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Austrian Comments on the Draft Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict

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Austrian Comments
on the
**Draft Guidelines for the Implementation of the 1999 Second Protocol to the Hague
Convention of 1954 for the Protection of Cultural Property in the Event of Armed
Conflict**

Austria welcomes the draft guidelines and estimates highly the efforts done by the Secretariat. The draft is a good basis for further deliberations of the Committee. We thank the Secretariat for the work being done. However, we would like to make the following comments:

1. General remarks concerning purpose and scope of the guidelines

In our understanding, the guidelines should be a helpful instrument for the implementation of the 2nd Protocol by States Parties to the Protocol. It might become the core of a "hand book" for civil and military units concerned. The focus of the guidelines should thus lie on practical aspects of the implementation of the 2nd Protocol and contain guidance for States Parties on how to fulfil their obligations. The guidelines should not be a mere restatement of the law, the excerpt of a textbook on public international law or a legal commentary to the 2nd Protocol. Legal reasoning should be confined to cases where an (authoritative) interpretation of a specific provision is necessary to ensure its proper implementation, such as the conditions for cultural property under enhanced protection, or where gaps in the 2nd Protocol need to be filled, such as the question how to mark cultural property under enhanced protection.

Although we understand the guidelines – even when endorsed by the Meeting of States Parties - open for any further amendments that will be seen as appropriate by future experiences in the implementation of the 2nd Protocol, we should strive for an initial version of the guidelines that is as comprehensive and at the same time specific as possible.

2. Specific comments on the draft

Ad Part 1. Introduction

In contrast to what is suggested in Part 1 of the draft, Austria is of the opinion that the scope of the guidelines should not exclude, but quite to the contrary focus on those provisions of the 2nd Protocol which need to be implemented by States Parties domestically. It does not seem useful to sit and wait how States Parties implement the Protocol and then consider reports on what has been done (or not). The result would be divergent State

practice which in respect to certain provisions of the Protocol would undermine its effectiveness. Thus, the guidelines should basically provide guidance for States Parties how to implement the provisions listed in paragraph 8.3. of the present draft.

Ad Part 2. Scope of Application

Part 2 of the draft gives a long introduction to general principles of international law. This part should be shortened and focus instead on the situations in which the 2nd Protocol applies, by providing more information on the terms "armed conflict", "occupation" or "time of peace". Guidance should also be given on the application of the 2nd Protocol in types of situations which evolved after 1954, e.g. in mixed conflicts, in multinational peace support operations or in the fight against terrorists.

Ad Part 3. Standards for Implementation

This part seems redundant, as it only restates some general principles on the law of treaties, and should therefore be deleted.

Ad Part 4. Coexistence of Protection Regimes: Analysis and Interrelations

Austria shares the view, that the Convention and the 2nd Protocol are autonomous sets of rules. However, as those coexisting regimes share the same philosophy, it does not seem to be appropriate to draw a strong distinction between them. The rules on the use of the emblem, as provided by Art 17 of the Convention should be applied to the 2nd Protocol correspondingly. Therefore, different emblems should only be foreseen for "Special Protection" (Convention) and "Enhanced Protection" (Protocol) on the one side (shield repeated three times), and "General Protection" as provided by the Convention and the Protocol on the other side (shield only one time).

Concerning the relationship between the Convention and the 2nd Protocol on the one hand, and the World Heritage Convention on the other, Austria shares the view that cultural sites protected under the World Heritage List are not automatically granted special or enhanced protection under the Convention or the Protocol. Despite that fact, States Parties member also to the World Heritage Convention should be invited to request enhanced protection for cultural property as defined in Art 1 of the Convention that belongs to a World Heritage Site. To assist States in administering these different regimes, however, more information, e.g., concerning the criteria for cultural objects to be eligible under one or the other regime as well as the (legal and practical) consequences of such election, should be provided.

Ad Part 5. The List of Cultural Property under Enhanced Protection

Instead of repeating the text of the 2nd Protocol it would be necessary to specify, by explaining and illustrating by examples, the conditions to request enhanced protection. The proposal to introduce a minimum distance, or even a "Buffer Zone", around cultural property under enhanced protection, needs careful consideration in order not to deviate from the text of the 2nd Protocol in a way that hampers its effective implementation. It has to be noted that Article 10 sub-para. c) does not use the term "potential military objective" but speaks of "military sites" instead. Furthermore, this provision speaks of "shielding" military sites and not of keeping a certain distance from them. This makes a big difference, not only in legal but also in practical terms, which would have to be adequately reflected in the guidelines as well. Generally, Austria does not sympathize with fixed distances as they tend to blur the full meaning of the underlying legal obligation and will in practice often turn out to be either impracticable, or inadequate under the given circumstances to guarantee the required protection.

In 5.2.3 reference should be made, that for cultural properties inscribed on the World Heritage List no further evidence is to be provided that the property is of "greatest importance for humanity" (Art 10 lit a of the Protocol), unless the Committee asks for such evidence.

In 5.2.4 the required national legal and administrative protection measures (i) and the other measures (iii – v) should be part of the management plan or management system. The wording should be improved and shortened. As information about the ownership does not seem to be of great interest and the ownership of private properties regularly changes, we do not see the need for this information.

With regard to the use of a distinctive emblem for cultural property see the comments to part 4 above. If a new emblem is considered desirable for cultural property under enhanced protection, it should be a distinctive sign and not simply be a multiple of the existing emblem.

Ad Part 7. The Fund

This part, in particular the draft Financial Regulations of the Fund, should be transformed into a separate document. The present guidelines, which are to be developed by the Committee and endorsed by the Meeting of the Parties, are clearly distinct from the guidelines for the Fund, which are to be provided by the Meeting of the Parties – cf. Articles 23 sub-para. 3 b) and c) and 27 sub-para. 1 a). This distinction requires the preparation of two separate documents which will be separately dealt with by different fora under different rules of procedure.
