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Guidelines and Criteria

The International Council on Archives

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Guidelines and Criteria

The 2nd Protocol covers "movable or immovable property of great importance to the cultural heritage of every people" (c.f. article 10). Article 1.b seems to suggest that 'movable' property would be housed in buildings that would be meant to preserve, exhibit or shelter those objects. This is not necessarily the case; in time of war, movable property may be moved to less vulnerable locations that have not necessarily been listed as shelter before.

The Guidelines¹ request that the description of the property shall include the identification of the property, and an overview of its history and development. All component parts that are mapped should be identified and described. In particular, where serial requests are proposed, each of the component parts should be clearly described. The history and development of the property should describe how the property has reached its present form and the significant changes that it has undergone. This information should provide the important facts needed to support and give substance to the argument that the property would meet the criteria required under Article 10.²

The explanation of what "requests and all necessary and relevant documentation to substantiate the request"³ should consist of, underlines the assumption that the authors of the Guidelines envisage built heritage in first instance, and secondly their contents. They seem not to refer at movable heritage as such.

'The important facts needed to support and give substance to the argument that the property meets the criteria required under Article 10' may suffice for registrations under the World Heritage Convention; however, they do not suffice as means of 'unique identifier' for movable property such as records and archives.

In the understanding that objects after legal or illegal removal from their housing as mentioned above would still benefit from enhanced protection, description of the property should thus contain a 'finger print' that could serve as a unique identifier. Subsequently the Guidelines should be amended and require 'important facts' that would be adequate as unique identifier for those objects and that would be acceptable as proof in case of litigation.

This illustrates the fundamental problem for ICA of these draft Guidelines – they are largely based on immovable heritage and do not address the complexities of protecting all form of movable cultural property.

Paris, 2007 March 27

¹ See 5.2.2. Description of the Property

² See *Operational Guidelines for the Implementation of the World Heritage Convention*, N°132 (2).

³ See 5.2.7. Format of Request and Documentation

2. Scope of Application

The first practical question is to understand to what situation the Second Protocol applies. The scope of application of the Second Protocol is clarified by illustrating its different criteria based on the subject-matter (*ratione materiae*), the time element (*ratione temporis*), the state and territories concerned (*ratione personae* and *loci*).

Additional clarifications cover the use of terms as armed conflict and occupation, as well as the specific situation of conflicts not of an international character.

2.1. The Definition of Cultural Property (Scope Ratione Materiae)

With a view to facilitating the application of both the 1954 Convention and its 1999 Protocol, the drafters of the Second Protocol made sure that the scopes of application of the 1954 Convention and the 1999 Protocol be identical.

As made clear under Article 1, b of the Second Protocol, "cultural property" means cultural property as defined in Article 1 of the 1954 Convention, i.e. which reads:

For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
- (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'.

2.2. Time Factor (Scope Ratione Temporis)

As other treaties, which do not state anything to the contrary, the Second Protocol is deemed not to operate retroactively. The Protocol applies vis-à-vis a State Party to acts or facts, which took place after its entry into force with respect to that State Party⁴.

The Second Protocol entered into force on 9 March 2004, three months after the twentieth instrument of ratification, acceptance, approval or accession was deposited⁵.

Vis-à-vis each new State Party, the Second Protocol shall enter into force, for each Party, three months after the deposit of its instrument of ratification, acceptance, approval or accession⁶.

As an exception to the three-month rule, situations of armed conflict, both of an international or non-international character, as referred to in Articles 18 and 19 of the 1954 Convention⁷, shall give

⁴ Article 28, *Non-retroactivity of treaties* (1969 Vienna Convention on the Law of Treaties). Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

⁵ Article 43 (1).

⁶ Article 43 (2).

⁷ Article 18. Application of the Convention:

1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by, one or more of them.
2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High

immediate effect to ratifications, acceptances or approvals or accessions to the Second Protocol deposited by the parties to the conflict either before or after the beginning of hostilities or occupation. In such cases, the Director-General shall transmit the communications referred to in Article 46 by the speediest method⁸.

2.3. States and Territories Concerned (Scope Ratione Personae and Loca)

As with any treaty that expresses no different drafters' intention, the Second Protocol is binding only vis-à-vis its States Parties and does not create rights or obligations for third States (unless their consent is evidenced)⁹.

Furthermore, the Second Protocol applies to the entire territories of its States Parties¹⁰.

The drafters of the Second Protocol did not include a provision, which enables States Parties to limit the territorial extension of the Second Protocol. This provision exists under the 1954 Convention.¹¹

5.1. Conditions to Request Enhanced Protection

5.1.1. The Three Conditions

The Second Protocol provides in Article 10 that upon the application of a State Party the Committee may place the most important cultural property under enhanced protection, providing it meets three conditions¹², i.e.

- "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."

These conditions must be met at the time enhanced protection is applied for and must last as long as this protection is granted. Where cultural property no longer meets any one of these conditions, the Committee may suspend its enhanced protection status or cancel that status by removing that cultural property from the List¹³ (See below).

Contracting Party, even if the said occupation meets with no armed resistance.

3. If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in relation to the said Power, if the latter has declared, that it accepts the provisions thereof and so long as it applies them.

Article 19. Conflicts not of an international character

1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as, a minimum, the provisions of the present Convention which relate to respect for cultural property.
2. The parties to the conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
3. The United Nations Educational, Scientific and Cultural Organization may offer its services to the parties to the conflict.
4. The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

⁸ Article 44.

⁹ Article 34. *General rule regarding third States (1969 Vienna Convention on the Law of Treaties)*. A treaty does not create either obligations or rights for a third State without its consent.

¹⁰ Article 29, *Territorial scope of treaties (1969 Vienna Convention on the Law of Treaties)*. Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

¹¹ Article 35.

¹² "Condition" is the terminology used in Article 10 ("Critère" in the French version). These Guidelines use both "condition" and "criteria".

¹³ Article 14 (1).

Cultural property, which is eligible for enhanced protection, remains "cultural property" in the sense of the Second Protocol, i.e. as defined by Article 1 of the 1954 Convention¹⁴.

5.1.2. The Special Status of Condition b)

Again, the importance of the criteria (conditions) set forth under Article 10 is self-explanatory. They represent the only basis the Committee has for its decision to grant or deny enhanced protection¹⁵ and, *inter alia*, limit the scope of representations other States Parties may make (see below).

However, different from conditions a) and c), condition b) (Cultural property is protected by adequate domestic legal and administrative measures) may be unfulfilled at the time the Committee assesses the request. Indeed, in these exceptional cases, when the Committee has concluded that the Party requesting inclusion of cultural property in the List cannot fulfil the criteria of Article 10 sub-paragraph (b), the Committee may decide to grant enhanced protection, provided that the requesting Party submits a request for international assistance under Article 32¹⁶.

The same specific status of condition b) exists with regard to a different situation. Upon the outbreak of hostilities, a State Party to the conflict may request, on an emergency basis, enhanced protection of cultural property under its jurisdiction or control by communicating this request to the Committee. In this case the Committee may decide to grant provisional enhanced protection pending the outcome of the regular procedure for the granting of enhanced protection, provided that the provisions of Article 10 sub-paragraphs (a) and (c) are met¹⁷.

5.1.3. Does Condition c) Imply a Minimum Distance or even a "Buffer Zone"?

Condition c) requires the property not to be "used for military purposes or to shield military sites" and that "a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used".

Condition c) does not make any distance between a potential military objective and the cultural property proposed for enhanced protection a formal requirement to request enhanced protection under Article 10. The Committee may, however, wish to consider whether a minimum distance (i), or even a "Buffer Zone" (ii), would be an appropriate additional element, though it would not operate as an additional formal requirement (beyond the three conditions under Article 10).

- i) A minimum distance of [500] meters between a potential military objective and the cultural property proposed for enhanced protection, appears a sound protection requirement. If this minimum distance fails in a given case, a request for enhanced protection remains possible under Article 10. The requesting State Party shall, however, state its views on the risks the proximity of a potential military objective may generate for the cultural property and endeavour to the possible extent to increase the distance to the minimum required [500 meters].
- ii) A further step would be to require the requesting State Party to propose a "Buffer Zone" wherever necessary for the proper protection of the cultural property submitted for enhanced protection. While a minimum distance [500 meters or a different distance] is a merely geographical requirement and involves no limitation on the use of the territory underlying the distance, a "Buffer Zone" would represent a step further, both more protective for the property and more demanding on the

¹⁴ See above on scope (*ratione materiae*). Article 1 of the 1954 Convention reads:

For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
- (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'.

¹⁵ Article 11 (7).

¹⁶ Article 11 (8).

¹⁷ Article 11 (9).

territorial State. Indeed, it requires the requesting State Party to ensure that this zone - as in the example of the World Heritage Convention - has complementary legal and/or customary restrictions placed on its use and development to give an added layer of protection to the property¹⁸.

In any event, a "Buffer Zone" requirement is not part of the conditions set out in Article 10. Thus, even if the Committee wishes to adopt a "Buffer Zone" in the framework of requests for enhanced protection, it would imply an obligation on the requesting State Party i) to propose a "Buffer Zone" around the cultural property submitted for enhanced protection wherever necessary for the proper protection of it; ii) to explain why the buffer zone is not required for an effective protection of the cultural property concerned in the cases where it was not proposed. However, this obligation would not extend to making the existence of an effective "Buffer Zone" a formal requirement in addition to the three conditions set out in Article 10 for cultural property to be placed under enhanced protection.

5.2.2. Description of the Property

The description of the property shall include the identification of the property, and an overview of its history and development. All component parts that are mapped shall be identified and described. In particular, where serial requests are proposed, each of the component parts shall be clearly described.

The history and development of the property shall describe how the property has reached its present form and the significant changes that it has undergone. This information shall provide the important facts needed to support and give substance to the argument that the property meets the criteria required under Article 10.¹⁹

5.2.3. Significance of the Property as of the "Greatest Importance for Humanity"

Documentation providing clear evidence that the cultural heritage submitted to the Committee for the purposes of granting to it enhanced protection is of the greatest importance for humanity.

In addition, a comparative analysis of the property in relation to properties of a comparable significance, recognized both at the national and the international levels, shall be provided, regardless of whether or not these properties are on the List of Cultural Property under Enhanced Protection and/or on the World Heritage List.

5.2.4. Adequate Domestic Legal and Administrative Measures

Documentation providing clear evidence that the cultural heritage submitted to the Committee for the purposes of granting to it enhanced protection is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value, and ensuring the highest level of protection.

This requires the requesting State Party to provide *inter alia* evidence of:

- i) Legal status and ownership of the property concerned, including full details of any national legal and administrative cultural heritage protection measure applicable to it, recognizing its exceptional cultural and historical value and ensuring the highest level of protection;
- ii) An appropriate management plan or management system and assurances of its effective implementation;
- iii) The emergency protective measures or plans and the means of implementing them;
- iv) The key indicators proposed
 - a. to measure and assess the state of conservation of the property,
 - b. the factors affecting it,

¹⁸ Operational Guidelines for the Implementation of the World Heritage Convention, N° 104.

For the purposes of effective protection of the nominated property, a buffer zone is an area surrounding the nominated property which has complementary legal and/or customary restrictions placed on its use and development to give an added layer of protection to the property. This should include the immediate setting of the nominated property, important views and other areas or attributes that are functionally important as a support to the property and its protection. The area constituting the buffer zone should be determined in each case through appropriate mechanisms. Details on the size, characteristics and authorized uses of a buffer zone, as well as a map indicating the precise boundaries of the property and its buffer zone, should be provided in the nomination.

¹⁹ See Operational Guidelines for the Implementation of the World Heritage Convention, N° 132 (2).

- c. conservation measures,
- d. the periodicity of their examination; and
- e. the identity and contact information of the responsible management authority for the property.

5.2.5. No Current and Future Use of the Property for Military Purposes

Documentation providing clear evidence that the cultural heritage submitted to the Committee for the purposes of granting to it enhanced protection is not used for military purposes or to shield military sites and that a declaration has been made by the Party, which has control over the cultural property, confirming that it will not be so used.

In this framework, it should be observed that the Second Protocol provides no definition of use for military purposes. However, it defines "military objective" as an object, which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

If the Committee decides to establish a mechanism of "minimum" distances from any potential military objectives, or even "Buffer Zones" (see above, 5.1.3.), the documentation provided shall cover also these issues.

5.2.6. Information about a Change of Situation

The requesting State Party is committed to inform promptly the Secretariat of any change affecting the capacity of the concerned property to meet the requirements set out in Article 10 so as to enable an up-date and, where appropriate, a revision of the status of enhanced protection and/or a new decision by the Committee.

5.2.7. Format of Request and Documentation

Requests and all necessary and relevant documentation to substantiate the request shall:

- i) include recent images and an image inventory²⁰;
- ii) be transmitted in printed form (A4-size paper or "letter") as well as in electronic format (E-mail in Word or RTF Format, and CD-Rom);
- iii) be presented in English or French duly signed (by the official empowered to sign the request on behalf of the State Party), and transmitted to the Secretariat (International Standards Section, Division of Cultural Heritage, 1 Rue Miollis, 75015 Paris);
- iv) be in two copies (one for the President of the Committee, one for the Secretariat) with an additional third copy in a loose-leaf format to facilitate photocopying (rather than in a bound volume).

The Secretariat will retain all supporting documentation (maps, plans, photographic material, etc.) submitted with the request.

²⁰ States Parties shall provide a sufficient number of recent images (prints, slides and, where possible, electronic formats, videos and aerial photographs) to give a good general picture of the property. Slides shall be in 35mm format and electronic images in jpg format at a minimum of 300 dpi (dots per inch) resolution. If film material is provided, Beta SP format is recommended for quality assurances. This material shall be accompanied by the image inventory and photograph and audiovisual authorization form. At least one photograph that may be used on the public web page illustrating the property shall be included. States Parties are encouraged to grant to UNESCO, in written form and free of charge, the non exclusive cession of rights to diffuse, to communicate to the public, to publish, to reproduce, to exploit, in any form and on any support, including digital, all or part of the images provided and license these rights to third parties. The non exclusive cession of rights does not impinge upon intellectual property rights (rights of the photographer / director of the video or copyright owner if different) and that when the images are distributed by UNESCO a credit to the photographer / director of the video is always given, if clearly provided in the request. All possible profits deriving from such cession of rights will go to the Fund. (See *Operational Guidelines for the Implementation of the World Heritage Convention*, Annex V, 7 a).