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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

Seventh meeting
UNESCO Headquarters, Paris
20 to 21 December 2012

Item 8 of the Provisional Agenda:
Protection of cultural property in occupied territory

(prepared by Azerbaijan)

I. Introduction

1. The cultural heritage, together with natural environment represents values which contribute to the sustainable development and to the social culture of society. Thus, its protection constitutes a significant part of the material and spiritual wealth of the world. Unfortunately, today, the world suffers from armed conflicts resulted in military aggression, occupation and forceful acquisition of territories. Along with civilians, who suffer from forceful displacement and ethnic cleansing, cultural and historical heritage is one of the most vulnerable targets of these hostile acts.
2. Cultural heritage must be protected, not only in the event of armed conflict but also in case of occupation. In many cases, the cultural heritage situated in the occupied territories suffers from destruction accompanied by illegal archeological excavations, appropriation and subsequent export of the cultural property from the occupied territories.
3. The scale of such destruction has risen significantly since the nineties, and Azerbaijan, as several other countries, knows it firsthand. The deficiencies regarding the scope of protection and lack of monitoring mechanisms in international law, namely in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the 1954 Hague Convention) led to the adoption of the Second Protocol of the Convention in 1999 and subsequent establishment of the Committee for the Protection of Cultural Property in the Event of Armed Conflict (Committee). Regrettably, the Committee since its first meeting in 2006, has not achieved all its objectives, namely the supervision of implementation of the relevant provisions of the Second Protocol related to the protection of cultural property in occupied territories. There are several mechanisms dealing with the monitoring of a situation with regard to protection of cultural property in an occupied territory in the Convention and in the Second Protocol, but those are either not working or doomed to failure.
4. By presenting this document which covers several mechanisms existing in the Second Protocol, Azerbaijan wishes to draw the attention of the Committee to this highly important issue and to discuss what kind of mechanisms can be put in place.

II. Occupation in international humanitarian law

5. The occupation is one of the situations which follow the history of States and is often a consequence of the military invasion. If the invasion is a military irruption into the territory of the States, the occupation is a specific situation which does not mean transfer of the sovereignty and is regulated by the laws of armed conflicts. It is necessary to keep in mind these basic provisions before starting to deal with the narrower subject of the situation of cultural property in occupied territories.
6. The issue of occupation and its legal definition was a matter of concern since the end of nineteenth century and with the regulation of the laws of war by international legal provisions, this issue was dealt with by practically all international conventions on the laws of war. It started with the International Declaration concerning the Laws and Customs of War (Brussels Declaration of 1874)¹ and followed by the 1899 and 1907 Hague Regulations². The 1907 Hague Regulations is undoubtedly the most important provision in this field. It was not only an international treaty, but was recognized as part of the customary international law.
7. The next most important source of the law concerning the occupation is the 1949 Fourth Geneva Convention,³ which is essential for understanding the basic present rules concerning the occupation. The Fourth Geneva Convention goes beyond the issue of occupation and further provides the provision dealing with protection of cultural property in occupation.⁴

¹ Article 1-3 and 7 of the Brussels Declaration of 1874

² Article 42-43, 55-56 of the Hague Regulations of 1907

³ Article 47-78 of the Fourth Geneva Convention of 1949

⁴ Article 53 of the Fourth Geneva Convention of 1949

8. The international law stipulates that the occupying power cannot annex the occupied territory, change its political status, demographic, social or cultural character and is obliged to respect political and social status and the institutions that exist in that territory. During the period of occupation, the occupying forces are responsible for the management of public order and civil life in the territory under their control.
9. But in this regard, it should be underlined that in some cases, the legitimate authorities of the occupied territories are totally demolished and eliminated, and as a result of total ethnic cleansing, whole communities have been expelled from the occupied territories and their cultural heritage has been completely destroyed. In these situations, the preservation and protection of the cultural heritage in occupied territories demands special attention and should be dealt with by the international community.

III. Protection of cultural property in occupied territories

A. The 1954 Hague Convention

10. The Convention for the Protection of Cultural Property in the Event of Armed Conflict adopted at The Hague (Netherlands) in 1954, in response to the massive destruction of the cultural heritage in the Second World War, is the first international treaty of universal application dedicated exclusively to the protection of cultural heritage in the event of armed conflict.
11. The Convention is accompanied by Regulations for its execution, which forms an integral part thereof, as well as a first Protocol aimed primarily at preventing the export of cultural objects from occupied territory. The Convention, namely Article 5, imposes an obligation upon the Contracting Parties to *“take measures to preserve cultural property situated in occupied territory and damaged by military operations”*.
12. Protection is accorded automatically to all objects which fall under the definition. It comprises two aspects: safeguarding and respect for such property, however, the Convention does not specify the form which such 'safeguarding' should take.
13. Article 4, relating to 'respect for cultural property' is even more detailed, and prohibits *“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”*. It also prohibits *“any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property”*.
14. The Convention also provides for a system of special protection (Articles 8-11; Regulations for Execution, Articles 11 -17). Objects falling under such protection include refuges intended to shelter movable cultural property in the case of armed conflict, centers containing monuments and other immovable cultural property of very great importance.

B. The 1999 Second Protocol to the 1954 Hague Convention

15. Like the 1954 Hague Convention with Article 5, the Second Protocol also includes specific provision on the protection of cultural property in occupied territory. Thus, Article 9 stipulates the obligation of a State Party in occupation to *“prohibit and prevent in relation to the occupied territory:*
 - a. any illicit export, other removal or transfer of ownership of cultural property;*
 - b. any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property*
 - c. any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence”*.
16. Paragraph 2 of Article 9 of the Second Protocol underlines the exclusive competence of the national authorities of the occupied territory in the event that any archeological excavation, alteration to, or change of use of cultural property is undertaken.

17. The title of the Article and the introductory phrase of paragraph 1 indicate that two elements must be kept in mind: protection of cultural property, regulated in particular by Article 4 of the Convention, and occupied territory, regulated in principle by Article 5 of the Convention.
18. As it is reflected in the definition of the occupation, Article 9 of the Protocol must be seen in this context: the protection of cultural property should not be changed as a result of occupation and the aim of Article 9 is to eliminate by prohibition and preventive measures, significant interference in the cultural environment of the occupied territory. This Article, based on the existing international law of occupation, protects cultural property against arbitrary decisions based on military strength and force and requires that the decisions of national authorities of an occupied territory or State must be respected.

Paragraph 1

19. The Article defines the Occupying Power as “a Party in occupation of the whole or part of the territory of another Party.” An Occupying Power has a responsibility to ‘prohibit and prevent’ the series of acts mentioned in sub-paragraphs (a), (b) and (c) in relation to the occupied territory.
20. It should be pointed out that the involvement of national authorities is fully respected in Article 5 of the Convention. The drafters of the Convention were very much preoccupied with the respect and role of the national authorities of the occupied territory. The Occupying Power has to provide support to the national authorities, and even this duty is limited by the clause ‘as far as possible”, thus reflecting the notion of military necessity. It is therefore necessary to reinforce the responsibility of the Occupying Power and limit the possible benefits from the occupation.

Paragraph 2

21. To reflect the obligation of the Occupying Power, paragraph 2 uses the word ‘shall,’ and archaeological excavations mentioned here should be carried out in close cooperation with the competent national authorities of the occupied territory. This is confirmation of one of the principles of the 1956 Recommendation on International Principles Applicable to Archaeological Excavations, expressed in its Preamble, that individual States are more directly concerned with archaeological discoveries made on their territory.
22. This paragraph confirms the role of national authorities in all questions relating to cultural property. It also confirms the rules which govern occupation since the adoption of the 1907 Hague Regulations.

C. Destruction of cultural property - war crime

23. It is also important to mention that the International Criminal Tribunal for the former Yugoslavia and the Rome Statute of the International Criminal Court consider the destruction of cultural property to be a war crime.
24. The ICTY has held individuals accountable for the destruction or damage done to the institutions dedicated to religious, artistic, scientific, or historic monuments. It is interesting to mention that legal literature analyzed the concept of “cultural genocide”, introduced by the Polish Professor Raphael Lemkin, who formulated the term “genocide” and referred to cultural genocide which may occur when the institutions and objects devoted to religious, artistic, literary, or other cultural activities are destroyed during armed conflicts and occupations.

IV. Implementation of the provisions of the 1954 Hague Convention and the 1999 Second Protocol

A. Supervision of the implementation of the Protocol – Reporting system

25. One of the main reasons for the adoption of the Second Protocol was to improve the protection of cultural property in the event of armed conflict and supplement the provisions of the Hague Convention through measures to reinforce their implementation. This rationale

was behind the creation of the Committee which is tasked, among other things, with the monitoring and supervision of the implementation of the Protocol.⁵

26. The implementation mechanism requires that the Parties to the Protocol provide the information on their implementation of the Second Protocol, including Article 9. According to the Article 37 (2), the information is to be provided every four years. In this respect, one of the functions of the Committee is “ to consider and comment on reports of the Parties, to seek clarifications as required, and prepare its own report on the implementation of this Protocol for the Meeting of the Parties”.⁶

27. The Guidelines recently adopted by the Committee are specifically dealing with the periodic reports of State Parties in occupation:

“102. The Committee requests Parties to cover the following items in their periodic reports on the implementation of the Second Protocol:

- *Implementation of general provisions regarding protection*

- *To inform on peacetime preparatory measures for the safeguarding of cultural property undertaken or envisaged to be undertaken.*

- *Parties which are occupying powers, to inform how the provisions of the Protocol concerning the protection of cultural property in occupied territory are complied with”.*

B. Role of the Protecting Powers

28. Another important institution of the international law is the role given to the Protecting Powers. The Hague Convention of 1954 includes the following Articles related to Protecting Powers: Chapter VII (Execution of the Convention) Articles 21-22. The Second Protocol follows this model in Articles 34-35. But the provisions with regard to this mechanism are not applicable to current situations.

C. Implementation of the Second Protocol in the absence of Protecting Powers

29. If there are serious problems with the appointment and use of the Protecting Powers, the Second Protocol includes the provision in the absence Protecting Powers.⁷

D. Assistance of UNESCO

30. Two Articles are devoted to the role of UNESCO in this field: Article 23 of the Hague Convention and Article 33 of the 1999 Second Protocol. Both articles are very similar and mainly focus on technical assistance of UNESCO to protect cultural property by preventive and organizational measures.

E. Commissioners-General for Cultural Property

31. The 1954 Hague Convention introduced a very innovative system of implementation included in the Articles 2, 4 and 6 of the Regulations for its execution. It is important to note that the use of the Commissioner-General is done when there is no possibility to use the system of the Protecting Powers. The few attempts to develop this system were, unfortunately, not successful. Even if all other attempts were abandoned, such an innovative system should be used again.

⁵ Article 27 (Functions of the Committee) of the Second Protocol of the Hague Convention of 1954

⁶ Article 27 (1(d)) of the Second Protocol of the Hague Convention of 1954

⁷ Article 36 of the Second Protocol of the Hague Convention of 1954

V. Conclusions and practical proposals

32. Taking into consideration the analysis of the existing legal instruments related to the protection of cultural property in occupied territories and mechanisms of its implementation, there is a dire necessity to bring this issue to the attention of the Committee and to discuss possible ways to protect and monitor the cultural property in occupied territories.
33. The most practical and immediate actions may be the following:
- i. Request the Director-General to send her personal representative(s) to occupied territories, as appropriate, in order to assess the state of cultural property situated therein and to propose practical safeguarding measures. The terms of reference are to be agreed upon by the Occupying Power and the State, the territories of which have been occupied. It will be at the discretion of the Director-General to decide on further use of reports of the personal representative(s); and,
 - ii. Use the services of the Chairperson of the Committee with a view to arranging for a meeting of the representatives of the Occupying Power and the State, the territories of which have been occupied, and in particular, of the authorities responsible for the protection of cultural property, at the invitation of one Party or of the Director-General, on the territory of a State not party to the conflict. Such meeting shall focus on technical issues related to the assessment of the state of cultural property and proposal for safeguarding measures.
 - iii. Request the Secretariat to provide the Committee with an in-depth study of best practices to protect and monitor the cultural property in occupied territories at the eighth meeting of the Committee in 2013;
 - iv. Undertake the study in collaboration with the International Committee of the Red Cross on ways to improve the protection and methods of protection which will substantially improve the existing traditional and static way of dealing with such situations;
34. In view of the above, the Committee may wish to adopt the following decision:

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The Committee,

1. Referring to Articles 4, 5 and 23 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,
2. Referring to Articles 9, 33, 34, 35 and 36 of the Second Protocol to the 1954 Hague Convention,
3. Recalling paragraph 102 of the Guidelines for the Implementation of the Second Protocol to the 1954 Hague Convention,
4. Emphasizing the importance of the protection and monitoring of the cultural property in occupied territories,
5. Having considered document CLT-12/7.COM/CONF.201/7, "Protection of Cultural Property in Occupied Territories", submitted by the Republic of Azerbaijan,
6. Requests the State Parties in occupation to cover in their periodic reports, the information on the implementation of the provisions of the Second Protocol concerning the protection of cultural property in occupied territories;
7. Invites the Director-General to send her personal representative(s) to occupied territories of the Republic of Azerbaijan;
8. Invites the Director-General to report, as appropriate, to the Meeting(s) of the Committee on the outcome of the mission(s) of her personal representative(s);

9. Requests the Secretariat to provide the Committee with in-depth study of best practices to protect and monitor the cultural property in occupied territories at the eight meeting of the Committee in 2013.