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

THIRTEENTH MEETING

UNESCO Headquarters
6-7 December 2018

Item 16 of the Provisional Agenda:
Protection of cultural property of national, ethnic and religious minorities
(prepared by Armenia)

This document contains information related to the general framework of the 1954 Hague Convention and its Second Protocol such as their scope of application, peacetime preparatory measures, penal measures or different categories of assistance under the Second Protocol.

Draft decision: 13.COM 16, see paragraph 6.
I. Introduction

1. Regrettably, wars have always been an integral part of human history. Destruction and looting of cultural property were inevitable consequences, as were changes in geopolitical boundaries and placement of cultural heritage outside of national frontiers. Cultural heritage is a significant part of national identity and people have long endeavored to protect and preserve their cultural property. It overreaches geopolitical boundaries and constitutes cultural inheritance of the humanity irrespective of the place where it was created or is situated.

2. International law has long operated on the principle that the state holds sovereign authority over property within its own territory. Nevertheless, within the past two decades, developments in international law related to the intentional destruction of cultural heritage have challenged state dominance over cultural property within its borders. A state’s international obligation to take appropriate measures for the prohibition, prevention, and punishment of any intentional destruction of cultural heritage has been emphasized through the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY), the adoption of the 1999 Second Protocol to the 1954 Hague Convention, universal condemnation of the Taliban's destruction of the Bamiyan Buddhas in 2001 and the following 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage.1

3. States which have inherited cultural property of other nations have a responsibility to protect and to preserve such property without segregation. However, due to ethnic or religious intolerance or other reasons, numerous cultural heritage sites have been destroyed or endangered throughout history.

4. We are currently witnessing an unprecedented international focus on the recognition of the importance of cultural heritage protection for the preservation of international peace and security. In particular, the recent UN Security Council Resolution 2347, adopted on 24 March 2017, is the first resolution adopted by the Security Council to concentrate on cultural heritage.2 In September 2016, the International Criminal Court made a historic decision finding jihadi leader Ahmad al-Faqi al Mahdi guilty of destroying ancient monuments in Timbuktu.3 This was the first-ever prosecution of the destruction of cultural heritage as a war crime. These are significant steps in the protection of cultural heritage and enforcement of the legal mechanisms stipulated in international law for the protection of cultural property.

II. Scope of the application of the 1954 Convention and the Second Protocol and obligations of states related to protection of cultural property

5. The 1899 and 1907 Hague Conventions were the first international instruments to envisage protection of religious and cultural sites, historic monuments, works of art and science.4 Results of World War I and World War II included not only the enormous destruction of cultural heritage, but also the shift of international boundaries and the placement of many cultural heritage sites outside of their national territories. This massive destruction highlighted the shortcomings of Hague Conventions of 1899 and 1907, as well as the need of stronger international mechanisms for the protection of cultural property.

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7. The main threats to cultural property can be divided into following categories:
   - Constant threats (theft, vandalism, and deterioration);
   - Destruction during peacetime;
   - Destruction during armed conflict.

8. The causes of destruction of cultural property of other nation/s situated outside of its/their national boundaries are different:
   - Lack of measures taken by a state for the protection of cultural property belonging to other nationalities;
   - Ethnic and/or religious intolerance;
   - Cultural cleansing, manipulation and distortion of history through erasure of traces; and cultural heritage of other nationalities, etc.

9. The 1954 Convention and its Second Protocol apply:
   a. In peacetime;\(^5\)
   b. In the event of declared war;\(^6\)
   c. In the event of any other armed conflict that may arise between two or more of the contracting parties, even if the state of war is not recognized by the parties to the conflict;\(^7\)
   d. During partial or total occupation.\(^8\)

10. The 1954 Convention and its Second Protocol impose certain obligations and responsibilities on Contracting Parties pertaining to the protection of cultural property. Under Article 5 of the Second Protocol and pursuant to Article 3 of the 1954 Convention, the Contracting parties must take measures during peacetime for the safeguarding of cultural property against the foreseeable effects of an armed conflict. These measures include:
   a. preparation of inventories;
   b. planning of emergency measures for protection against fire or structural collapse;
   c. preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property;
   d. designation of competent authorities responsible for the safeguarding of cultural property.

11. The above-mentioned list of preparatory measures is not exhaustive. Parties are also encouraged to take other suitable preparatory measures consistent with the purposes of the Second Protocol. Article 3 of the 1954 Convention and Article 5 of the Second Protocol require State Parties to safeguard their own cultural property in peacetime, but does not include any specific requirements, which allows some states to avoid undertaking any considerable measures in peacetime to protect their or other nationalities' cultural property on their territory.

III. Enforcement mechanisms of the 1954 Hague Convention and the Second Protocol related to respect for cultural property

12. Article 28 of the 1954 Convention stipulates that Parties have to undertake, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the Convention. Nonetheless, the shortcoming of this Article is the absence of a list of violations that would require criminal sanction. The Second Protocol clarified this deficiency and developed a list of serious violations.

13. Article 15 of the Second Protocol delineates serious violations requiring sanction:
   a. making cultural property under enhanced protection the object of attack;
   b. using cultural property under enhanced protection or its immediate surroundings in support of military action;
   c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
   d. making cultural property protected under the Convention and this Protocol the object of attack;
   e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

14. Nevertheless, the definition of serious violations is not in itself sufficient to ensure that persons committing such violations are actually punished. Under Article 15 of the Second Protocol, Parties are obligated to adopt such measures as may be necessary to make the above-mentioned offences criminal and punishable by domestic legislation. In order to provide effective national enforcement, implementing legislation has to be adopted covering two aspects: (a) criminalizing violations, and (b) establishing jurisdiction to try or extradite.

15. Nevertheless, what are the enforcement mechanisms stipulated by the 1954 Hague Convention if a Contracting Party during an armed conflict or in time of peace is unwilling or unable to ensure the protection of cultural property located in its territory or deliberately allows or orders destruction of cultural property of other nations or ethnic and religious minorities. The main body responsible for monitoring and supervising the implementation of the Second Protocol is the Committee for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter—Committee) established under Article 24 of the Second Protocol.

16. Pursuant to Article 31 of the Second Protocol, in situations of serious violation of the Protocol, the Parties undertake to act, jointly through the Committee, or individually, in

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cooperation with UNESCO and the United Nations and in conformity with the Charter of the
United Nations.\textsuperscript{12}

17. Articles 32 and 33 of the Second Protocol also envisage international assistance or
assistance from UNESCO if a Party makes such a request. A Party may request from the
Committee international assistance for cultural property under enhanced protection as well
as assistance with respect to the preparation, development or implementation of the laws,
administrative provisions and measures referred to in Article 10.\textsuperscript{13}

18. A Party may call upon UNESCO for technical assistance in organizing the protection of its
cultural property, such as preparatory action to safeguard cultural property, preventive and
organizational measures for emergencies and compilation of national inventories of cultural
property, or in connection with any other problem arising out of the application of the Second Protocol.\textsuperscript{14}

19. The forms of possible assistance granted by the Committee, UNESCO or Parties envisaged
in Annex III of the Guidelines for the implementation of the Second Protocol are \textit{expert
advice}, dispatch of technical missions to undertake operational projects, dissemination of
various reports and studies on different aspects of the implementation of the Second Protocol, etc.\textsuperscript{15}

20. The Committee may wish to adopt the following decision:

\textbf{DRAFT DECISION 13.COM 16}

The Committee,

1. \textit{Having examined} document C54/18/13.COM/16.Rev, and underlining the
importance of safeguarding cultural property situated outside of national territory,

2. \textit{Recognizes} the importance of promoting cultural diversity and religious and ethnic
tolerance,

24 March 2017) and the UNESCO Declaration concerning the Intentional
Destruction of Cultural Heritage (adopted on 17 October, 2003),

4. \textit{Stresses} that United Nations Member States have the primary responsibility in
protecting their cultural heritage and taking all appropriate measures to prevent,
avoid, stop and suppress acts of intentional destruction of cultural heritage,
wherever such heritage is located,

5. \textit{Encourages} Parties to the 1954 Hague Convention and/or the 1999 Second
Protocol to draw attention to protection and preservation of cultural heritage of
other nations or ethnic and religious minorities, situated in their territories,

6. \textit{Calls upon} Parties to the Second Protocol, in accordance with its Articles 31, 32 and
33, to act in situations of serious violations jointly through the Committee, or
individually, in cooperation with UNESCO and the United Nations and in conformity
with the Charter of the United Nations in order to cease such violations,

\textsuperscript{12} See 1999 Second protocol, Article 15, available at \url{http://www.unesco.org/new/en/culture/themes/armed-conflict-and-
heritage/convention-and-protocols/1999-second-protocol/}

\textsuperscript{13} 1999 Second protocol, Article 32, available at \url{http://www.unesco.org/new/en/culture/themes/armed-conflict-and-
heritage/convention-and-protocols/1999-second-protocol/}

\textsuperscript{14} 1999 Second protocol, Article 33, available at \url{http://www.unesco.org/new/en/culture/themes/armed-conflict-and-
heritage/convention-and-protocols/1999-second-protocol/}

\textsuperscript{15} See Guidelines for the implementation of the Second Protocol, Parts VI, VI.A, VI.B, VI.C, VI.D, VI.E, VI.F p.30-39, Annex III, p.48-52,
available at \url{http://unesdoc.unesco.org/images/0018/001867/186742E.pdf}
7. Invites the Parties to establish effective criminal enforcement mechanisms punishable by domestic legislation for breaches of the 1954 Hague Convention and serious violations of the 1999 Second Protocol,

8. Reaffirms the significance of the mandate assigned to the Committee under Article 27(1)(c) of the 1999 Second Protocol, particularly in the context of monitoring and supervising implementation,

9. Requests the Secretariat to prepare and to present a report to the 14th Meeting of the Committee regarding the options for conducting monitoring through the International Committee of the Blue Shield or other organizations on the status of protection and preservation of cultural heritage of other nations or ethnic and religious minorities, situated on the territories of the Parties.