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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

Ninth Meeting
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Item 7 of the provisional agenda: Cultural property and its immediate surroundings

The present document explains from a theoretical viewpoint the notion of immediate surroundings of cultural property in light of the 1954 Hague Convention and its Second Protocol. At the same time, it highlights the notion of immediate surroundings, in practice, as a variable-content notion which depends on the interpretation of the Parties to the Second Protocol.

The Parties' interpretation for determining the immediate surroundings of the cultural property under their jurisdiction, however, must be made in good faith by taking into consideration the object and aim of the Hague Convention and its Second Protocol.

Draft Decision: paragraph 21.

1. In December 2013, on the occasion of the eighth meeting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter “the Committee”), the Committee’s members considered the notion of “immediate surroundings”, which is mentioned both in Article 4(1) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter “the Hague Convention”) and in Articles 12 and 15(1)(b) of its 1999 (Second) Protocol (hereinafter “the Second Protocol”).¹ The question arose when the Committee examined applications submitted to it for the granting of enhanced protection status to cultural property and, more specifically, fulfilment of the criterion stated in Article 10(c) of the Second Protocol.² In the light of those queries, the Bureau of the Committee requested the Secretariat to prepare, for its ninth meeting in December 2014, a document explaining the notion of “immediate surroundings” in order to facilitate the submission of applications for enhanced protection.
2. To meet that request, the Secretariat will make it clear in this document that the notion of “immediate surroundings” is substantively variable in practice – in other words it is a notion that may be appraised wholly within the discretion of the Parties – and may not therefore be appraised in absolute terms. In the final analysis, only States Parties to the treaty instruments in question may interpret the provisions of the Hague Convention and its Second Protocol.
3. In this regard, it is important to point out that “immediate surroundings”, within the meaning of The Hague Convention and its Second Protocol, are distinct from the notion of “buffer zone” used in the Operational Guidelines for the Implementation of the World Heritage Convention.³ Whereas the purpose of the “buffer zone” is to protect the cultural property so that it retains the characteristics that warranted its inclusion in the World Heritage List, “immediate surroundings” serve a different purpose insofar as they are mentioned in the Hague Convention and its Second Protocol with a view to contributing to the protection of the cultural heritage item against the effects of hostilities.
4. This document refers, in Part I, to the relevant provisions of the Hague Convention and its Second Protocol, including the Guidelines for the Implementation of the Second Protocol (hereinafter “the Guidelines”). In Part II an explanation is provided of the extent to which “immediate surroundings” is a substantively variable notion, together with the reasons why only the Parties’ interpretation may be recognized as authoritative in international law.

1. **The theoretical notion of “immediate surroundings” in the light of the Hague Convention of 1954 and its Second Protocol**

5. The “immediate surroundings” notion is first mentioned in Article 4(1) of the Hague Convention. It is again mentioned in Articles 12 and 15(1)(b) of the Second Protocol. The notion is therefore closely linked, on the one hand, to the obligation of “respect for cultural property” under the general protection system and, on the other, to the legal, including criminal-law, consequences inherent in the granting of enhanced protection status to cultural property.

A. **The “immediate surroundings” in the general system of protection of cultural property**

6. One of the bases of the system of general protection afforded to cultural property originates in Article 4(1) of the Hague Convention, which states that:

¹ Annexed hereto are the relevant provisions of the 1954 Hague Convention, the Second Protocol and the Guidelines which are related to “immediate surroundings”.

² See Final Report of the 8th Meeting of the Committee, discussion on the granting of enhanced protection, available online at: <http://www.unesco.org/new/fr/culture/themes/armed-conflict-and-heritage/meetings-and-conferences/>

³ The “buffer zone” is mentioned in paragraphs 103-107, 112 and 113 of the Operational Guidelines for the Implementation of the World Heritage Convention (2013).

“The High Contracting Parties undertake to respect cultural property [...] by refraining from any use of the property **and its immediate surroundings** or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.”⁴

This provision concerning the obligation to “respect cultural property” is doubly prohibitive. Firstly, States are forbidden to use cultural property and its immediate surroundings or the appliances in use for its protection for purposes likely to expose it to destruction or damage. In other words, it is forbidden to make cultural property and/or its immediate surroundings a military objective by using such surroundings for military purposes.⁵ Secondly, it is forbidden to carry out any attack on cultural property, in accordance with the principle of distinction between military objectives and civilian property, including cultural property. In this regard, it should be emphasized that this principle, stated in favour of cultural property in Article 4(1) of the Hague Convention, is generally recognized in international humanitarian law Conventions.⁶

7. Article 4(2) of the Hague Convention, as complemented by Article 6 of its Second Protocol, provides that only “imperative military necessity” may constitute a waiver from the obligation of “respect for cultural property”. With regard to the possibility of using cultural property for purposes likely to expose it to destruction or damage, despite the obligation of “respect for cultural property”, the Second Protocol provides in Article 6(b) that “imperative military necessity” may be invoked only “when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage”. With regard to the possibility of directing an act of hostility against cultural property, despite the obligation of “respect for cultural property”, the Second Protocol provides in Article 6(a) that “imperative military necessity” may be invoked when “that cultural property has, by its function, been made into a **military objective** [...]”. Consequently, once cultural property is made a “military objective”, the latter can be the object of an “attack”. Apart from this eventuality, the prohibition on directing an act of hostility against cultural property is absolute. The Second Protocol contains a precise definition of the notion of “imperative military necessity” to avoid the abuses to which this notion may give rise in practice.
8. In addition to these considerations on the obligation of “respect for cultural property” and the notion of “imperative military necessity”, the Second Protocol sets out in Article 8 the rules for observing the principle of precaution against the effects of attacks in the particular case of cultural property.⁷ Accordingly, Article 8(b) of the Second Protocol contains clarification of

⁴ Emphasis added by the Secretariat.

⁵ The notion of “military objective” is defined in Article 1(f) of the Second Protocol, echoing the terms of Article 52(2) of the First Protocol of 1977 to the 1949 Geneva Conventions. Furthermore, with regard to the notion of “military objective”, it is of interest to consider Article 49(1) of the aforesaid First Additional Protocol of 1977, which gives the customary-law definition of “attack”.

⁶ Articles 48 and 52(1) of the First Additional Protocol of 1977 to the 1949 Geneva Conventions set out the principle of distinction and, as such, codify international custom. Furthermore, the ICRC study on customary international law confirms the customary nature both of the principle of distinction and of the definition of “military objective” (J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, ICRC, Cambridge University Press, 2005, Rules 7-10). The ICRC study also emphasizes the applicability of the principle of distinction to cultural property. Hence cultural property cannot be the object of attacks (Rule 38.B) or be used for purposes exposing them to destruction or damage (Rule 39).

⁷ The precautionary principle has two aspects: precaution against attack and precaution against the effects of attacks. This fundamental principle of international humanitarian law forms an integral part of customary international law. In that regard, Articles 57 and 58 of the First Additional Protocol of 1977 to the 1949 Geneva Conventions codify the custom relating thereto. Articles 7 and 8 of the Second Protocol refer to this cardinal principle, while providing specifically for specific cases of cultural property.

special interest for the purposes of determining the “immediate surroundings” of a cultural property by providing that:

“The Parties to the conflict shall, to the maximum extent feasible [...] avoid locating military objectives near cultural property.”

9. By extension, in light of these developments, particularly those relating to “imperative military necessity”, as defined in Article 6(a) of the Second Protocol, and those concerning the principle of precaution against the effects of attacks, the “immediate surroundings” of cultural property may be regarded as those constituting the perimeter of cultural property within which military objectives may not be sited on account of the risks of direct or indirect harm, because of such siting, to the cultural property in question. More precisely, such risks of direct or indirect harm – destruction or damage – could result from the effects of an “attack” launched against military objectives sites in the perimeter of cultural property.⁸

B. The immediate surroundings in the system of enhanced protection of cultural property

10. In connection with the system of enhanced protection introduced under the Second Protocol, it should be pointed out that its legal effects extend to the “immediate surroundings” of cultural property under enhanced protection.
11. Under the condition set forth in Article 10(c) of the Second Protocol, namely one of the three conditions on which enhanced protection may be granted, cultural property must not be used for military purposes or to shield military sites. It will be seen that Article 10(c) makes no mention of the “immediate surroundings” of cultural property that has been requested to be under enhanced protection. It must be noted concomitantly that paragraph 59 of the Guidelines on the content of the application for the granting of enhanced protection states appears *a priori* contradictory, as it states that:

“The declaration confirming that the **cultural property** and its **immediate surroundings** are not and will not be used for military purposes or to shield military sites is attached to the request [for the granting of enhanced protection]”.⁹

With regard, in general, to any request for the granting of enhanced protection, paragraph 55 of the Guidelines states that:

“The boundaries of an immovable property and its **immediate surroundings** are clearly defined [in the request for the granting of enhanced protection]. [...]. Maps are sufficiently detailed to determine precisely which area of land and/or building(s) are nominated. [...]”.¹⁰

While the Party is required to declare that the cultural property is not and will not be used for military purposes, the reference to “immediate surroundings” in the declaration of non-use for military purposes of the cultural property and in the application for inclusion in the list nevertheless, despite the aforesaid paragraphs 55 and 59, remains optional. As specified in Article 11(7) of the Second Protocol, the granting of enhanced protection is conditional on fulfilment of the conditions limitatively set forth in Article 10 of the Second Protocol. This point

⁸ The term “attack” refers to the notion of “attack”, as accepted in customary international humanitarian law and, as such, reflected in Article 49(1) of the First Additional Protocol of 1977 to the 1949 Geneva Conventions.

⁹ Paragraph 59 of the Guidelines for the Implementation of the Second Protocol, as amended in Decision 4.SP 2 adopted in December 2011 by the fourth Meeting of the Parties. Emphasis added by the Secretariat.

¹⁰ Paragraph 55 of the Guidelines for the Implementation of the Second Protocol, as amended in Decision 4.SP 2 adopted in December 2011 by the Fourth Meeting of the Parties. Emphasis added by the Secretariat.

of view is confirmed in paragraph 42 of the Guidelines, specifically devoted to the non-use for military purposes of cultural property in connection with the granting of enhanced protection. Incidentally, paragraph 42 stresses that the Party must confirm in a declaration that the cultural property will not be used for military purposes or to shield military sites, but does not refer to the “immediate surroundings” of the said cultural property. Consequently, in order to fully reflect the requirements of Articles 10 (c) and 11 (7) of the Second Protocol, it may be appropriate to amend the Guidelines’ paragraph concerning the requests for the granting of enhanced protection when those refer to immediate surroundings of cultural property¹¹.

12. The conclusion is that it is not absolutely necessary to mention the “immediate surroundings” of cultural property in the declaration of non-use for military purposes of the cultural property and in the request for inclusion in the list. However, once enhanced protection has been granted by the Committee in accordance with Article 11 of the Second Protocol, its legal effects extend to the “immediate surroundings” of the cultural property.
13. The notion of “immediate surroundings” determines the scope of the immunity that States are required to grant for cultural property placed under enhanced protection, in accordance with Article 12 of the Second Protocol. Furthermore, the Committee may, under Article 14(2) of the Second Protocol, suspend enhanced protection in the event of serious violations of the obligations guaranteeing immunity for cultural property under enhanced protection, particularly in the eventuality of use of the immediate surroundings of cultural property in support of military action, or it may even cancel the enhanced protection in the event of continuous serious violations.
14. The notion of “immediate surroundings” also determines the scope of the criminalization provided for in Article 15(1)(b) of the Second Protocol on “using cultural property under enhanced protection or its immediate surroundings in support of military action”. Under Article 15(2) of the Protocol, the Parties are required to take measures to recognize serious violations of the Second Protocol as criminal offences under their domestic law and to make them punishable by appropriate penalties. In accordance with paragraph 39 of the Guidelines, the incorporation of the criminal-law provisions of Chapter IV of the Second Protocol into States Parties’ domestic law constitutes one of the conditions *sine qua non* for the granting of enhanced protection.

II. The notion of “immediate surroundings”, a variable-content notion in practice that only the Parties may interpret

15. It has been shown that the notion of “immediate surroundings” corresponds to a perimeter that must be determined and protected in order to effectively implement the relevant provisions of the Hague Convention and its Second Protocol.
16. In addition to this comment, it should be stressed that, from a practical point of view, the perimeter in question depends on the specific features of each cultural property, whether movable or immovable. As an illustration, the immediate surroundings of immovable cultural property – for instance a house characterized by architecture of the greatest importance to humanity – cannot be likened to the immediate surroundings of other cultural property – such as an archaeological site, certainly also of the greatest importance to humanity but covering several hundred hectares. In that regard, the notion of “immediate surroundings” is essentially a variable-content notion that must ultimately be interpreted by the Parties to the Second Protocol, which have sole authority to determine the immediate surroundings of cultural property under their jurisdiction. In this connection, it should also be stressed that,

¹¹ Paragraphs 55, 59 and 77 of the Guidelines are concerned. By amending, it is understood to delete the reference to immediate surroundings of cultural property. A proposal of amendments has been drafted, and is included to this document in annex 2.

while the Committee has authority to grant enhanced protection (Article 11 of the Second Protocol), just as it has authority to suspend or cancel such protection (Article 14 of the Second Protocol), it nevertheless has no authority under the Second Protocol to determine the “immediate surroundings” of a cultural property. In regard to the granting of enhanced protection, Article 11(7) of the Second Protocol stresses expressly that “a decision to grant or deny enhanced protection may **only** be made on the basis of the criteria mentioned in Article 10 [of the Second Protocol]”.¹² As to requests for the granting of enhanced protection, it follows that the Parties identify, as appropriate, the “immediate surroundings” of the cultural property in question for information only and that the Committee is not required to rule on their relevance.

17. Furthermore, it is important to stress that only the interpretation accepted by the Parties to the Second Protocol for determining the “immediate surroundings” of cultural property is recognized as authoritative in international law. Nevertheless, the States Parties’ interpretation of the Second Protocol must be set in a specific context. Not only must the Hague Convention and its Second Protocol be executed in good faith in accordance with the *pacta sunt servanda* principle,¹³ but they must also be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the treaty so that their provisions will be effective.¹⁴ As to the Hague Convention and its Second Protocol, the purpose of the said treaties is to protect cultural property in the event of armed conflict, and that aim is pursued by introducing, in particular, the goal of specific protection mechanisms and a system of international assistance.

III. Conclusion

18. This document has made it clear that the “immediate surroundings”, as mentioned both in the Hague Convention and in its Second Protocol, may be regarded as those constituting, in theory, the perimeter of cultural property within which military objectives may not be sited on account of the risks of direct or indirect harm, because of such siting, to the cultural property in question.
19. In relation to the requests for granting enhanced protection and the probable reference to “immediate surroundings” of cultural property with the requests, this document underlines that such a reference, according to the Second Protocol, has an informative value and does not influence the validity of the request for the granting of enhanced protection. In order to fully reflect the stipulation laid down by the Second Protocol in this matter, it is proposed, in annex 2 of this document, a series of amendments to paragraphs 55, 59 and 77 of the Guidelines.
20. Furthermore, since the notion of “immediate surroundings” is a variable-content notion, its expression, in practice, depends on the specific features of each cultural property. Hence Parties determine, at their own discretion, the immediate surroundings of the cultural properties within their jurisdiction. In connection with the implementation of the Hague Convention and its Second Protocol, the notion of “immediate surroundings” may therefore be interpreted peremptorily only by the Parties to the Second Protocol. Such interpretation must nevertheless, in accordance with the relevant principles of interpretation, be made in good faith, in light of the object and aim of the Hague Convention and its Second Protocol and for the purpose of making treaty instruments effective.

¹² Emphasis added by the Secretariat.

¹³ Customary principle codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties.

¹⁴ Customary principle codified in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties. See also: ICJ, Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994, pp. 6 et seq., especially p. 25, paragraph 51.

21. In view of the above, the Committee may wish to adopt the following decision:

DRAFT DECISION 9.COM 5

The Committee

1. Having examined document CLT-14/9.COM/CONF.203/5 concerning the relevant principles for the determination of the immediate surroundings of cultural property according to 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol,
2. Recommends to the meeting of the Parties to consider at its sixth meeting in 2015 the proposals of amendments to the Guidelines as jointed in Annex 2 in order to endorse them, as appropriate, and to amend those Guidelines accordingly.

Annex 1

Provisions of the 1954 Hague Convention of interest for determining the immediate surroundings of a cultural property

Article 4. Respect for Cultural Property

1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

[...]

Provisions of the 1999 Second Protocol of interest for determining the immediate surroundings of a cultural property

Article 6. Respect for cultural property

With the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:

a. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:

- i. that cultural property has, by its function, been made into a military objective; and
- ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;

b. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;

c. the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;

d. in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit.

Provisions of the Guidelines for the Implementation of the Second Protocol of interest for determining the immediate surroundings of a cultural property

[...]

Granting of enhanced protection – Criteria – No military use

42. The cultural property concerned must not be used for military purposes or to shield military sites. The Party which has control over the cultural property has to make a declaration confirming that the cultural property will not be used for military purposes or to shield military sites. In accordance with Article 3 of the Second Protocol, these provisions also apply in times of peace.

[...]

Procedure for the granting of enhanced protection – content of the request

55. The boundaries of an immovable cultural property and its immediate surroundings are clearly defined, and the Universal Transverse Mercator (“UTM”) co-ordinates of the boundaries of such property are marked on the map(s) attached to the request. Maps are sufficiently detailed to determine precisely which area of land and/or building(s) are nominated. Movable cultural property is identified by its detailed descriptions and sufficient images.

[...]

59. The Party describes the use of the cultural property. It provides all relevant information to establish that the property is not used for military purposes or to shield military sites. In addition, a declaration, issued by the national authority which has been authorized by the State concerned as competent for this matter, confirms that the cultural property and its immediate surroundings will not be used for military purposes or to shield military sites is attached to the request. The information provides the facts needed to support and substantiate the argument that the cultural property meets the criterion laid down in Article 10(c).

[...]

The List [of cultural property under enhanced protection]

77. Each cultural property is inscribed in one of the two divisions. Information about the cultural property and the scope of the protection is provided as follows:

- (a) name and identification of the cultural property;
- (b) description of the cultural property;
- (c) location, boundaries and immediate surroundings of the cultural property;
- (d) other relevant information.

[...]

Procedure on suspension and cancellation – Suspension

85. The Committee may suspend the enhanced protection of a cultural property if cultural property or its immediate surroundings are used in support of military action.

Annex 2

Proposals of amendments to paragraphs 55, 59 and 77 of the Guidelines for the implementation of the 1999 Second Protocol

<u>Guidelines for the implementation of the Second Protocol</u>	<u>Proposed amendments</u>
<p>55. The boundaries of an immovable cultural property and its immediate surroundings are clearly defined, and the Universal Transverse Mercator (“UTM”) co-ordinates of the boundaries of such property are marked on the map(s) attached to the request. Maps are sufficiently detailed to determine precisely which area of land and/or building(s) are nominated. Movable cultural property is identified by its detailed descriptions and sufficient images.</p>	<p>55. The boundaries of an immovable cultural property and its immediate surroundings are clearly defined, and the Universal Transverse Mercator (“UTM”) co-ordinates of the boundaries of such property are marked on the map(s) attached to the request. Maps are sufficiently detailed to determine precisely which area of land and/or building(s) are nominated. Movable cultural property is identified by its detailed descriptions and sufficient images.</p>
<p>59. The Party describes the use of the cultural property. It provides all relevant information to establish that the property is not used for military purposes or to shield military sites. In addition, a declaration, issued by the national authority which has been authorized by the State concerned as competent for this matter, confirms that the cultural property and its immediate surroundings will not be used for military purposes or to shield military sites is attached to the request. The information provides the facts needed to support and substantiate the argument that the cultural property meets the criterion laid down in Article 10(c).</p>	<p>59. The Party describes the use of the cultural property. It provides all relevant information to establish that the property is not used for military purposes or to shield military sites. In addition, a declaration, issued by the national authority which has been authorized by the State concerned as competent for this matter, confirms that the cultural property and its immediate surroundings will not be used for military purposes or to shield military sites is attached to the request. The information provides the facts needed to support and substantiate the argument that the cultural property meets the criterion laid down in Article 10(c).</p>

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- (b) description of the cultural property;
- (c) location, boundaries and immediate surroundings of the cultural property;
- (d) other relevant information.

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- (a) name and identification of the cultural property;
- (b) description of the cultural property;
- (c) location **and boundaries and immediate surroundings of the cultural property**;
- (d) other relevant information.