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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

Tenth Meeting  
UNESCO Headquarters, Paris  
10 and 11 December 2015

#### **Item 6 of the provisional agenda:** **Procedure for granting enhanced protection**

This working document is part of efforts to follow up on Decision 9.COM 6 of the Committee. It outlines the outcome of the consultations of the Secretariat with the Parties with a view to developing methodologies for analysing the three criteria outlined in Article 10 of the 1999 Second Protocol whilst also presenting the information available to the Secretariat to date with regards to examining requests for the granting of enhanced protection.

**Draft decision:** paragraph 75

## INTRODUCTION

1. The enhanced protection mechanism introduced by Chapter III (Articles 10 to 14) of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (hereafter referred to as "enhanced protection") aims to ensure the immunity of cultural property<sup>1</sup> inscribed on the List of Cultural Property under Enhanced Protection (hereafter referred to as "the List") in the case of armed conflict, including occupation. From a legal perspective, enhanced protection respectively complements the general protection afforded to cultural property (Article 4 (a) of the 1999 Second Protocol) and replaces the special protection regime (Article 4 (b) of the 1999 Second Protocol). In other words, when cultural property is under both special and enhanced protection, the status of enhanced protection shall prevail with regards to relations between Parties.
2. The List currently features 10 cultural properties falling under the jurisdiction and control of States party to the 1999 Second Protocol (Azerbaijan, Belgium, Italy, Lithuania and the Republic of Cyprus).<sup>2</sup> All of these cultural properties were already inscribed on the World Heritage List.
3. The Committee for the Protection of Cultural Property in the Event of Armed Conflict (hereafter referred to as "the Committee"), created by the 1999 Second Protocol and governed in its operation by Articles 24 and 27 of this standard-setting instrument, shall have sole authority over the inscription of cultural property on the List.
4. The granting of enhanced protection to cultural property is subject to the cumulative fulfilment of the conditions outlined in Article 10 of the 1999 Second Protocol, namely:
  - (a) *"it is cultural heritage of the greatest importance for humanity"*;
  - (b) *"it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection"*;
  - (c) *"it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used"*.
5. In accordance with Article 11, paragraph 7, of the 1999 Second Protocol, the decision to grant or refuse enhanced protection may only be made on the fulfilment of said conditions.
6. Any cultural property, as defined in Article 1 of the Hague Convention of 1954, may be submitted for inscription on the List. Requests for enhanced protection can therefore be submitted both for movable or immovable cultural property and for buildings whose main and effective purpose is to preserve or exhibit movable cultural property (e.g. museums or refuges) and centres containing monuments.
7. Based on the observation that the Committee does not have a methodology for examining the fulfilment of the conditions outlined in Article 10, paragraphs (a) and (b), the Secretariat commissioned two studies by the International Council on Monuments and Sites (hereafter referred to as "ICOMOS") in 2013 for the purposes of clarifying the

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<sup>1</sup> The notion of 'cultural property' is defined in Article I of the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

<sup>2</sup> The List of cultural property under enhanced protection is available at [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/19542P-enhanced-protection-list-en\\_20140320.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/19542P-enhanced-protection-list-en_20140320.pdf)

notions outlined in Article 10, paragraphs (a) and (b), and establishing a methodology that makes it possible to objectively assess the fulfilment of these two conditions.<sup>3</sup>

8. During its 8th Meeting, the Committee took note of the following:

*"the relevance of developing methodologies to analyse criteria 10 (a) and 10 (b) of the 1999 Second Protocol in order to facilitate the submission of requests for enhanced protection, as well as their evaluation [whilst inviting] the Secretariat to present the conclusions of the completed studies as well as any potential follow-up at its ninth meeting".<sup>4</sup>*

9. During the Committee's 9th Meeting, the Secretariat drew the Committee's attention to the studies performed by ICOMOS<sup>5</sup>, whilst pointing out that it was continuing to consider them in conjunction with the World Heritage Centre.<sup>6</sup>
10. During this same meeting, the Committee decided to extend its analysis to all of the conditions outlined in Article 10 of the Second Protocol, including Article 10, paragraph (c) regarding the non-military use of the cultural property submitted for inscription on the List.
11. In doing so, the Committee, by means of its Decision 9.COM 6, requested that the Secretariat:

*"further continue its work, in cooperation with the International Committee of the Red Cross and the International Committee of the Blue Shield, **in consultation with the Parties**, on developing methodologies **to analyse the three criteria of Article 10 of the 1999 Second Protocol** and to report on the results of its evaluation prior to the Tenth Meeting of the Committee [and invited] the Secretariat, in this context, to present, as appropriate, draft amendments to the Guidelines for the Implementation of the Second Protocol for consideration by the members of the Committee at its Tenth Meeting".<sup>7</sup>*

## I. FOLLOW-UP TO COMMITTEE DECISION 9.COM 6

12. In order for the Parties to be consulted on the development of methodologies for analysing the three criteria outlined in Article 10 of the Second Protocol, the Secretariat prepared a document containing all of the information it had available, along with a commentary of those paragraphs of the Guidelines for the Implementation of the Second Protocol (hereafter referred to as "the Guidelines") considered to be relevant with regards to requests for the granting of enhanced protection.
13. This document, accompanied by a letter from the Assistant Director-General for Culture explaining the approach, was sent by email on 3 July 2015 to the Parties to the 1999 Second Protocol, the International Committee of the Red Cross (hereafter referred to as the "ICRC") and the International Blue Shield Committee (hereinafter referred to as "the Blue Shield").

<sup>3</sup> The purpose of these studies is outlined in the Secretariat's working document CLT-13/8.COM/CONF.203/2, and §7 thereof in particular. Document available at <http://unesdoc.unesco.org/images/0023/002301/230111E.pdf> (consulted on 21 April 2015).

<sup>4</sup> Decision 8.COM 2 adopted by the Committee at its 8th Meeting. Available at <http://unesdoc.unesco.org/images/0023/002301/230105E.pdf> (consulted on 21 April 2015).

<sup>5</sup> The ICOMOS study is available at <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/ICOMOS-studies.pdf> (consulted on 21 April 2015).

<sup>6</sup> Document CLT-14/9.COM/CONF.203/6. Available at <http://unesdoc.unesco.org/images/0023/002309/230928E.pdf> (consulted on 21 April 2015).

<sup>7</sup> Decision 9.COM 6 adopted by the Committee at its 9th Meeting. Available at: [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/9\\_COM\\_Decisions\\_EN.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/9_COM_Decisions_EN.pdf) (consulted on 21 April 2015). (Highlighting by the Secretariat).

14. As of 31 August 2015, comments had been received from 9 Parties (Belgium, Canada, Cyprus, Germany, Greece, Japan, Mexico, Spain, and the Netherlands), that is a little over 13% of the Parties, and from the ICRC and the Blue Shield. The comments are available online at the following website: <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/meetings-and-conferences/>.

## II. CONDITIONS FOR GRANTING ENHANCED PROTECTION

15. In order to facilitate the Committee's discussions on the conditions for granting enhanced protection, the following is outlined below with regards to the notions of "greatest importance for humanity" and the "highest level of protection":
- The issue raised;
  - The primary findings of the studies conducted by ICOMOS;
  - A summary of the written comments received by the Parties and Organisations consulted; and,
  - The proposal put forward by the Secretariat, reflecting the consensus of the opinions expressed by the nine Parties that participated in the consultation phase.

With regards to the "declaration of non-use for military purposes", the following aspects will be outlined:

- The current practice adopted by the Secretariat;
- A summary of the written comments received by the Parties; and,
- The proposal put forward by the Secretariat, reflecting the consensus of the opinions expressed by the nine Parties that participated in the consultation phase

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

16. Cultural property must be of the "*greatest importance for humanity*" in order to be submitted for inscription on the List. The Guidelines (paragraphs 32 to 37) suggest that the fulfilment of this condition be assessed on a case-by-case basis based on three non-cumulative criteria, these being:
- The exceptional cultural significance of the cultural property;
  - The uniqueness of the cultural property; and/or,
  - The irretrievable loss for humanity in the event that the cultural property is destroyed.
17. 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.
18. 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 is permitted to presume that immovable cultural property included on the World Heritage List satisfies the "*greatest importance for humanity*" criterion.

### Issue

19. The current system demonstrates a number of shortcomings:
- The presumption benefits only immovable cultural property inscribed on the World Heritage List;

- Movable cultural property, which can also be submitted for inscription on the List, does not benefit from any presumptions; and,
  - With regards to cultural heritage, inscription on the World Heritage List concerns only immovable cultural property of "*outstanding universal value*".<sup>8</sup> 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 merely a synonym of the notion of "*outstanding universal value*".
20. 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. Said heritage is not necessarily specifically advertised and/or not included on the World Heritage List. This, of course does not mean that it is any less worthy of attention or appropriate protection. It is important, therefore, to also encourage the inscription of such heritage on the List wherever possible.

### **Primary findings of the ICOMOS study**

21. The ICOMOS study on Article 10, paragraph (a),<sup>9</sup> highlighted the following, among other things:
- Unlike the World Heritage List, which is considered to be particularly selective, the List is inclusive. In other words, the List, owing to the spirit of "protection" that underpins the Hague Convention of 1954 and the two corresponding Protocols, is designed to cover as much cultural property as possible (paragraph 1.13 of the study on Article 10 (a));
  - Unlike the 1972 Convention, which recognises the "outstanding universal value" of cultural property provided that said value is of universal scope, the Guidelines recognise property of exceptional cultural importance, be it national, regional or universal, as satisfying the "*highest importance for humanity*" criterion (paragraph 1.16 of the study on Article 10(a));<sup>10</sup>
  - A proposed definition of the notion of "*greatest importance for humanity*" (paragraphs 2.1, 2.2, and 6.2 to 6.4 of the study) and proposed amendments to the current paragraphs 31 to 35 of the Guidelines (paragraph 6.5 of the study on Article 10(a)); and,
  - A list of information that should feature in the application for the granting of enhanced protection, in order to help justify the "*greatest importance for humanity*" aspect (paragraph 7 of the study on Article 10 (a)).

### **Summary of written comments received by the Parties and Organisations consulted with regards to Article 10, paragraph (a)**

22. **Germany** welcomed the inclusion in the Guidelines of a definition of the notion of "greatest importance for humanity" that would be as broad as possible while still emphasising the importance of the legal qualification used by the submitting State. **Germany** does, however, believe that it is necessary to determine whether the legal qualification used by the submitting State would be a compulsory part of the process of

<sup>8</sup> Article 11, paragraph (b) of the 1972 Convention Concerning the Protection of World Cultural and Natural Heritage.

<sup>9</sup> The ICOMOS study can be viewed via the following link: <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/ICOMOS-studies.pdf> (consulted on 21 April 2015).

<sup>10</sup> Point 6.6 of the ICOMOS study on Article 10 (a) recommends that the notion of 'regional' be clarified and suggests that the term 'regional' be understood as relating to a cultural or geographical space encompassing two or more States.

evaluating requests for the granting of enhanced protection. Likewise, it is important to determine at what point in the procedure for granting enhanced protection the qualification in question would be taken into consideration.

23. Having examined the definition proposed by ICOMOS, **Belgium** believes subparagraph 3 of the definition proposed in point 6.5 of the first study to be clearly undesirable. Furthermore, **Belgium** believes that it is important to clarify in the future definition whether, as ICOMOS suggests, the "irretrievable loss for humanity" would be incorporated in the definition, or whether this aspect would continue to be one of the evaluation criteria, as the Guidelines recommend with regards to this matter. **Belgium** has also called for clarification regarding the issue of the inscription both of transnational cultural property, mixed heritage and cultural landscapes, and of mass-produced goods.
24. Generally speaking, **Canada** believes that the Guidelines represent an appropriate tool for examining requests for the granting of enhanced protection. With regards to introducing a definition, **Canada** considers it problematic to seek to define the concept of "greatest importance for humanity" and believes that the drafting of a definition could resemble a *de facto* modification of the Second Protocol. Finally, **Canada** believes that the notion of "greatest importance for humanity" is in essence restrictive and that when a property is included on the List this should be based on the cultural importance of the property in question and not on the threat under which it finds itself.
25. **Cyprus** has expressed its agreement on the drafting of a definition of the notion of "greatest importance for humanity", emphasising the inclusive nature of the list with a view to covering as much cultural property as possible.
26. **Spain** believes that the List should be considered inclusive. It does, however, recognise the difficulty associated with identifying objective criteria with a view to assessing the "greatest importance for humanity", given the cultural diversity of the world.
27. **Greece** has highlighted the fact that the absence of a definition of the "greatest importance for humanity" was intentional at the time the Guidelines were produced, in order to leave room for manoeuvre when it came to examining the fulfilment of this condition. A definition may, however, now be necessary.
28. **Mexico** believes that it is important to find a balance that makes it possible to avoid the inconveniences of a restrictive understanding of the notion of "greatest importance for humanity" whilst at the same time ensuring that the List remains relevant. **Mexico** believes that, as things stand, the Guidelines represent an appropriate tool for examining requests for the granting of enhanced protection. Although **Mexico** believes that the drafting of a definition would provide a point of reference both for States and for the Committee with a view to broaching the issue of enhanced protection in a more coherent manner, it also underlines the risk that the latter may be too vague or too specific, thus proving detrimental to the mechanism by which enhanced protection is granted.
29. The **Netherlands** believes that the List is inclusive and that it is for each Party to determine which of the cultural properties that belong to it are of the "greatest importance for humanity". With this in mind, the **Netherlands** is in favour of respecting the qualification used by the submitting State. With regards to a potential definition, the **Netherlands** believes that the latter should include the option for a Party to refer back to its own methodology for defining the importance of cultural heritage. Furthermore, the **Netherlands** believes that other lists, such as the "Memory of the World Register", whether compiled by government or non-government bodies, could be taken into consideration for the purposes of determining the "greatest importance for humanity" of a cultural property.

30. The **ICRC** believes that the introduction of an objective assessment of the "greatest importance for humanity" criterion should be considered in terms of feasibility and appropriateness. With this in mind, the **ICRC** believes that a definition of this notion would inevitably have restrictive effects that would not be in the interests of the Committee since it would prevent it from granting enhanced protection to property that it nevertheless deemed worthy of such protection on formal grounds. The **ICRC** considers the List to be inclusive and that, consequently, the approach selected by the Guidelines is worthy of being pursued, in that it recognises that the Committee has a certain margin of appreciation when it comes to examining requests for the granting of enhanced protection.
31. With regards to the table that could be incorporated in the Guidelines and that would contain all of the factual information and internal documents justifying the "greatest importance for humanity", **Germany** believes that in order to ensure the credibility of the List, the Guidelines should clearly state that any conclusions on this matter should be based, first and foremost, on the factual information referred to in paragraphs 33 and 34 thereof.
32. **Cyprus** has also expressed its agreement with the production of a table, with a view to assisting the Parties concerned in gathering the information required to justify the "greatest importance for humanity", without said table having to be either exhaustive or exclusive.
33. **Japan** believes that an example of a table containing the information to be taken into account when considering the greatest importance for humanity should be put forward in order to fuel a more in-depth discussion.
34. The **ICRC** is in favour of incorporating a table in the Guidelines, provided that it is not exhaustive.
35. The **Blue Shield** believes that, in addition to introducing a table containing all of the information to help demonstrate the "greatest importance for humanity", the Guidelines could also permit both government and non-government organisations with expertise in the cultural field to testify to the Committee regarding the "greatest importance to humanity" of a cultural property.

**Proposal put forward by the Secretariat, reflecting the consensus of the opinions expressed by the nine Parties that participated in the consultation**

36. The legal qualification used, along with the justification provided by the submitting State with regards to the "*greatest importance for humanity*" of the cultural property for which enhanced protection is requested, is fundamental. Given the inclusive nature of the List, it is important to avoid a restrictive understanding of this notion, to the point of excluding cultural heritage with extraordinary characteristics from the enhanced protection system.
37. The legal qualification used by the submitting State, including the corresponding justification,<sup>11</sup> should be respected. The submitting State, however, must produce justification outlining the characteristics of the cultural property that demonstrate its greatest importance for humanity. The procedure outlined in Article 11, paragraph 5, of the 1999 Second Protocol, along with the authoritative decision of the Committee, shall both exclude situations in which property that is not of cultural nature is submitted for inscription on the List and enable correcting factual mistakes.

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<sup>11</sup> Paragraph 57 of the Guidelines outlines the action to be taken with regards to the way in which the submitting State should justify, in its application form for the granting of enhanced protection, "*the greatest importance for humanity*" of the cultural property under its jurisdiction and/or control. In the Secretariat's opinion, this does not require any modification.

38. Despite the definition proposed by ICOMOS, the inclusion in the Guidelines of a definition of the concept of "greatest importance for humanity" has not been met with approval from all of the Parties that participated in the consultation phase. In the absence of a definition, a centreline for facilitating the assessment of the condition outlined in Article 10, paragraph (a), of the Second Protocol could be to extend the spectrum of the presumptions outlined in paragraph 37 of the Guidelines whilst also taking into account inscription on the "Memory of the World Register" and inscription on the "International Register of Cultural Property under Special Protection" or on any other national, regional or universal document produced by a government or non-government authority attesting to the extraordinary cultural importance and/or unique nature of the cultural property in question.

#### **B. ARTICLE 10, PARAGRAPH (B): "THE HIGHEST LEVEL OF PROTECTION"**

39. The 1954 Hague Convention (Article 3) and its 1999 Second Protocol (Article 5) made the obligation to safeguard cultural property one of the cornerstones of the cultural property protection system. This obligation requires preparatory measures to be taken against the foreseeable effects of an armed conflict to be adopted in times of peace.
40. With regards to the granting of enhanced protection, the Second Protocol requires such measures to be adopted, provided that they acknowledge "extraordinary cultural and historic value" and guarantee the "highest level of protection" (see Article 10, paragraph (b), of the Second Protocol and paragraph 38 of the Guidelines).
41. Paragraphs 39 to 41 of the Guidelines have illustrated this obligation, notably making the implementation of Chapter IV of the Second Protocol - "Criminal responsibility and jurisdiction" - one of the essential conditions on which to determine the fulfilment of said condition.

#### **Issue**

42. Assessing the condition outlined in Article 10, paragraph (b), of the Second Protocol requires both factual and qualitative analysis. Whilst an examination of the relevant criminal legislation (purely factual analysis), or of the transposition of the regulations regarding the protection of cultural heritage in military training programmes (purely factual analysis), are not *a priori* problematic, the same cannot be said for the evaluation of other preparatory measures resulting from the implementation of Article 5, as complemented by paragraphs 27 to 29 and 39 of the Guidelines respectively – first subsection.
43. For each cultural property, the objective assessment of said preparatory measures requires a qualitative analysis with a view to determining both their appropriateness and their effectiveness (paragraph 40 of the Guidelines).

#### **Primary findings of the ICOMOS study**

44. The ICOMOS study on Article 10, paragraph (b),<sup>12</sup> highlighted the following, among other things:
- A list of preparatory measures that should be implemented in order to ensure that the condition outlined in Article 10, paragraph (b) (paragraphs 1.2, 1.5 and 1.6 of the study on Article 10(b)) is met; and,
  - The importance of ensuring that the state of preservation of cultural goods under enhanced protection is monitored, following their inscription on the List, with said monitoring testifying to the effectiveness of the preparatory

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<sup>12</sup> The ICOMOS study can be viewed via the following link: <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/ICOMOS-studies.pdf> (consulted on 21 April 2015).



measures adopted and presented at the time of the request for inscription on the List (paragraph 1.3 of the study on Article 10(b)).

**Summary of written comments received by the Parties and Organisations consulted with regards to Article 10, paragraph (b)**

45. **Germany** supports the introduction of a consolidated table listing all of the preparatory measures to be adopted depending on the type of cultural heritage in question for the purposes of assessing the "highest level of protection" that can be granted to cultural property. It does, however, believe that this table should be seen as auxiliary evidence that paragraph 39 of the Guidelines is being observed. Furthermore, **Germany** believes that it is important to clarify whether the "highest level of protection" should be examined based on a series of universal criteria or through the adoption of a case-by-case approach.
46. As mentioned in the ICOMOS studies, **Belgium** would like the adoption of safeguarding measures to be recognised as also being relevant for the purposes of protecting cultural heritage against the effects of natural disasters. With regards to safeguarding measures, **Belgium** believes that it is important to limit this to the setting of objectives, without specifying the appropriate means of achieving them, which will fall within the authority of the Parties concerned.
47. **Canada** is in favour of producing tools and methodologies to help the Parties to ensure the "highest level of protection" for the cultural property for which they request enhanced protection based on a series of common and standard criteria. With regards to movable cultural property, **Canada** believes that the work undertaken by ICOMOS should be further developed.
48. **Cyprus** is in favour of introducing a checklist highlighting the preparatory measures that must be adopted with regards to requests for the granting of enhanced protection.
49. **Spain** is in favour of a checklist that would help facilitate the submission of requests for the granting of enhanced protection.
50. **Japan** believes that there are many different types of cultural property and that the distinction exceeds the limits of movable and immovable cultural goods alone. Each type of cultural property is subject to a number of specific regulations. With this in mind, a practical table listing the preparatory measures for each type of cultural property should be provided as a basis for discussion. Furthermore, **Japan** believes that defining the notions referred to in Article 5 of the Second Protocol is likely to result in the introduction of unnecessary stringent conditions and that it is important to encourage requests for the granting of enhanced protection by avoiding the introduction of stringent conditions.
51. **Mexico** believes that the Guidelines, as they currently stand, make it possible to thoroughly examine whether property submitted for inscription is covered by the "highest level of protection". Since the Guidelines represent a practical and concise tool we should avoid complicating them unnecessarily.
52. The **Netherlands** believes that the location of cultural property is of vital importance to the Ministries of Defence of Parties involved in conflict.
53. The **ICRC** is in favour of incorporating a table into the Guidelines, provided that it is not exhaustive.
54. With regards to the monitoring of cultural property under enhanced protection, the **Blue Shield** believes that they should be monitored in a way similar to that in which world heritage sites are monitored.

**Proposal put forward by the Secretariat, reflecting the consensus of the opinions expressed by the nine Parties that participated in the consultation**

55. In the absence of significant involvement of the Parties concerned in the consultation, it is difficult to break away from the *status quo*. Nevertheless, some of the Parties that did participate in this phase have expressed an interest in the introduction of a table summarising the information to be taken into consideration when assessing the fulfilment of the condition outlined in Article 10, paragraph (b), of the Second Protocol.
56. A potential centreline could therefore involve incorporating a table not into the Guidelines themselves but into Annex I of the Guidelines, which includes the 'Enhanced Protection Request Form' (a 'Checklist' table designed to provide the Committee with a basis for discussion, if need be, is attached to the present document). In practice, the table would contain the information referred to in paragraphs 38 to 41 of the Guidelines. This tool would enable the national authorities responsible for preparing requests for the granting of enhanced protection to ensure that their requests comply with the Guidelines.
57. With regards to the monitoring of cultural property under enhanced protection, meanwhile, the Secretariat believes this to be of vital importance, not least because it helps ensure that the conditions outlined in Article 10 of the Second Protocol are continually being met and gives the Parties concerned the opportunity to highlight any changes in their situations in accordance with paragraph 65 of the Guidelines. As demonstrated by the letter sent by the Assistant Director-General for Culture to all of the States party to the 1999 Second Protocol on 20 March 2015, the Secretariat currently favours the monitoring of cultural property under enhanced protection by means of a modification to the form regarding national reports. With this in mind, a new 'standard format' for the submission of national reports was prepared for the Committee's 10th Meeting.

**C. ARTICLE 10, PARAGRAPH (C): "NON-USE FOR MILITARY PURPOSES"**

58. The granting of enhanced protection is dependent upon the presentation of a "declaration of non-use for military purposes". Given the wording of paragraph (c), the declaration appears to cover two aspects, namely:
- a current factual observation; in other words, the cultural property is not used for military purposes or to shield military sites; and,
  - a declaration for the future regarding the non-use of the cultural property for military purposes or to shield military sites.
59. The declaration made in virtue of paragraph (c) of Article 10 is effective in times of peace (see paragraph 42 of the Guidelines, which refers back to Article 3 of the Second Protocol). Nevertheless, it should be clarified that "*the guarding of cultural property by armed custodians specially empowered to do so, or the presence, in the vicinity of such cultural property, of police forces normally responsible for the maintenance of public order, is not deemed "use for military purposes"*".<sup>13</sup>
60. In order to fully comply with the wording of paragraph (c), the Secretariat has already proposed an amendment to paragraph 59 of the Guidelines at the Committee's 9th Meeting that would see this paragraph apply only to the cultural property in question and not to its immediate surroundings, with regards to the declaration of non-use for military purposes. This proposed amendment has been accepted by the Committee

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<sup>13</sup> Paragraph 43 of the Guidelines.

and will be submitted for approval at the 6th Meeting of the Parties, to take place at the UNESCO Headquarters in December 2015.<sup>14</sup>

61. It should be noted that whilst the request for the granting of enhanced protection can be submitted by the Party that "has jurisdiction or control over the cultural property" in question (Article 11, paragraph 2, of the Second Protocol), the declaration of non-use for military purposes can only be made by the Party "which has control over the cultural property" (Article 10, paragraph (c), of the Second Protocol).
62. The notions of 'jurisdiction' and 'control' in the framework of the mechanism for granting enhanced protection call for an interpretation that, in any case, only the Parties to the 1999 Second Protocol are able to offer (Article 31, paragraph 3 of the 1969 Vienna Convention on the law of treaties).
63. Beyond the notions of 'jurisdiction' and 'control', it is important to note that, in accordance with Article 11, paragraph 4, of the Second Protocol, "neither the request for inclusion of cultural property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State, nor its inclusion, shall in any way prejudice the rights of the parties to the dispute".

**Current practice adopted by the Secretariat**

64. With regards to assessing the declaration of non-use for military purposes, the Secretariat receives said declaration and to pass it on to the Committee.<sup>15</sup>
65. Furthermore, according to paragraph 59 of the Guidelines, as modified by the 4th Meeting of the Parties, the Secretariat does not offer an opinion regarding the competent authority to make such a declaration.
66. In the event of a dispute regarding the validity of the declaration of non-use for military purposes, the Parties are able to implement the procedure outlined in Article 11, paragraph 5, of the 1999 Second Protocol, and the Committee, with final authority, shall decide.

**Summary of written comments received by the Parties with regards to Article 10, paragraph (c)**

67. Only two Parties expressed their views on the practice adopted by the Secretariat with regards to examining the declaration of non-use for military purposes.
68. **Germany** believes that the declaration of non-use for military purposes shall not, under any circumstances, be considered a unilateral declaration that creates any legal obligations.
69. **Belgium**, meanwhile, believes that since, in accordance with paragraph 46 of the Guidelines, as modified by the 4th Meeting of the Parties, the Secretariat forwards requests for the granting of enhanced protection to the Bureau of the Committee, together with a review of their completeness, it cannot simply receive the declaration of non-use for military purposes and pass it on to the Committee. On the contrary, it is important that the Secretariat also give its opinion on the validity of said declaration. In practice, the validity of this declaration requires the Party making the declaration to 'control' the cultural property submitted for inscription on the List. In order for the

<sup>14</sup> Secretariat document CLT-14/9.COM/CONF.203/5, "Cultural property and its immediate surroundings", Annex 2. Available at: <http://unesdoc.unesco.org/images/0023/002304/230491E.pdf> (consulted on 21 April 2015).

<sup>15</sup> Over the course of the 5th Meeting of the Parties, the amended request form for the granting of enhanced protection was approved, including a model declaration of non-use for military purposes. Available at: <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/enhanced-protection-request-form-en.pdf>

Secretariat and, in the event of any uncertainty, the Bureau of the Committee to examine the request, **Belgium** believes that it is important then to refer, in the Guidelines, to the relevant international case law defining the notions of 'jurisdiction' and 'control'.

70. The other Parties that participated in the consultation did not raise any objections regarding the practice adopted by the Secretariat.

**Proposal put forward by the Secretariat, reflecting the consensus of the opinions expressed by the nine Parties that participated in the consultation phase**

71. As things currently stand, the Secretariat does not believe that any modifications to the Guidelines, with the exception of the one to be presented at the 6th Meeting of the Parties, is required.

**CONCLUSION**

72. 68 States are currently party to the Second Protocol. Of these 68 States, only 9, that is just over 13%, have expressed an opinion. Beyond the fact that they express the positions of a limited number of Parties, an analysis of the comments received does not reveal a broad consensus with regards to any potential amendments to the Guidelines. The positions of the Parties concerned vary, and are sometimes difficult to reconcile.
73. With this in mind, the Secretariat is not in a position to propose any amendments to those paragraphs of the Guidelines relating to the conditions governing the granted of enhanced protection that are likely to be approved by the Parties or, at the very least, by the majority of them. As a result, unless the Committee indicates the direction in which future amendments to the Guidelines should be taken, the *status quo* would appear to be appropriate.<sup>16</sup>
74. Whilst the Committee was nevertheless meant to consider that the amendments to the paragraphs of the Guidelines were essential, a possible centreline could be to adopt a dynamic decision indicating those paragraphs that, in Chapter III.A of the Guidelines, "The granting of enhanced protection", should be amended, along with the direction in which such amendments should be taken. In order to facilitate the process, the Chairperson of the Committee could be entrusted with the task of conducting the necessary consultations with representatives of the Parties with a view to obtaining a result that is representative of the positions of those concerned. This approach would help provide an amendment draft for the relevant paragraphs of the Guidelines that more accurately reflects the positioning of the Parties at the Committee's 11th Meeting and is also likely to be more readily adopted by the 7th Meeting of the Parties, to take place in 2017.
75. The Committee may wish to adopt the following decision:

**DRAFT DECISION 10.COM 3**

The Committee,

1. Having examined document CLT-15/10.COM/CONF.203/3,
2. Recalling its Decision 9.COM 6, whereby the Secretariat was entrusted with the task of conducting consultations with the Parties with a view to developing

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<sup>16</sup> Whilst the practice currently adopted by the Meeting of the Parties tends to favour a consensus when it comes to the adoption of its decisions, including those regarding the approval of the Guidelines in accordance with Article 23 (3) (b) of the 1999 Second Protocol, the fact nevertheless remains that, in line with the Rules of Procedure of the Meeting of the Parties, a simple majority, subject to the rules of quorum and not consensus, is what is needed for the decisions made at the Meeting of the Parties to be adopted (Article 12 of the Rules of Procedure of the Meeting of the Parties to the Second Protocol).

methodologies for analysing the three criteria outlined in Article 10 of the 1999 Second Protocol,

3. Noting the poor level of participation among the Parties in this consultation phase,
4. Acknowledges the difficulties that such conditions present with regards to putting forth concrete proposals with a view to facilitating the procedure for granting enhanced protection;
5. Entrusts the Chairperson of the Committee with the task of conducting the appropriate consultations with the Parties with a view to identifying improvements that may be made to the procedure for granting enhanced protection and of reporting back to the Committee at its 11th Meeting;
6. Asks that the Secretariat assist the Chairperson of the Committee in his/her endeavours.

## 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.

<i>Nature of the protective measure to be implemented</i>	Have you taken this information into account in the application for the granting of enhanced protection?	Have you explained the measure(s) adopted by your authorities, demonstrating their relevance and their effectiveness in practice?	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.
Establishment of an inventory of the cultural property in question, including any movable property that it might contain			
Planning of emergency measures to ensure that property is protected against the risks of fire or the collapse of buildings			
Preparing for the removal of movable cultural property or provision for adequate <i>in situ</i> protection for said property			

Designation of competent authorities responsible for the safeguarding of cultural property			
Consideration of the protection of cultural heritage in military training plans and programmes			
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)			