

How the *Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954* contribute to better protection of cultural property

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Abstract

This article analyzes the contribution of the 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 (the Guidelines) to better protection of cultural property in peacetime and in times of armed conflict. The first part of the article introduces the Guidelines within the context of 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 (1999 Second Protocol) and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and provides examples of UNESCO's other standard-setting instruments such as the 1972 Convention Concerning the

* The present article is based on a number of my previous presentations. The factual information in this article reflects the situation as of 12 May 2022.

Protection of the World Cultural or Natural Heritage, the 2001 Convention on the Protection of the Underwater Cultural Heritage and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, as well as bodies providing for guidelines for these instruments. The second part underscores the most important advances of the Guidelines in the implementation of the 1999 Second Protocol. The third part focuses on the contribution of the Guidelines as subsequent practice in the application of the 1999 Second Protocol establishing the agreement of the parties regarding its interpretation in the framework of Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties. Finally, the fourth part concludes by highlighting the main advantages of the Guidelines in providing better protection for cultural property.

Keywords: cultural property, general protection, special protection, enhanced protection, international assistance, *Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954*, 1954 Hague Convention, 1999 Second Protocol to the 1954 Hague Convention, 1972 World Heritage Convention.

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Introduction

This article analyzes the contribution of the *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* (the Guidelines) to better protection of cultural property in peacetime and in times of armed conflict. It is divided into four parts.

The first part introduces the Guidelines within the context of 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 (1999 Second Protocol)¹ and the 1954 Hague Convention for the Protection of Cultural

1 The 1999 Second Protocol supplements the 1954 Hague Convention with regard to relations between the parties: see Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999 (1999 Second Protocol), Art. 2, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/590> (all internet references were accessed in June 2022). It provides a number of considerable advances: for example, it elaborates the content of peacetime safeguarding measures through the provision of concrete examples; it clarifies the notion of military necessity with regard to cultural property under both general and enhanced protection by providing for conditions when this notion may be applied, thus preventing its misinterpretation or abuse; it elaborates the notion of precautions in attack and precautions against the effects of hostilities; it improves the protection of cultural property in occupied territory by providing for specific obligations of the Occupying Power; it introduces the notion of enhanced protection with regard to certain categories of cultural heritage (as discussed in the section on “Enhanced Protection” later in this article); it defines the notion of serious violations of the 1999 Second Protocol as well as other violations of this agreement; it improves the protection of cultural property in non-international armed conflicts by providing for the applicability of the 1999 Second Protocol in its entirety to non-international armed conflicts; it establishes the Committee for the Protection of Cultural Property in the Event of Armed Conflict (see the following section below) and a biannual Meeting of the Parties;

Property in the Event of Armed Conflict (1954 Hague Convention), and provides examples of the United Nations Educational, Scientific and Cultural Organisation's (UNESCO) other standard-setting instruments and bodies providing guidelines for these instruments. The second part underscores the most important advances of the Guidelines in the implementation of the 1999 Second Protocol. The third part focuses on the contribution of the Guidelines as subsequent practice in the application of the 1999 Second Protocol establishing the agreement of the parties regarding its interpretation in the framework of Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties.² Finally, the fourth part concludes by highlighting the main advantages of the Guidelines in providing better protection for cultural property.

Introduction of the Guidelines within the context of the implementation of the 1999 Second Protocol and the 1954 Hague Convention

Article 27(1)(a) of the 1999 Second Protocol provides, *inter alia*, for the function of the Committee for the Protection of Cultural Property in the Event of Armed Conflict (the Committee), a twelve-member supervisory body of the 1999 Second Protocol and the 1954 Hague Convention³ (for those High Contracting Parties bound by the 1999 Second Protocol⁴) to develop the Guidelines.⁵ Once developed, the Guidelines are to be endorsed by the Meeting of the Parties to the Second Protocol.⁶ Obviously, this provision also relates to the endorsement of subsequent amendments to the Guidelines.

The main objectives of the Guidelines are threefold:

- to provide a concise and practical tool for facilitating the implementation of the 1999 Second Protocol by its parties;

and finally, it establishes the system of international assistance and creates the Fund for the Protection of Cultural Property in the Event of Armed Conflict.

- 2 See also Kevin Chamberlain, *War and Cultural Heritage: A Commentary on the Hague Convention 1954 and its Two Protocols*, 2nd ed., Institute of Art and Law, Bülth Wells, 2013, p. 164.
- 3 The Committee is essentially responsible for the monitoring of the implementation of the 1999 Second Protocol and management of enhanced protection and international assistance. Its functions are set out in Article 27(1) of the Protocol. The Committee is currently composed of Austria, the Czech Republic, Estonia, Greece, Morocco and Nigeria (elected until 2023), and Azerbaijan, El Salvador, Finland, Japan, Qatar and Ukraine (elected until 2025). The current chairperson of the Committee is H. E. Ms Claudia Reinprecht (Austria).
- 4 In conformity with Articles 41 and 42 of the 1999 Second Protocol, only High Contracting Parties may become party to the Protocol. In other words, a State wishing to become party to this Protocol is required to first join the 1954 Hague Convention.
- 5 The 1954 Hague Convention does not establish any supervisory body. The 1954 Hague Intergovernmental Conference considered this issue, but the discussion did not result in the creation of the supervisory body. Article 27(2) of the 1954 Hague Convention provides for the possibility of convening meetings of the High Contracting Parties, the main purpose of which is "to study problems concerning the application of the Convention and of the Regulations for its execution, and to formulate recommendations in respect thereof". The first meeting of the High Contracting Parties took place in 1962. It considered, *inter alia*, the issue of "adequate distance" under Article 8(1)(a) of the 1954 Hague Convention but did not reach any specific conclusions. The last (14th) meeting of the High Contracting Parties took place in 2021.
- 6 1999 Second Protocol, Art. 23(3)(b).

- to provide guidance to the Committee and the Secretariat of UNESCO for the fulfilment of their functions as established by the 1999 Second Protocol; and
- to attempt to embody best practices in the implementation of the 1999 Second Protocol.⁷

The Guidelines are an important *novum* in comparison with the 1954 Hague Convention; the latter does not provide for such tool. The inclusion of the development of the Guidelines in the functions of the Committee was inspired by the *Operational Guidelines for the Implementation of the World Heritage Convention*,⁸ which have been modified on several occasions, most recently in 2021.

It should be stressed that the 2001 Convention on the Protection of the Underwater Cultural Heritage,⁹ the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions all contain provisions for their specific guidelines (in the first case, the *Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage*; in the second case, the *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Heritage*;¹⁰ and in the third case, the *Operational*

7 See UNESCO, *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*, Paris, December 2019 (Guidelines), paras 1–2, available at: https://en.unesco.org/sites/default/files/1999_Protocol_Guidelines_EN_2020.pdf. Paragraph 3 provides for the possibility of revising the Guidelines to reflect the decisions and recommendations adopted by the Meeting of the Parties and the Committee.

8 The main purposes of the *Operational Guidelines for the Implementation of the World Heritage Convention* are set forth in their paragraph 1, which reads as follows: “The *Operational Guidelines for the Implementation of the World Heritage Convention* ... aim to facilitate the implementation of the *Convention concerning the Protection of the World Cultural and Natural Heritage* ..., by setting forth the procedures for:

- a) the inscription of properties on the World Heritage List and the List of World Heritage in Danger;
- b) the protection and conservation of World Heritage properties;
- c) the granting of International Assistance under the World Heritage Fund; and
- d) the mobilization of national and international support in favor of the Convention.”

Paragraph 2 of the *Operational Guidelines* provides for their periodic revision to reflect the decisions of the World Heritage Committee. See UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention*, UNESCO Doc. WHC.21/01, 31 July 2021, available at: <https://whc.unesco.org/en/guidelines/> (this web page also contains a section on the historical development of the *Operational Guidelines*).

Regarding the *Operational Guidelines*, Professor Catherine Redgwell has stated: “The Guidelines do not constitute a legally binding instrument, but rather perform a valuable policy function in guiding the implementation of the Convention by the key stakeholders, which include the States Parties, members of the Committee, the Bureau, the Advisory Bodies (ICOMOS, IUCN, and ICCROM), the UNESCO secretariat, and the site managers.” Catherine Redgwell, “Article 2: Definition of Natural Heritage”, in Francesco Francioni (ed.), *The 1972 World Heritage Convention: A Commentary*, Oxford Commentaries on International Law, Oxford University Press, New York, 2008, pp. 66–67.

9 The main purpose of the 2001 Convention’s *Operational Guidelines* under their paragraph 22 is to facilitate the implementation of this Convention by giving practical guidance. Paragraph 23 of the *Operational Guidelines* provides for the possibility of their revision by the Meeting of States Parties to the 2001 Convention whenever deemed necessary. See UNESCO, *Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage*, UNESCO Doc. CLT/HER/CHP/OG 1/REV, August 2015, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000234177>.

10 According to the UNESCO website, available at: <https://ich.unesco.org/en/directives>: “Article 7 of the Convention stipulates that one of the functions of the Committee is to prepare and submit to the General Assembly for approval operational directives for the implementation of the Convention.

*Guidelines of the 2005 Convention*¹¹). It is interesting to note that neither the 2003 Convention's *Operational Directives* nor the 2005 Convention's *Operational Guidelines* contain any specific paragraphs on their main objective.

Finally, the Subsidiary Committee of the Meeting of States Parties to the 1970 Convention¹² also elaborated on the *Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property*.¹³ In accordance with paragraph 8, the main purpose of the *Operational Guidelines* is threefold:

- to strengthen and facilitate the implementation of the 1970 Convention in order to minimize risks related to disputes over the interpretation of the Convention as well as to litigation, and thus to contribute towards international understanding;
- to assist States Parties in implementing the provisions of the Convention, including by learning from the best practices of States Parties geared towards enhancing the effective implementation of the Convention; and
- to identify ways and means to further the achievement of the goals of the Convention through strengthened international cooperation.

The General Assembly adopted for the first time the *Operational Directives* in June 2008, and amended them in June 2010, 2012, 2014 and 2016. It will continue to complete and revise them in future meetings.

Among other things, the *Operational Directives* indicate the procedures to be followed for inscribing intangible heritage on the lists of the Convention, the provision of international financial assistance, the accreditation of non-governmental organizations to act in an advisory capacity to the Committee or the involvement of communities in implementing the Convention.”

The *Operational Directives* are also available on the web page cited above.

- 11 According to the UNESCO website, available at: <https://en.unesco.org/creativity/convention/texts>: “Operational Guidelines of the Convention include a set of texts elaborated by the Intergovernmental Committee and adopted by the Conference of Parties, providing general guidelines for the implementation and application of the provisions of the Convention. They are to be considered as a ‘roadmap’ for understanding, interpretation and implementation of specific articles of the Convention.” The *Operational Guidelines* are also available on the web page cited above.
- 12 According to the UNESCO website, available at: https://en.unesco.org/fightrafficking/1970/subsidiary_committee_and_sessions: “The Subsidiary Committee of the Meeting of States Parties to the 1970 Convention is made up of representatives from 18 States Parties (3 per regional group). The election of the Committee follows the principles of geographic representation and fair rotation. The members of the Committee are elected for a period of four years. Every two years, the Meeting of States Parties renews half of the members of the Committee. A member of the Committee cannot be elected for two consecutive terms.

The functions of the Subsidiary Committee are:

- promoting the aims of the Convention;
 - reviewing of national reports submitted to the General Conference by States Parties to the Convention;
 - preparing and submitting to the Meeting of States Parties recommendations and guidelines that can contribute to the implementation of the Convention;
 - identify problematic situations resulting from the implementation of the Convention, including matters relating to the protection and return of cultural property;
 - establishing and maintaining coordination with the ‘Return-Restitution’ Committee in connection with capacity-building measures to fight the illicit trafficking of cultural property;
 - informing the Meeting of States Parties of the activities that have been implemented.”
- 13 Available at: <https://en.unesco.org/fightrafficking/operational-guidelines>.

The most important advances of the Guidelines

In my view, the most important advances of the Guidelines are in three fields: enhanced protection, international assistance, and the reporting system.

Enhanced protection

Before introducing the concept of enhanced protection, it may be useful to introduce two categories of protection under the 1954 Hague Convention: general and special.¹⁴

General protection is granted to all the three categories of cultural property defined by Article 1 of the Convention:

- 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 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 just described;
- buildings whose main and effective aim is to preserve or exhibit the movable cultural property mentioned in the previous point; and
- centres containing monuments.

All such property is generally protected under the Convention, regardless of its origin or ownership. It is up to the High Contracting Parties to identify such cultural property situated in their territory.

In addition to general protection under the 1954 Hague Convention, Article 8(1) of the Convention also provides for special protection which may be granted to a limited number of three categories of property:

- refuges intended to shelter movable cultural property in the event of armed conflict;
- centres containing monuments; and
- other immovable cultural property of very great importance.

Thus, movable cultural property may not be granted special protection unless it is stored in a shelter for such property.

Unlike the general protection that is attributed to all categories of cultural property, the granting of special protection is not automatic.¹⁵ Article 8 of the Convention subjects the granting of such protection essentially to two conditions:

14 Further details on the contents of the 1954 Hague Convention and its two Protocols can be found in International Committee of the Red Cross (ICRC), “1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict and Its Protocols”, fact sheet, ICRC Advisory Service on IHL, April 2021, available at: www.icrc.org/en/document/1954-convention-protection-cultural-property-event-armed-conflict-and-its-protocols-0.

15 Further details on general, special and enhanced protection may be found in ICRC, above note 14.

(1) the cultural property in question must be situated at an adequate distance from any large industrial centre or any important military objective constituting a vulnerable point, and (2) such property may not be used for military purposes.

The first condition warrants a question: what is “an adequate distance”? Such a notion is not defined by the Convention and, therefore, is left to the discretion of each State party to the Convention. Its definition will obviously depend on a number of factors such as the location of military units or armament manufacturers, or requirements of national self-defence. There is only one exception to the requirement of adequate distance: if the cultural property in question is situated in the proximity of an important military objective, the special protection may nevertheless be granted if the State concerned undertakes not to use this military objective in the event of armed conflict. The second condition is obvious because cultural property may not be used for military purposes and simultaneously enjoy protection.

Special protection is granted upon a special request of the State where the cultural property concerned is situated. No other High Contracting Party may object; if any objections are lodged and maintained, the special protection will not be granted.

Cultural property under special protection is listed in the International Register of Cultural Property under Special Protection,¹⁶ a special register maintained by the director-general of UNESCO. At present, cultural property in four High Contracting Parties (Germany, the Holy See, Mexico and the Netherlands) has been entered in the Register at the request of those States (a total of four refugees, as well as the whole of the Vatican City State). Two States (Austria and the Netherlands) have withdrawn registrations.

It should be noted that the concept of special protection has never fully developed its potential, given that as of today, only four High Contracting Parties have placed their property under special protection and the last entry in the Register took place in 2015.

There are essentially two reasons why a vast majority of the High Contracting Parties have so far abstained from placing their cultural sites under special protection:

- “the practical difficulties encountered when applying Article 8, in particular with regard to cultural property in the middle of large cities or close to major urban, political, and industrial centres”;¹⁷ and
- “the increasing politicisation resulting from the Cold War and the tensions that pervaded relations between States, including any cultural measures”.¹⁸

16 A copy of the Register is on file with the author.

17 Jiří Toman, “The Road to the 1999 Second Protocol”, in Nout van Woudenberg and Liesbeth Lijnzaad (eds), *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Martinus Nijhoff, Leiden and Boston, MA, 2010, p. 5. When analyzing the issue of enhanced protection, Jean-Marie Henckaerts and Nout van Woudenberg stress the practical difficulties concerning the notion of “adequate distance” and the issue of cultural property in the heart of large urban, political, and industrial centres (see pp. 32 and 52, respectively, of the above publication).

18 *Ibid.*, p. 5.

Before analyzing the system of enhanced protection, it should be stressed that items of cultural property are protected as civilian objects.¹⁹

Chapter III of the 1999 Second Protocol introduces a new category of protection: enhanced protection.²⁰ To be eligible for the granting of enhanced protection, the cultural property in question (both immovable and movable) must meet three conditions: it must be of the greatest importance for humanity; it must be protected by adequate domestic legal and administrative measures; and it may not be used for military purposes or to shield military sites. A declaration to this end must be provided. Enhanced protection is granted by the Committee for the Protection of Cultural Property in the Event of Armed Conflict by the entry of the cultural property in question into the International List of Cultural Property under Enhanced Protection (the List).²¹ At the time of writing of this article, the Committee has inscribed seventeen cultural properties of ten parties to the Second Protocol (Armenia, Azerbaijan, Belgium, Cambodia, Cyprus, the Czech Republic, Georgia, Italy, Lithuania and Mali) in the List. Sixteen of them are cultural World Heritage Sites, and the seventeenth – the National Central Library of Florence – is part of the Historic Centre of Florence, a World Heritage Site.

The Guidelines introduce a number of important elements for facilitating the clarification of the criterion of “the greatest importance for humanity”, the preparation of requests for the granting of enhanced protection, and the evaluation of such requests. Furthermore, they also provide for procedural aspects for the submission of the nomination files, thus establishing clarity and predictability in this process.

I will start with the clarification of the criterion of “the greatest importance for humanity”, which is contained in paragraphs 32–37 of the Guidelines.

Paragraph 32 provides for three sub-criteria: exceptional cultural significance of the cultural property concerned, its uniqueness, and the fact that its destruction would lead to irretrievable loss for humanity. These three sub-criteria are disjunctive.

Paragraph 33 stipulates that cultural property of national, regional or universal value may have exceptional cultural significance. It goes on to state that this significance may be deduced from the following indicative criteria: the property in question bears testimony to one or more periods of the development of humankind at the national, regional or global level; it represents a masterpiece of human creativity; it bears an exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; it exhibits an important

19 See Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 52(1): “Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.”

20 See Jean-Marie Henckaerts, “New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict”, in N. van Woudenberg and L. Lijnzaad (eds), above note 17.

21 A copy of the International List of Cultural Property under Enhanced Protection is on file with the author.

interchange of human achievements over a span of time or within a cultural area of the world on developments in arts and sciences; and it has a central significance to the cultural identity of the societies concerned.²²

Paragraph 34 clarifies the notion of uniqueness by stating that the property in question is considered to be unique if there is no other comparable cultural property that is of the same cultural significance. Furthermore, it provides that the unique character may be deduced from a variety of indicative criteria, including age, history, community, representativeness, location, size and dimension, shape and design, purity and authenticity in style, integrity, context, artistic craftsmanship, aesthetic value, and scientific value.

Paragraph 35 clarifies the criterion of irretrievable loss for humanity. This criterion is met if the damage or destruction of the cultural property in question would result in the impoverishment of the cultural diversity or cultural heritage of humankind.

Paragraph 36 provides for a presumption of satisfying the condition of the greatest importance for humanity for immovable cultural property inscribed on the World Heritage List. This presumption is not automatic because it is introduced by the term “subject to other relevant considerations”. However, from my own experience from the Bureau and Committee meetings organized by the UNESCO Secretariat, I can state that when a cultural World Heritage Site was submitted for the granting of enhanced protection, there was no substantive discussion of this issue and participants in those meetings unanimously concluded that the site in question complied with Article 10(a) of the 1999 Second Protocol.

Paragraph 37 relates to documentary heritage. It stipulates that the Committee will consider the fact that the cultural property is inscribed on UNESCO’s Memory of the World Register.²³ As of today, no element of this register has been submitted for the granting of enhanced protection.

Paragraphs 44–51 of the Guidelines provide for procedural aspects of the submission of requests for the granting of enhanced protection to the Committee. In conformity with paragraph 45, the request for the granting of enhanced protection is sent by the Permanent Delegation to UNESCO of the party to the Committee through the Secretariat. This provision is important because it ensures that the Permanent Delegation is fully informed of the request, supports it and, if necessary, may coordinate with its relevant national authorities on the submission of further information. This paragraph also stipulates that requests need to be received by the Secretariat by 1 March of each year at the latest in order to be considered at the upcoming meeting of the Committee. The importance of this provision is twofold: it enables the party concerned to plan its work and to coordinate the preparation and completion of the request at the national level within a specific time limit, and it enables the Committee and the Secretariat to

22 These criteria are heavily inspired by criteria (i), (ii) and (iii) set forth in paragraph 77 of the *Operational Guidelines for the Implementation of the World Heritage Convention*, above note 8.

23 A copy of the Register is on file with the author.

optimize their work. For obvious reasons, this rule does not apply in cases of requests for provisional enhanced protection.

Paragraph 46 describes the role of the Secretariat. The Secretariat acknowledges the receipt of the request, checks for completeness and registers the request. It requests any additional information from the party, as appropriate. All such information must be received, preferably, in a single submission of one complete file within two months of the date of the request from the Secretariat. Finally, the Secretariat forwards complete requests to the Bureau²⁴ of the Committee for *prima facie* consideration, together with a review of completeness prepared by the Secretariat.

Paragraph 47 stipulates that the Bureau forwards the request (including the evaluation) to the Committee and may propose a decision.

Paragraph 48 sets out the role of the Committee following receipt of the request. It informs all parties of the request for inclusion in the List.

Paragraph 49 deals with representations related to the entry into the List. To the best of my knowledge, at the time of the writing of this article no representation has been submitted.

Paragraph 52 of the Guidelines introduces the important notion of a “tentative list”.²⁵ The tentative list “means a list of cultural property for which a Party intends to request the granting of enhanced protection”. This paragraph also encourages parties to submit tentative lists for two purposes: to facilitate the Committee’s maintenance and updating of the Enhanced Protection List, and to facilitate the management of requests for international assistance. The last phrase of this paragraph provides that the fact that an item of cultural property has not been previously included in the tentative list does not prevent the party from requesting the granting of enhanced protection for the item. This is an important difference in comparison with the *Operational Guidelines for the Implementation of the World Heritage Convention* because the latter provides in paragraph 63 that “a nomination dossier will not be considered complete unless the nominated property has already been included on the State Party’s Tentative List and has undergone a Preliminary Assessment”.²⁶ Thus, the 1999 Second Protocol’s system gives the parties a choice – either to opt for inclusion of the cultural property concerned in a tentative list and then to submit this property for the

24 The six-member Bureau (the chairperson, the four vice-chairpersons and the rapporteur) is elected in conformity with Rule 16.1 of the Rules of Procedure of the Committee at the beginning of each ordinary session of the Committee. In accordance with Rule 15.1 of the Rules of Procedure of the Committee, the functions of the Bureau are to coordinate the work of the Committee and to fix the dates, hours and order of business of meetings. In addition, under the Guidelines the Bureau plays an important role in the management of requests for the granting of enhanced protection and those related to the granting of international assistance. The current Bureau is composed of H. E. Ms Claudia Reinprecht (Austria), the chairperson; H. E. Mr Imoh Sunday Egbo (Nigeria), the rapporteur; and the four vice-chairpersons from El Salvador, Estonia, Japan and Morocco.

25 The notion of a “tentative list” was taken almost *expressis verbis* from paragraph 62 of the *Operational Guidelines for the Implementation of the World Heritage Convention*, above note 8.

26 *Ibid.*, para. 63.

granting of enhanced protection, or to submit the cultural property concerned directly for the granting of enhanced protection.

Paragraphs 54–61 provide for the content of the request: identification of the cultural property, description of the cultural property, protection of the cultural property, use of the cultural property, information regarding responsible authorities, signature on behalf of the party, and format of the request.

Paragraph 68 introduces an important *novum* – a “Statement of Inclusion of the Property on the List of Cultural Property under Enhanced Protection”²⁷ adopted by the Committee. The Statement confirms that all three criteria of Article 10 of the 1999 Second Protocol are met. The Statement is the basis for the further protection of the cultural property in question.

Paragraphs 76–79 provide for different issues concerning the List. Paragraph 76 stipulates that the List will be divided into two divisions: cultural property under enhanced protection, and cultural property under provisional enhanced protection. Paragraph 77 states that the information is structured in the following way: name and identification of the cultural property; description of the cultural property; location, boundaries, and, as appropriate, immediate surroundings of the cultural property; and other relevant information. In conformity with paragraph 78, other relevant information includes the date of entry in the List, description of an exceptional or emergency situation, decisions and recommendations of the Committee such as time periods, and suspensions or cancellations. Finally, paragraph 79 states that the List is made available by the Secretariat through appropriate means; in practice, this means that the Secretariat will post the List on its website.

To facilitate the preparation and submission of requests for the granting of enhanced protection, the Secretariat prepared an Enhanced Protection Request Form (Annex I to the Guidelines) and a model of the non-military use declaration. This model stipulates that this declaration is to be signed by the representative authorized by the party which has control over the cultural property as competent for this matter. In practice, a number of parties have had this declaration signed either by the minister of defence or a high-level representative of the Ministry of Defence. A model of the non-military use declaration is annexed to the Guidelines.

The Guidelines also provide in Chapter III.E for the distinctive emblem for cultural property under enhanced protection and modalities for its use.²⁸ The most important parts concern basic principles relating to the distinctive emblem (paragraphs 98–102); modalities for using the distinctive emblem – use *ratione materiae* (paragraphs 103–104) and use *ratione temporis* (paragraphs 105–107);

27 See *ibid.*, para. 155, introducing the Statement of Outstanding Universal Value. The 1999 Second Protocol Statement closely mirrors the Statement of Outstanding Universal Value.

28 It should be pointed out that Chapter V (“The Distinctive Emblem”) of the 1954 Hague Convention provides for the distinctive emblem. Its description is contained in Article 16(1) of the Convention, and the modalities for its use in Article 17. Furthermore, Articles 20 and 21 of the Regulations for the Execution of the Convention deal with the issue of the emblem.

modalities for placing the distinctive emblem (paragraphs 108–110); and protection of the distinctive emblem from misuse (paragraphs 111–113).

The distinctive emblem takes the form of a shield, divided per saltire in blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and a royal-blue triangle above the square, the space on either side being taken up by a white triangle), which is outlined by an external red band that is detached from the shield.²⁹

In accordance with paragraph 98 of the Guidelines, the basic principles relating to the distinctive emblem are essentially twofold: to ensure the recognition and identification of cultural property under enhanced protection, particularly during the conduct of hostilities, with a view to ensuring the effectiveness of the provisions of the 1999 Second Protocol, and, more particularly, to contribute to the effectiveness of Article 12 on the “Immunity of Cultural Property under Enhanced Protection”;³⁰ and to ensure legal certainty with regard to criminal responsibility of belligerents in order to ensure reasonable implementation³¹ of Article 15(1)³² of the Protocol.

Paragraph 99 of the Guidelines states clearly that the marking of cultural property under enhanced protection is declaratory and has no constitutive effect. In other words, in general, a party having a cultural property under enhanced protection is not obliged to mark this property with the distinctive emblem.

Paragraph 100 encourages parties to affix the enhanced protection emblem alone, without any other logo and/or emblem, with due consideration being taken of a combatant’s field of vision when directing an attack from land, sea or air during hostilities.

Paragraph 101 provides for the obligation to use the distinctive emblem in accordance with the relevant rules of international humanitarian law and the

29 Guidelines, above note 7, Annex IV, “Distinctive Emblem for Cultural Property under Enhanced Protection, Including Its Graphic Charter”.

30 “The Parties to a conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack or from any use of the property or its immediate surroundings in support of military action.”

31 Under the Guidelines, the term “reasonable implementation” means establishing as criminal offences under domestic criminal law of the parties serious violations of the 1999 Second Protocol as set forth in Article 15(2) of the Protocol. Article 15(2) provides the following: “Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.”

32 Article 15(1) stipulates the following: “Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:

- a. making cultural property under enhanced protection the object of attack;
- b. using cultural property under enhanced protection or its immediate surroundings in support of military action;
- c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
- d. making cultural property protected under the Convention and this Protocol the object of attack;
- e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.”

modalities *ratione materiae* and *ratione temporis* for its use specified in the Guidelines. While this paragraph does not specify the relevant rules of international humanitarian law, in my view, one such rule is the prohibition against perfidy.³³

Paragraph 102 provides for the exception to the voluntary character of the marking. It stipulates that when the Committee is requested to grant enhanced protection under the emergency procedure, it requests the party that has jurisdiction or control over the cultural property to mark the property.

Paragraph 103 contains an important principle: the exclusive use of the distinctive emblem to mark cultural property under enhanced protection. The emblem may not be used for purposes, be they commercial or non-commercial, other than those specified in the Guidelines.

With regard to use *ratione temporis*, in peacetime parties having jurisdiction or control over cultural property under enhanced protection may make preparations to mark such property by using the distinctive emblem (paragraph 105).

In conformity with paragraph 106, in times of armed conflict, the parties to the conflict are encouraged to mark cultural property under enhanced protection by using the distinctive emblem. Finally, in case of suspension or cancellation of enhanced protection by the Committee, parties that have jurisdiction or control over the cultural property concerned are required to remove the distinctive emblem that had been used to mark the property.

Paragraphs 108–110 set forth modalities for placing the distinctive emblem. They may be summarized as follows: the placement of the emblem is at the discretion of the parties' competent authorities; it should be done in a manner benefiting the property; and, subject to availability of resources, technological developments will determine the means used (both in peacetime and wartime) to place the distinctive emblem on cultural property.

Paragraphs 111–113 lay down principles for the protection of the distinctive emblem from misuse. They may be summarized as follows: avoidance of the use of the distinctive emblem that does not comply with principles set out in the Guidelines; encouragement of parties to disseminate information concerning the distinctive emblem and the modalities for its use, both within

33 Article 37(1) of AP I, above note 19, prohibits killing, injury or capture of an adversary by resort to perfidy. Perfidy is constituted by acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence. Furthermore, the authoritative ICRC study on customary international humanitarian law provides in its Rule 61 for the prohibition of the improper use of other internationally recognized emblems: see Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>. This rule is applicable both in international and non-international armed conflicts (see Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict", *International Review of the Red Cross*, Vol. 87, No. 857, 2005). Finally, the authoritative commentary on Rule 61 (ICRC Customary Law Study, above, pp. 212–213) states that the distinctive emblem for cultural property is covered by Rule 61 in both international and non-international armed conflicts.

their civilian populations and among military personnel; and encouragement of the parties to enact legislation on the protection of the distinctive emblem and the modalities for its use and/or adoption of other measures, as appropriate, on the protection of the distinctive emblem and the modalities for its use.

To conclude on the enhanced protection emblem, it is necessary to point out that unlike the distinctive emblem of the 1954 Hague Convention, which is foreseen by Chapter V of the Convention (“The Distinctive Emblem”), the enhanced protection emblem was adopted by the Ninth Meeting of the Committee (Decision 9.COM 4) in December 2014 and endorsed by the Sixth Meeting of the Parties (Decision 6.SP 2) in December 2015.

International assistance

The article now turns to the second important advance of the Guidelines: international assistance. Issues of international assistance – both substantive and procedural – are dealt with in Chapter VI of the Guidelines (“International Assistance”). I will begin with the substantive issues.

Paragraph 133 provides for the three categories of international assistance: preparatory measures (essentially taken during peacetime), emergency measures (essentially taken during an armed conflict) and recovery measures (essentially taken after an armed conflict).

Paragraph 134 speaks about three purposes of preparatory measures: support to parties’ overall domestic sustainable efforts related to cultural property, contribution to the preparation and development of administrative or institutional measures, provisions and structures for the safeguarding of cultural property, and contribution to the preparation, development or implementation of the laws, administrative provisions and measures recognizing the exceptional cultural and historic value and ensuring the highest level of protection of cultural property to be nominated for enhanced protection.

Paragraph 135 defines the purpose of emergency measures. They are aimed at ensuring the adequate protection of the cultural property concerned and to prevent its deterioration, destruction or looting.

Paragraph 136 sets forth the purpose of recovery measures. They are focused on ensuring the preservation and conservation of cultural property damaged in connection with the conflict as well as the return of cultural property that has been removed.

Paragraph 138 provides for four considerations by which the Committee is guided when considering requests for the granting of international assistance: the probability that the assistance will have a catalytic and multiplier effect (“seed money”) and will promote financial and technical contributions from other sources; whether the legislative, administrative and, wherever possible, financial commitment of the recipient is available to the activity; the exemplary value of the activity; and the cost-efficiency of the activity.

Procedural aspects of consideration of requests for international assistance provided by the Committee, including financial and other assistance from the Fund

for the Protection of Cultural Property in the Event of Armed Conflict (the Fund),³⁴ are laid down by Chapter VI.E of the Guidelines (“Process of Considering Requests for International Assistance Provided by the Committee, Including Financial and Other Assistance from the Fund”).

The fundamental question to be asked is who may submit a request for international assistance. In accordance with paragraph 157, requests may be submitted either by a party to the 1999 Second Protocol or by a party to a conflict which is not a party to the Protocol but which accepts and applies the provisions of the Protocol. Finally, requests may also be submitted jointly by two or more parties concerned. As of the time of writing of this article, to the best of my knowledge, no joint submission has been made.

Under paragraph 163, requests for all forms of international assistance provided by the Committee are to be submitted to the Committee by or in cooperation with the Permanent Delegation of the party to UNESCO, where appropriate, through the Secretariat. The role of the Secretariat is to acknowledge the receipt and to verify the completeness of the request. If the request is not complete, the Secretariat will ask the applicant to provide the missing information.

The request is to be submitted in writing in one of the two working languages of the Secretariat (English or French) by using the application form and, if possible, in an electronic format (paragraph 171).

Paragraph 164 provides the time frame for the submission of requests. They are to be submitted to the Secretariat at least six months before the meeting of the Committee. The Secretariat forwards the requests to the Bureau of the Committee

34 Article 29 of the 1999 Second Protocol (“The Fund for the Protection of Cultural Property in the Event of Armed Conflict”) reads as follows: “1. A Fund is hereby established for the following purposes:

- (a) to provide financial or other assistance in support of preparatory or other measures to be taken in peacetime in accordance with, *inter alia*, Article 5, Article 10 sub-paragraph (b) and Article 30; and
- (b) to provide financial or other assistance in relation to emergency, provisional or other measures to be taken in order to protect cultural property during periods of armed conflict or of immediate recovery after the end of hostilities in accordance with, *inter alia*, Article 8 sub-paragraph (a).

2. The Fund shall constitute a trust fund, in conformity with the provisions of the financial regulations of UNESCO.

3. Disbursements from the Fund shall be used only for such purposes as the Committee shall decide in accordance with the guidelines as defined in Article 23 sub-paragraph 3(c). The Committee may accept contributions to be used only for a certain programme or project, provided that the Committee shall have decided on the implementation of such programme or project.

4. The resources of the Fund shall consist of:

- (a) voluntary contributions made by the Parties;
- (b) contributions, gifts or bequests made by:
 - (i) other States;
 - (ii) UNESCO or other organizations of the United Nations system;
 - (iii) other intergovernmental or non-governmental organizations; and
 - (iv) public or private bodies or individuals;
- (c) any interest accruing on the Fund;
- (d) funds raised by collections and receipts from events organized for the benefit of the Fund; and
- (e) all other resources authorized by the guidelines applicable to the Fund.”

As of 16 March 2022, the total amount of assets available under the Fund amounts to \$499,409.49. See UNESCO, “Item 4 of the Provisional Agenda: Emergency International Assistance to Ukraine”, UNESCO Doc. C54/22/2.EXT.COM/4, 16 March 2022, p. 3, para. 14, p. 3, available at: https://en.unesco.org/sites/default/files/item.3_ext_international_assistance_en_0.pdf.

for its *prima facie* consideration, together with its review for completeness. The six-month time frame is not applicable in case of requests for emergency measures, which may be submitted at any time. The Committee will consider them as soon as possible on an *ad hoc* basis (paragraph 169).

Paragraph 166 sets out the role of the Bureau in the evaluation of requests. Following their evaluation, the Bureau will forward the request to the Committee for consideration and an appropriate decision, and may offer any relevant observations.

Paragraph 167 provides for the modality of adoption of the decision by the Committee on the granting of requests for international assistance. Such a decision is to be taken by a majority of two thirds of the Committee's members present and voting. To the best of my knowledge, during the period of my being the secretary of the Committee, all decisions on the granting of international assistance were adopted without voting.

Once the Committee has reached a decision on the granting of a request for international assistance, it communicates this decision to the applicant party within two weeks following the decision. In case of granting international assistance, the Secretariat concludes an agreement with the recipient of the international assistance as appropriate (paragraph 168).

Finally, the Committee monitors and evaluates the international assistance that was granted (paragraph 170).

To facilitate the preparation and submission of requests for the granting of international assistance, the Secretariat has developed an International Assistance Application Form, available on the Secretariat's website.

Reporting system

I will now address the third advance of the Guidelines: the reporting system.

Both the 1954 Hague Convention and its 1999 Second Protocol contain specific provisions on the obligation of States party to each instrument to provide periodic reports.³⁵ The main issue with those two provisions is that they do not specify what kind of information should be provided by the parties or High Contracting Parties.

The most important provisions on the reporting system are contained in paragraphs 118–121 of the Guidelines. Paragraph 118 encourages parties to submit their reports on the implementation of the 1999 Second Protocol together with their reports on the implementation of the 1954 Hague Convention. This

35 1954 Hague Convention, Art. 26(2): "Furthermore, at least every four years, they [the High Contracting Parties] shall forward to the Director-General [of UNESCO] a report giving whatever information they think suitable concerning any measures being taken, prepared or contemplated by their respective administrations in fulfillment of the present Convention and of the Regulations for its execution." 1999 Second Protocol, Art. 37(2): "The Parties shall submit to the Committee, every four years, a report on the implementation of this Protocol." For an analysis of the reporting system under the 1954 Hague Convention, see Jan Hladik, "Reporting System under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict", *International Review of the Red Cross*, Vol. 82, No. 840, 2000.

provision is important in two respects: firstly, as all parties are automatically a party to the 1954 Hague Convention and the 1999 Second Protocol develops a number of provisions of the Convention (for example, Article 5³⁶ of the Protocol develops Article 3³⁷ of the Convention), the parties may develop in one single report measures taken both for the implementation of the 1954 Hague Convention and the 1999 Second Protocol. Secondly, the joint submission optimizes the use of resources of the parties because they are not obliged to submit a national report on the implementation of the 1954 Hague Convention within one specific time frame and a national report on the implementation of the 1999 Second Protocol within another specified time frame.

Paragraph 119 stipulates that Parties cover the following items in their periodic report:

Implementation of general provisions regarding protection:

- information on peacetime preparatory measures for the safeguarding of cultural property undertaken or envisaged to be undertaken; and
- information by parties which are Occupying Powers on their compliance with the provisions of the 1999 Second Protocol concerning the protection of cultural property in occupied territory.

Implementation of provisions regarding enhanced protection:

- information on whether the party intends to request the inclusion of cultural property in the List; and
- information on the use of the enhanced protection emblem.

Implementation of provisions regarding criminal responsibility:

- information on national legislation concerning criminal responsibility for serious violations within the meaning of the 1999 Second Protocol, and
- information on national legislative, administrative or disciplinary measures taken to suppress other violations.

Implementation of provisions regarding dissemination:

- information on measures taken concerning dissemination.

36 1999 Second Protocol, Art. 5 (“Safeguarding of Cultural Property”): “Preparatory measures taken in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict pursuant to Article 3 of the Convention shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such property and the designation of competent authorities responsible for the safeguarding of cultural property.”

37 1954 Hague Convention, Art. 3 (“Safeguarding of Cultural Property”): “The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.”

Implementation of provisions regarding technical assistance:

- information on any other activities relating to the 1999 Second Protocol, including activities at a bilateral or multilateral level, in order to share experiences or best practices.

Paragraph 120 encourages parties to provide the Secretariat with the name and address of a single national focal point for all official documents and correspondence related to the implementation of the 1999 Second Protocol by their relevant authorities. Unless a party requests otherwise, the presumed focal point would be its Permanent Delegation to UNESCO. The Secretariat will make a list of these addresses available on its website.

Paragraph 121 also encourages parties to inform the Committee through the Secretariat, on a voluntary basis, of all legislative, judicial or other matters relevant to the parties' implementation of the 1999 Second Protocol. In its turn, the Secretariat will register this information in a database.

The Committee last considered national reports on the implementation of the 1954 Hague Convention and/or its two (1954 and 1999) Protocols at its 16th Meeting at UNESCO Headquarters in Paris on 2–3 December 2021. It adopted Decision 16.COM 11,³⁸ which, *inter alia*, took note of the national reports and thanked the sixty parties that provided them.

Before concluding on the reporting system, another innovative aspect of the 1999 Second Protocol having reporting character shall be mentioned: the report of the Committee to the Meeting of the Parties. This obligation falls within the functions of the Committee under Article 27(1)(d)³⁹ of the 1999 Second Protocol.

In conformity with paragraph 124, the Committee takes, at a minimum, the below issues into account in its report:

- parties' requests for inclusion of cultural property in the List;
- parties' requests for international assistance;
- international cooperation; and
- the use of the Fund.

The last submission of the report by the Committee took place at the Ninth Meeting of the Parties to the 1999 Second Protocol, held at UNESCO Headquarters in Paris on 30 November–1 December 2021. The Meeting of the Parties, *inter alia*, took note of the report and thanked all the members of the Committee for their active contribution to its work as well as the members who have been involved in the Bureau and especially the chairperson, Ms Najat Rhandi.⁴⁰

38 On file with the author.

39 Under Article 27(1)(d), the Committee is mandated "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".

40 See Resolution 9.SP 5 in UNESCO, *Resolutions Adopted during the 9th Meeting of the Parties to the 1999 Second Protocol*, UNESCO Doc. C54/21/9.SP/Resolutions, Paris, 30 November–1 December 2021, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000380338>.

Contribution of the Guidelines as subsequent practice in the application of the 1999 Second Protocol establishing the agreement of the parties regarding its interpretation in the framework of Article 31(3)(b)⁴¹ of the 1969 Vienna Convention on the Law of Treaties

At its 70th Session in 2018, the International Law Commission (ILC) adopted a set of *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries* (Draft Conclusions).⁴²

In my view, the most important provisions related to subsequent practice in relation to the interpretation of the 1999 Second Protocol with respect to the Guidelines are Draft Conclusions 3, 4, 5, 6, 7, 10 and 11.

Thus, Draft Conclusion 3 (“Subsequent Agreements and Subsequent Practice as Authentic Means of Interpretation”) reads as follows:

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

This provision is of fundamental importance because, *inter alia*, it underscores one important element: the role of subsequent practice as an objective evidence of the understanding of the parties as to the meaning of the treaty and its position as an authentic means of interpretation.

When commenting on this Conclusion, the ILC stressed the reference of the term “authentic” to different forms of “objective evidence” or “proof” of conduct of the parties, reflecting the “common understanding of the parties” as to the meaning of the treaty.⁴³

The ILC also stated that “the common will of the parties, which underlies the treaty, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty”.⁴⁴

When clarifying the term “authentic means of interpretation”, the ILC specified that this term encompasses a factual and a legal element. “The factual element is indicated by the expression ‘objective evidence’, whereas the legal element is contained in the concept of ‘understanding of the parties’.”⁴⁵

Draft Conclusion 4 (“Definition of Subsequent Agreement and Subsequent Practice”) relates to the definition of subsequent agreement and subsequent practice. Its paragraph 2 reads as follows:

41 Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31(3)(b): “There shall be taken into account, together with the context: ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”

42 ILC, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries*, 2018, available at: https://legal.un.org/ilc/texts/instruments/word_files/english/commentaries/1_11_2018.doc.

43 *Ibid.*, p. 9.

44 *Ibid.*, p. 9, para. 3.

45 *Ibid.*, p. 11, para. 9.

A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

When commenting on this paragraph, the ILC stated that “[p]aragraph 2 is limited to subsequent practice as a means of authentic interpretation that establishes the agreement of all the parties to the treaty, as formulated in article 31, paragraph 3 (b)”.⁴⁶ It went on to say that such subsequent practice may consist of any “conduct” and “may thus include not only acts, but also omissions, including relevant silence, which contribute to establishing agreement”.⁴⁷

Thus, when the Guidelines and amendments thereto were developed by the Committee and subsequently endorsed by the Meeting of the Parties without any objections or disagreement as to their content, the primary conduct of the Committee members and the subsequent conduct of parties to the 1999 Second Protocol established agreement of the parties regarding the interpretation of the Protocol.

The first paragraph of Draft Conclusion 5 (“Conduct as a Subsequent Practice”) reads as follows:

Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial, or other functions.

This provision is self-explanatory, though the ILC considered it necessary to repeat that the term “any conduct” encompasses actions and omissions.⁴⁸

It is to be submitted that the Guidelines do represent subsequent practice in the application of the 1999 Second Protocol which establishes the agreement of the parties regarding its interpretation.

The first two paragraphs of Draft Conclusion 6 (“Identification of Subsequent Agreements and Subsequent Practice”) read as follows:

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. Such a position is not taken if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).
2. Subsequent agreements and subsequent practice under article 31, paragraph 3, may take a variety of forms.

When commenting on the first sentence of paragraph 1, the ILC stated that “subsequent practice under article 31, paragraph 3 (b) must be ‘in the application

⁴⁶ *Ibid.*, p. 17, para. 16.

⁴⁷ *Ibid.*, p. 17, para. 17.

⁴⁸ *Ibid.*, p. 22, para. 2.

of the treaty’ and thereby establish an agreement ‘regarding its interpretation’”.⁴⁹ It went on to say:

The relationship between the terms “interpretation” and “application” in article 31, paragraph 3, is not clear-cut. “Interpretation” is the process by which the meaning of a treaty, including one or more of its provisions, is clarified. “Application” encompasses conduct by which the rights under a treaty are exercised, or its obligations are complied with, in full or in part. “Interpretation” refers to a mental process, whereas “application” focuses on actual conduct (acts and omissions). In this sense, the two concepts are distinguishable, and may serve different purposes under article 31, paragraph 3 ... but they are also closely interrelated and build upon each other.⁵⁰

When commenting on paragraph 2 of Draft Conclusion 6, the ILC stated that “[s]ubsequent practice at the international level need not necessarily be joint conduct. Parallel conduct by parties may suffice.”⁵¹

Draft Conclusion 7 (“Possible Effects of Subsequent Agreements and Subsequent Practice in Interpretation”) analyzes, *inter alia*, possible effects of subsequent practice in interpretation. In this regard, paragraphs 1 and 3 are pertinent. They read as follows:

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

...

3. It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or modify it. The possibility of amending or modifying a treaty by the subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the 1969 Vienna Convention and under customary international law.

Draft Conclusion 10 (“Agreement of the Parties Regarding the Interpretation of a Treaty”) focuses on the position of the parties regarding the interpretation of a treaty. It reads as follows:

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account.

⁴⁹ *Ibid.*, p. 28, para. 3.

⁵⁰ *Ibid.*, pp. 28–29, para. 3.

⁵¹ *Ibid.*, p. 35, para. 23.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Finally, it is important to highlight paragraphs 1 and 3 of Draft Conclusion 11 (“Decisions Adopted within the Framework of a Conference of States Parties”). They read as follows:

1. A Conference of States Parties, under these draft conclusions, is a meeting of parties to a treaty for the purpose of reviewing and implementing the treaty, except where they act as members of an organ of an international organization.

...

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus.

Paragraph 1 of Draft Conclusion 11 reflects Article 23(3)(e) of the 1999 Second Protocol, which tasks the Meeting of the Parties “to discuss any problem related to the application of this Protocol, and to make recommendations, as appropriate”. Thus, when the Meeting of the Parties endorses amendments to the Guidelines, it approves the subsequent practice related to the interpretation and implementation of the 1999 Second Protocol.

In accordance with paragraph 3 of Draft Conclusion 11, a decision taken on the endorsement of amendments to the Guidelines represents a subsequent practice with regard to both the interpretation and the implementation of the 1999 Second Protocol.

Conclusion

The Guidelines do represent an important *novum* as a subsequent practice in the interpretation and implementation of the 1999 Second Protocol, in particular in the following aspects: enhanced protection (both procedural and substantive), international assistance (both procedural and substantive), and reporting. Their elaboration, adoption by the Committee, endorsement by the Meeting of the Parties and subsequent amendments have enabled Committee members and parties not represented in the Committee to have a significant say in the implementation of the Protocol, thus improving the protection of cultural property both in peacetime and in times of armed conflict. Furthermore, the Guidelines introduce legal certainty and predictability in the granting of

enhanced protection and international assistance, thus providing parties, the Bureau of the Committee, the Committee and the Secretariat with clear guidance as to the preparation and consideration of their nomination files in both cases. It must also be stressed that by involving Committee members and other parties in the elaboration of the Guidelines, those key stakeholders have obtained full control and ownership of this process.

From a procedural point of view, the Guidelines have an important advantage because they may be modified through a very flexible process that does not necessitate amending the 1999 Second Protocol. In my view, any modification of the Protocol would have three negative consequences: (1) it would result in the creation of a two-tier legal regime – the original Protocol and the amended Protocol – which would lead to confusion; (2) it would endanger the achievements of the Protocol because it is quite likely that some parties would wish to reopen discussions on certain issues of the Protocol, such as the notion of military necessity; and (3) prospective parties would most likely await the result of the modification of the Protocol before ratifying it, thus effectively bringing the ratification process of this instrument to a halt.

To conclude, let me express my hope that further elaboration of the Guidelines on the basis of existing practice of all the parties to the 1999 Second Protocol will result in further improvements to the protection of our precious cultural property both in peacetime and in the event of armed conflict.