which was submitted at the tenth Committee meeting.

3. As part of the follow up of decision 10.COM 3, and in continuation with the outcome of consultations held in 2015, during which ten Parties expressed opinions on the issue, the Secretariat continued to lead consultations with the support of the President of the Committee, notably at the Bureau of the Committee meeting (in Paris, on 23 May 2016). Additional contributions on this subject were passed on to the Secretariat by Georgia, Mexico, the Czech Republic and Slovakia.

4. A methodology for the Committee needs to be set up based on a solid cultural and technical foundation. Studies carried out by the International Council on Monuments and Sites (ICOMOS) clearly constitute an interesting basis for these considerations, but they cannot serve as a methodological tool to guide evaluation on their own, since as an example the requests for the granting of enhanced protection for cultural property are not part of the World Heritage List. Additionally, after analyzing the comments expressed by the Parties (at consultations held in 2015 and 2016), we found that in some cases these are difficult to reconcile.

5. The conclusions reached by the Secretariat in the document CLT-15/10.COM/CONF.203/3 therefore remain very similar:

   The analysis of the comments, in addition to the fact that they express the position of a limited number of Parties, does not allow us to identify a large consensus for potential amendments to the Guidelines. Positions are varied and sometimes difficult to reconcile.

   In these circumstances, the Secretariat is not able to propose any amendments to the paragraphs of the Guidelines relating to the conditions for the granting of enhanced protection which are likely to be accepted by the Parties, or at least the majority of the Parties. Consequently keeping the status quo seems appropriate, except that the Committee should indicate the way in which future amendments to the Guidelines should be proposed.

6. A preliminary draft of statutory modifications to the Guidelines cannot be submitted in the current situation. Indeed, any plan, even if this is embryonic, should be based on careful

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1 The working paper CLT-15/10.COM/CONF.203/3 is available online at the following address: http://unesdoc.unesco.org/images/0023/002356/235600F.pdf

2 Comments are available online at the following address: http://www.unesco.org/new/fr/culture/themes/armed-conflict-and-heritage/meetings-and-conferences/

3 Comments are available online at the following address: http://www.unesco.org/new/fr/culture/themes/armed-conflict-and-heritage/meetings-and-conferences/

consideration of the issues. Consequently, the Secretariat is analyzing a series of propositions as part of each of the conditions relating to the granting of enhanced protected.

I. **ARTICLE 10, PARAGRAPH (A): "THE GREATEST IMPORTANCE FOR HUMANITY"

7. Cultural property must satisfy, among others, the criterion of "greatest importance for humanity" in order to be eligible for granting enhanced protection. Paragraph 32 of the Guidelines for the Implementation of 1999 Second Protocol ("the Guidelines") provides for the fulfilment of this condition by an assessment on a case–by-case basis based on three criteria, these being:

- The exceptional cultural significance of the cultural property; and/or
- Its uniqueness of the cultural property; and/or,
- The irretrievable loss for humanity in the event that the cultural property is destroyed.

8. For each of these criteria, the Guidelines outline a list of factual information that should enable the Committee to determine whether the condition outlined in Article 10, paragraph (a), has been fulfilled (c.f. paragraphs 33 – 35 of the Guidelines).

9. Paragraphs 36 and 37 of the Guidelines enable the Committee to consider inscription on the World Heritage List and the Memory of the World Register for immovable and movable cultural property, respectively. According to paragraph 36 of the Guidelines, the Committee may presume, subject to other relevant considerations, that immovable cultural property inscribed on the World Heritage List satisfies the condition of the "greatest importance for humanity" criterion.

**Challenges**

10. The current methodology entails various limitations:

- The presumption benefits only immovable cultural property, that are sites inscribed on the World Heritage List, which benefit from thorough evaluations including field missions;
- Movable cultural property, which can also be submitted for the granting of enhanced protection, does not benefit from the presumption of the greatest importance for humanity because the guidelines do not foresee such possibility; and
- With regard to cultural heritage, inscription on the World Heritage List concerns only immovable cultural property of "outstanding universal value". Article 10, paragraph (a), of the 1999 Second Protocol refers to a different notion, namely the notion of "greatest importance for humanity". This notion cannot be considered as a synonym of the notion of "outstanding universal value".

11. In practice, cultural heritage - notably museums and archaeological sites - finds itself under threat in certain parts of the world that are affected by instability and conflict. The information about heritage is not necessarily well known and this heritage may not be included on the World Heritage List. This, of course does not mean that it is any less worthy of attention or appropriate protection as indicated in Article 12 of the World Heritage Convention. It is important, therefore, to also encourage applications for the granting of enhanced protection of such properties wherever possible provided that they comply with the three conditions of Article 10 of the Second Protocol.

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5 Article 11, paragraph (b) of the 1972 Convention Concerning the Protection of World Cultural and Natural Heritage
Methods of evaluation of cultural property used by other UNESCO conventions

a. ICOMOS as evaluation body of the 1972 World Heritage Convention

12. ICOMOS is a non-governmental organization. Founded in 1965 upon recommendations put forward by UNESCO, “its role is to promote the application of theory, methodology and scientific techniques to the conservation of the architectural and archaeological heritage.”6 According to paragraph 34 of the Operational Guidelines for the Implementation of the World Heritage Convention:

“The specific role of ICOMOS in relation to the Convention includes: evaluation of properties nominated for inscription on the World Heritage List, monitoring the state of conservation of World Heritage cultural properties, reviewing requests for International Assistance submitted by States Parties, and providing input and support for capacity-building activities.”

13. In this framework, ICOMOS is contracted by the Secretariat of the 1972 World Heritage Convention to evaluate cultural nominations, to present its report to the World Heritage Committee in order for the Committee to determine whether such property satisfies the criteria to be inscribed on the World Heritage List. This process entails among others expert evaluations and field visits to the site. In 2016, ICOMOS has evaluated 37 properties (among which 32 cultural properties and 5 mixed (cultural and natural) properties).7

14. This poses a number of limitations namely the fact that ICOMOS evaluates immovable heritage only, a fact that does not fully satisfy fully the definition for cultural property given in Article 1 of the 1954 Hague Convention as well as the fact that the cost for commissioning ICOMOS considerably exceeds any Regular Programme allocations per activities related to the implementation of the 1954 Convention and its two Protocols.

b. The 2003 Intangible Cultural Heritage Convention and its advisory bodies for the review of applications

15. The Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage have established an “Evaluation Body”. It is composed of twelve members appointed by the Committee: six experts qualified in the various fields of the intangible cultural heritage representatives of States Parties non-Members of the Committee and six accredited non-governmental organizations. This evaluation body replaced previous methods of evaluation such as review by the Bureau or subsidiary bodies. In accordance with paragraph 27 of the above-mentioned operational directives, it is in charge of evaluating nominations for inscription on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding and on the Representative List of the Intangible Cultural Heritage of Humanity, proposed programmes, projects and activities that best reflect the principles and objectives of the Convention and of international assistance requests greater than US$100,000.

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6 Operational Guidelines for the Implementation of the World Heritage Convention, para. 34
c. Table 1: Evaluation methodologies for other UNESCO Conventions compared to the 1954 Convention and the Second Protocol:

|------------------|-----------------|-----------------|-----------------------------|-----------------------|
| **1972 Convention** | - Intergovernmental Committee  
-Bureau of the Committee  
-General Assembly | - World Heritage List  
- List of World Heritage in Danger | - IUCN  
- ICOMOS  
- ICCROM | - World Heritage Fund |
| **2003 Convention** | - General Assembly  
- Intergovernmental Committee  
-Bureau of the Committee | - List of Intangible Cultural Heritage in Need of Urgent Safeguarding  
- Representative List of the Intangible Cultural Heritage of Humanity  
- Best Safeguarding Practices | - Evaluation Body | - Intangible Cultural Heritage Fund |
| **1954 Convention and Second Protocol** | - Intergovernmental Committee  
-Bureau of the Committee  
-Governing bodies (States Parties to the Second Protocol and High Contracting Parties to the Hague Convention) | - International Register of Cultural Property under Special Protection’  
- List of Cultural Property under Enhanced Protection | X | X |

*Proposal put forward by the Secretariat*

16. As seen in the table above, one of the fundamental differences in relation to the 1972 and 2003 Conventions, is that neither the Second Protocol, nor the Guidelines for Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, provide for the possibility of evaluation and monitoring missions, thus, the above-mentioned evaluation process cannot be transposed. In addition, the Secretariat lacks the qualifications to carry out scientific evaluations and last but not least, budgetary reasons prevent the creation and maintenance of such an Evaluation Body, as the total cost considerably exceeds Regular Programme allocations for the activities related to the implementation of the 1954 Convention and its two Protocols.

17. Despite the very useful comments received in 2015 and 2016 from Parties to the Second Protocol, they are not representative of all the Parties and in some cases, they are contradictory. In addition, the Secretariat has not yet received any specific direction as to how States Parties wish to modify the Guidelines. The development of an alternative evaluation methodology was researched, yet the cost for such methodology to be properly implemented cannot be covered by the Regular Programme allocated to the activities for the implementation of the 1954 Convention and its two Protocols. If these actions are ever undertaken, they shall rely entirely on extra-budgetary resources, for an amount to be determined.

18. Therefore, after careful consideration, the Secretariat has contemplated the option of commissioning an established university to carry out research and produce a study to establish a methodology of evaluating whether cultural property satisfies criterion 10(a). The preliminary estimate of costs of such study amount around USD 5,000. However, it may exceed this sum.
As to the source of financing, the Secretariat proposes to use the Fund for the Protection of Cultural Property in the Event of Armed Conflict and to make an appeal for extra-budgetary contributions.

II. **ARTICLE 10, PARAGRAPH (B): “THE HIGHEST LEVEL OF PROTECTION”**

19. The Hague Convention of 1954 (article 3) and its Second Protocol of 1999 (article 5) made the obligation to safeguard cultural property one of the cornerstones of the system for protecting cultural property. This obligation involves the adoption, in times of peace, of preparatory measures against the foreseeable effects of armed conflict.

20. With regards to granting enhanced protection, the Second Protocol requires the adoption of measures such that they recognize the “exceptional cultural and historical value” and guarantee the “highest level of protection (see: article 10 paragraph (b) of the Second Protocol; and paragraph 38 of the Guidelines).

21. Paragraph 39 to 41 of the Guidelines have illustrated this obligation, in particular by making Chapter IV of the Second Protocol “Criminal responsibility and jurisdiction” one of the **sine qua non** conditions used to assess the realization of this condition.

**Issue**

22. Assessing the condition set out in article 10, paragraph (b) of the Second Protocol involves a factual and qualitative analysis. Although an examination of criminal legislation (purely factual analysis) or of the transposition of regulations on protecting cultural heritage into military training programs (purely factual analysis) is not a priori problematic, this is not the case when assessing other preparatory measures resulting from the implementation of article 5 as supplemented respectively by paragraphs 27 to 29 and 30 of the Guidelines - first indent.

23. For each cultural property, an objective assessment of preparatory measures involves a qualitative analysis to determine its appropriateness and effectiveness (paragraph 40 of the Guidelines).

**Proposal of the Secretariat**

24. The insertion of a guide (in the form of a checklist) in annex I of the Guidelines would provide a practical tool for the national authorities in charge of preparing applications for enhanced protection. The checklist would summarize the elements set out in paragraphs 38 to 41 of the Guidelines and explain in greater detail how to achieve realization. An example table, which has already been suggested in the document CLT-15/10.COM/CONF.203/3, is reproduced in the annex to this document.

III. **ARTICLE 10, PARAGRAPH (C): “NOT USED FOR MILITARY PURPOSES”**

25. The granting of enhanced protection is dependent on the production of a “declaration of non-use for military purposes”.

26. In practice, paragraph 59 of the Guidelines offers a detailed framework for assessing the “declaration of non-use for military purposes”.

**Proposal of the Secretariat**

27. The Secretariat does not consider that a change to the Guidelines is necessary.

28. As part of the follow-up to the Committee’s decision 10.COM 3, the Secretariat has prepared an information document intended for the eleventh meeting of the Committee on “The concepts of ‘control’ and ‘jurisdiction’ as set out in articles 10 (c) and 11 (2) of the Second Protocol: perspectives according to international law and international jurisprudence”. If the Committee were to come to the conclusions of this information document, these could be reflected in a future preliminary draft of statutory modifications to the Guidelines.

29. The Committee will perhaps wish to adopt the following decision:
DRAFT DECISION 11.COM 7

The Committee,

1. Having examined the document C54/16/11.COM/7,

2. Expresses its agreement regarding the proposal of the Secretariat to commission a study relating to the evaluation, under article 10 of the Second Protocol, of immovable cultural property not inscribed on the World Heritage List as well as that of movable cultural property;

3. Authorizes use of the resources of the Fund up until [XXX] to finance such a study and requests the Parties to make extra-budgetary contributions to finance this study;

4. Approves the integration of the table set out in the annex to the document C54/16/11.COM/7 into the Guidelines for the implementation of the Second Protocol (1999);

5. Requests the Seventh Meeting of the Parties to introduce the aforementioned table into the Guidelines for the implementation of the Second Protocol (1999).
ANNEX
CHECKLIST

In order to be included on the List of cultural property under enhanced protection a cultural property must fulfil the three conditions outlined in Article 10 of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The condition outlined in paragraph (b) of this provision requires the relevant national authorities of the Party in question to adopt a series of measures. These measures must acknowledge the exceptional cultural and historic value of the cultural property and guarantee it the highest level of protection.

The present checklist primarily serves as a practical tool. It is intended to help the civil servants of the Parties responsible for preparing requests for the granting of enhanced protection to ensure that all of the measures outlined in this respect by the Second Protocol and the corresponding Guidelines have been adopted. This being the case, the checklist is not part of the request for the granting of enhanced protection.

<table>
<thead>
<tr>
<th>Nature of the protective measure to be implemented</th>
<th>Have you taken this information into account in the application for the granting of enhanced protection?</th>
<th>Have you explained the measure(s) adopted by your authorities, demonstrating their relevance and their effectiveness in practice?</th>
<th>Have you attached a copy, in English or in French, of the legislative, regulatory and/or institutional texts implementing the protective measures or a summary of such texts to your request for the granting of enhanced protection.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Establishment of an inventory of the cultural property in question, including any movable property that it might contain</td>
<td>Have you taken this information into account in the application for the granting of enhanced protection?</td>
<td>Have you explained the measure(s) adopted by your authorities, demonstrating their relevance and their effectiveness in practice?</td>
<td>Have you attached a copy, in English or in French, of the legislative, regulatory and/or institutional texts implementing the protective measures or a summary of such texts to your request for the granting of enhanced protection.</td>
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<tr>
<td>Planning of emergency measures to ensure that property is protected against the risks of fire or the collapse of buildings</td>
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<td>Preparing for the removal of movable cultural property or provision for adequate in situ protection for said property</td>
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<tr>
<td>Designation of competent authorities responsible for the safeguarding of cultural property</td>
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<td>Consideration of the protection of cultural heritage in military training plans and programmes</td>
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<tr>
<td>Implementation of the provisions of Chapter IV of the Second Protocol, and Articles 15 and 16 thereof in particular, within the framework of the Party's domestic law (Contact your Ministry of Justice if necessary)</td>
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