Comments by AUSTRIA
on the
Creation of a distinctive emblem for cultural property under enhanced protection and establishment of the modalities for its use
(Document CLT-13/9.COM/CONF.203/X of 17 April 2014)

1. General

The Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (hereinafter "the Hague Convention") and its two protocols, are distinct from other UNESCO conventions relating to cultural heritage: The Hague Convention and its protocols are part of international humanitarian law (IHL), or the law of armed conflict (LOAC), and are, as such, not "stand-alone"-treaties, but must be interpreted and applied in the context of IHL/LOAC as a whole, which includes, in particular, the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 8 June 1977, as well as respective customary international law.

One of the characteristic features of IHL/LOAC, which essentially applies in situations of armed conflict or military occupation only, is that serious violations of its provisions are punishable as war crimes before national and international criminal courts or tribunals. IHL/LOAC is based, inter alia, on the principle of distinction between military targets, on the one hand, and protected persons and objects on the other: Military targets may lawfully be attacked, while protected persons or objects must be spared from hostilities and protected against their effects. Cultural property is a specific category of protected objects under IHL/LOAC.

In order to facilitate the recognition of protected persons and objects, so-called "distinctive emblems" or "protective emblems" were established under diverse IHL/LOAC treaties, among them the distinctive emblem established by Article 16 of the Hague Convention. While marking of protected persons and objects is generally not a prerequisite for their protected status and thus not obligatory, the use of distinctive or protective emblems is regulated in detail by the respective IHL/LOAC treaties. Furthermore, any improper use or misuse of such emblems is prohibited, and under certain circumstances punishable as a war crime.

This also applies to the distinctive emblem of cultural property, the use of which is regulated by Article 17 of the Hague Convention and any improper use of which is forbidden. Furthermore, any use for whatever purpose of a sign resembling the distinctive emblem, is prohibited (cf. Article 17 para. 3 of the Hague Convention). The deliberate misuse of this emblem in an armed conflict is not only prohibited by Article 17 (para. 3) of the Hague Convention but also under Article 38 (para. 1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (hereinafter "AP I"). Under certain circumstances (i.e. perfidious use in violation of Article 37 of

AP I) the deliberate misuse amounts to a so-called “grave breach” which shall be regarded as a war crime (Article 85 AP I).

According to Article 28 of the Hague Convention States Parties (and thus all States Parties to the Second Protocol) are obliged to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the Convention. In addition, according to the Geneva Conventions of 1949, to which basically all States are Parties (including all States Parties to the Second Protocol), States are obliged to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches (cf., e.g., Article 146 of the Convention relative to the Protection of Civilian Persons in Time of War, hereinafter: “Geneva Convention IV”, in combination with Article 85 AP I).

As all States Parties to the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, of 26 March 1999 (hereinafter “Second Protocol”), are Parties to the Hague Convention as well as to the Geneva Conventions of 1949, they are bound by the provisions of those treaties relating to the protection of cultural property and the use of the distinctive emblem of cultural property. Any violation of these provisions would be a breach of IHL/LOAC entailing State responsibility as well as, under certain circumstances, individual criminal responsibility.

2. Specific comments on Document CLT-13/9.COM/CONF.203/X

Ad para 2

As the Second Protocol is not a “stand-alone”-treaty, but must be interpreted and applied in the context of IHL/LOAC as a whole, including, in particular, the Hague Convention, the Geneva Conventions of 1949 and their Additional Protocol I, as outlined above, the establishment of a new distinctive emblem (for cultural property under enhanced protection) and the modalities for its use may NOT be defined by the States Parties to the Second Protocol, insofar as they outline the best practices for the implementation of the Second Protocol. The only – lawful – way to establish such a new distinctive emblem would be to create new international treaty law.

Ad para. 3

Currently, there already exists a “distinctive emblem” (to mark cultural property, including cultural property under enhanced protection), namely the emblem of the Hague Convention, and it is the only one. The use of the short term “the Distinctive Emblem” in the present document is thus misleading and should therefore be avoided throughout the whole document.

Ad para. 6

The short term “distinctive emblem of Geneva” is misleading as the Red Cross and the Red Crescent as well as the so-called “Red Crystal” (each of them on white ground) are three different emblems. They were as such established by the Geneva Conventions (the first two) and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, of 8 December 2005.

Ad para. 7

See the comments on para. 2. above. The modalities for the use of a new distinctive emblem (for cultural property under enhanced protection) cannot be regulated in a legally non-binding document such as the Guidelines on the Implementation of the Second Protocol (hereinafter “the Guidelines”). From the legal perspective both, an improper use of the distinctive emblem of the Hague Convention, as well as the use of an emblem resembling the distinctive emblem of the Hague Convention would be a breach of the Hague Convention (and other IHL/LOAC treaties) to be suppressed and prosecuted by States Parties to the Second Protocol (see the comments under 1. above).

Ad para. 13

The quote from Article 17 (3) of the Hague Convention is incomplete and thus apt to convey a wrong understanding of its content. Thus, the words “shall be forbidden” should be inserted after the words “resembling the distinctive emblem”.

Ad para. 15

It would be a breach of IHL/LOAC by the States members of the Committee if they encouraged or called upon the Parties requiring enhanced protection to mark such property by either making improper use of the distinctive emblem of the Hague Convention or by using an emblem resembling the distinctive emblem of the Hague Convention. Under certain circumstances such practice could even lead to the criminal responsibility of those involved in such practice of the Committee (see also the comments under 1. and on para. 7 above).

Ad para. 16

See the comments on para. 3 above.

Ad para. 18

Legally, there is no specific regime for transport of cultural property under enhanced protection. It is thus not understandable, why “for didactic purposes” (?!) a transport shall be designated as the “transport of cultural property under enhanced protection”, if the applicable legal rules are those of (and not “remain identical to those for”)

transport under special protection according to Chapter III of the Hague Convention on the transport of cultural property.

Concerning the marking of such transports the rules of the Hague Convention and, in particular, its Article 12 para. 2 apply (see the comments under 1. and on para. 3 above). The principle "*accessorium sequitur principale*" is a private law principle and does as such not apply in (public) international law, in particular not in IHL/LOAC!

Ad para. 19

See the comments on para 18 above.

Ad para. 28

There would be no legal basis for "combating" misuse of a new distinctive emblem by States, neither internationally nor nationally, unless such emblem is established by international treaty law: According to the internationally recognized criminal law principles "*nullum crimen sine lege*" and "*nulla poena sine lege*" no one may, without legal basis, be prosecuted or punished for misuse of an emblem the use of which is regulated by legally non-binding guidelines only.

Ad para. 30

See the comments on para. 28 above. States taking legislative or other measures to prosecute or punish someone for misusing an emblem the use of which is regulated by legally non-binding guidelines only would violate international law, in particular human rights law, as well as, most probably, their own national law.