

## COMMENTS BY AUSTRIA

### Item 11: Amendments to the Guidelines for the implementation of the 1999 Second Protocol: Enhanced protection

---

working document: [UNESCO doc. C54/20/15.COM/11](#) (Paris, 29 October 2020)

On page 4, paragraph 44: Normative language (“shall”, “must” etc.) should be avoided in the Guidelines (the Guidelines have no legally binding character). Thus, the words “must be prepared” should be replaced by “**needs to be prepared**”.

On page 4, paragraph 48 (former 47): The first sentence (“The Bureau may consult organisations with relevant expertise for evaluation of the request”) should be deleted for the following reasons. Legally, it should be the Committee and not the Bureau to decide about and conduct such consultations (see Article 11(6) of the Second Protocol, which is reflected in paragraph 24 of the Guidelines). The Bureau is not a decision-making body, or a “mini-Committee”. Its functions are limited to co-ordinating the work of the Committee, fixing the dates, hours and order of business of meetings and to assist the Chairperson in carrying out his/her duties (see Rule 15.1 of the Rules of Procedure of the Committee).

The Committee as a whole, including those of its members who are not part of the Bureau, should be given the opportunity to use their expertise to evaluate a request for enhanced protection before any external experts are consulted. This follows from Article 24 of the Second Protocol (“*Parties members of the Committee shall choose as their representatives persons qualified in the fields of cultural heritage, defence or international law, and they shall endeavour, in consultation with one another, to ensure that the Committee as a whole contains adequate expertise in all these fields*”), which is also reflected in paragraph 21 of the Guidelines.

Besides that, to request an advisory opinion from any external experts could entail financial consequences, including disbursements from the Fund for the Protection of Cultural Property. In accordance with Article 29(3) of the Second Protocol, as well as in accordance with paragraph 4.2 of the Financial Regulations of the Special Account, it is the Committee (only) that has authority to decide over disbursements from the Fund and the appropriation of resources under the Special Account.

Finally, in view of the timetable contained in the proposal for a new paragraph 124 of the Guidelines (which reflects the timetable currently applied), the timespan available for the Bureau to consult any external experts could in fact be limited to three weeks (!) between the deadline by which the Secretariat transmits the request to the Bureau, and the deadline by which the Bureau forwards the request to the Committee.

Thus, for legal but also for practical procedural reasons the first sentence of paragraph 48 (former 47) should be deleted.

In addition, the reference, in the margins of paragraph 48 (former 47), to Article 11(5) of the Second Protocol should be deleted, because Article 11(5) does not mention the Bureau or its role in the procedure for granting enhanced protection but only deals with representations of one or more Parties to the request.

For the same legal reasons mentioned above, paragraph 165 of the Guidelines should be amended by replacing the word "Bureau" by "**Committee**" (only then would the reference to Article 27(3) of the Second Protocol in the margins to paragraph 165 be correct) and by replacing the word "evaluation" by "**consideration**". The amended paragraph should then be shifted to paragraph 167 and be inserted there as new second sentence.

On page 5, paragraph 55: Normative language ("shall", "must" etc.) should be avoided in the Guidelines (the Guidelines have no legally binding character). Thus, the words "are to be met" should be replaced by "**need** to be met".

On page 5, paragraph 59: Normative language ("shall", "must" etc.) should be avoided in the Guidelines (the Guidelines have no legally binding character). Thus, the words "shall provide" should be replaced by "**is expected to provide**".

On page 6, paragraph 64: Normative language ("shall", "must" etc.) should be avoided in the Guidelines (the Guidelines have no legally binding character). Thus, it is suggested to formulate the amendment proposal, by merging it with the existing text of paragraph 62 as follows: "Parties are ~~invited~~ **expected** to submit their requests **together with all documentation necessary to substantiate the request**, both in ~~paper and electronic format provided by the Secretariat~~ **printed form as well as in electronic format (Word and/or PDF format preferred)** ~~Requests may be submitted~~ in one of the two working languages of the Secretariat."

On page 6, paragraph 65 and its new heading: The heading, if inserted, should be numbered with (h). However, the content of the proposed paragraph 65 would also fit as a new second sentence in new paragraph 64: "**Parties are expected to ensure that the information submitted is accurate.**" In that case a new separate heading would become redundant.

On page 6, paragraph 70: It is not consistent with the existing structure of the Guidelines to insert such content as new paragraph 70. This would mean to insert it at a point where the Committee has already taken the decision to grant enhanced protection to a cultural property and where the Director-General has informed the UN Secretary-General and all Parties of this decision (see paragraph 69 of the Guidelines).

Beyond that, the second sentence deviates from the Second Protocol as it insinuates that the advisory opinion may only be sought from eminent professional organizations. Article 11(6) of the Second Protocol, however, provides that "*(i)n deciding upon a request, the Committee should ask the advice of governmental and non-governmental organisations, as well as of individual experts*".

Finally, the information that the Committee when granting enhanced protection may consult specific organizations in an advisory capacity is already contained in the current Guidelines,

namely in paragraph 24. The new paragraph 70 is therefore redundant and should not be inserted in the Guidelines.

If it is deemed useful to mention in the Guidelines that the Committee may also request advisory opinion for suspending or cancelling enhanced protection, paragraph 24, second sentence, of the Guidelines could be amended as follows: "To assist in the implementation of its functions, the Committee may invite to its meetings, and consult within the framework of granting, **suspending or cancelling** enhanced protection, in an advisory capacity, eminent professional organizations such as ...".

In addition, the following new paragraph 89 could be inserted at the beginning of Chapter III.D of the Guidelines: "**When considering the suspension or cancellation of enhanced protection the Committee may, inter alia, consult, in an advisory capacity, eminent professional organizations such as those mentioned in paragraph 24.**"

On page 7, new Chapter III.E: A separate chapter on the procedure for requesting an advisory opinion does not seem necessary because most of its contents are already covered under the existing Guidelines and the remaining additional information could be merged with existing paragraphs.

Paragraph 97 merely restates (part of the) rules on decision-making by the Committee as laid down in Article 26 (2) and (3) of the Second Protocol, which are already reflected in paragraph 66 of the Guidelines. Thus, paragraph 97 is redundant.

Paragraph 98, first sentence, repeats in other words what is already covered by paragraph 24 of the Guidelines. The second sentence of paragraph 98 unnecessarily limits the freedom of action of the Committee. It is up to the Committee to decide how to proceed, both in matters of time and substance, with a request the decision upon which depends on an advisory opinion. Paragraph 98 should therefore not be inserted in the Guidelines.

Paragraph 99, first sentence, relates to the procedure of preparing a revised request by a Party, a procedure that is subject to the national law of that Party and thus is not (and should not be) regulated in the Guidelines. The second sentence does not relate to the procedure for requesting an advisory opinion but to the procedure for granting enhanced protection. In particular, it relates to paragraph 72 of the Guidelines, which already states that "(i)f the Party decides to resubmit the revised request, this request will then be reevaluated according to the regular procedure". This means that the Party should resubmit the revised request by 1 March at the latest (see the timetable in the proposal for a new paragraph 124 of the Guidelines). There is no reason for deviating from that procedure and to unnecessarily limiting the time for checking (by the Secretariat) and evaluating the revised request (by the Bureau and by the other Committee members) to eight weeks before the meeting of the Committee.

Thus, paragraph 99 should not be inserted in the Guidelines.

On Paragraph 100: For the same legal reasons mentioned in the comments on paragraph 48 (former 47) above, it should be the Committee and not the Bureau to decide about consulting external experts. Possible time pressure in an emergency procedure is no reason to vest the Bureau with competences it does not have.

Moreover, the procedure for granting enhanced protection upon the outbreak of hostilities on an emergency basis is dealt with in Article 11(9) of the Second Protocol as well as in paragraphs 63, 66 and 75 of the Guidelines. Paragraph 63 describes the requirements which a request for enhanced protection on an emergency basis must fulfill, paragraph 66 repeats the specific voting rules contained in Article 11(9) of the Second Protocol, and paragraph 75 describes (elements of) the procedure for deciding about provisional enhanced protection. The only time element in this procedure is that the decision on provisional enhanced protection should be taken by the Committee "as soon as possible" (wording taken from Article 11(9) of the Second Protocol).

What is missing in paragraph 75 and in the current Guidelines in general, is a description of the steps (and timetable) of the procedure for granting provisional enhanced protection, as distinct from the regular procedure. In particular, it remains open which provisions of paragraphs 44 to 51 of the Guidelines and, in view of the proposal for a new paragraph 124, which timetable should or could be applied in such procedure.

Thus, instead of focusing on a singular aspect (i.e. who may request an advisory opinion, if required) of such procedure, as proposed in new paragraph 100, the Guidelines should be amended to generally describe the procedure for granting provisional enhanced protection. In particular, it should be discussed whether the three stages Secretariat – Bureau – Committee need to be kept and if so, how the procedure could still be expedited. Or whether the stage Bureau could be left out and how the remaining two-step procedure (Secretariat – Committee) could be expedited. One of the means expediting the procedure could be to organize extraordinary meetings of the Committee (see Article 24(2) of the Second Protocol), even in electronic format (e.g., via video teleconference), or to conduct a written exchange of views and take decisions in writing via electronic means, e.g. on a secure platform open to members of the Committee and the Secretariat only.

Thus, paragraph 100 should not be inserted in the Guidelines. Instead, it is suggested that the Committee asks the Secretariat to prepare for its next meeting a proposal on the procedure for granting provisional enhanced protection, as distinct from the regular procedure, with particular consideration of the need to conduct such procedure as expeditiously as possible.

On Paragraph 101 see the comments on paragraph 70 above. In view of the last two paragraphs these comments, paragraph 101 as such should not be inserted in the Guidelines.

On Paragraph 102 see the comments on paragraph 70 above, in particular the second paragraph. Furthermore, in view of Article 29(1) of the Second Protocol, which is reflected in Article 3(b) of the Financial Regulations of the Special Account, the financing of advisory services to the Committee through the Fund may only be justified, if that can be subsumed under either "financial or other assistance in support of preparatory or other measures to be taken in peacetime" (Article 29(1)(a), Article 3(a) of the Financial Regulations) or under "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" (Article 29(1)(b), Article 3(b) of the Financial Regulations). When considering that question the Committee should take into account that both categories of measures referred to in these rules are meant, as the Articles of the Second Protocol referred to in these rules reveal, primarily for providing assistance to the Parties for measures taken by them.

If the Committee comes to an affirmative answer, the use of the Fund to finance advisory services to the Committee should not be limited to eminent professional organizations. Furthermore, the new provision should not form a separate chapter but be inserted in the Guidelines as **new paragraph 68**: “**When preparing its decisions on enhanced protection, the Committee may, if considered necessary, decide to request an advice in accordance with Article 11(6) of the Second Protocol. If required, the Committee may also decide to finance such advisory services through the Fund for the Protection of Cultural Property in the Event of Armed Conflict.**”

On pages 8 and 9, “TIMETABLE”, it is not clear what “Year 1” means. The timetable and procedure described in new paragraph 124 applies in every (calendar) year. It is therefore suggested to delete “Year 1” after “1 March”, “1 March – 1 April” and “1 April”.

On page 10, in the paragraph starting with “Once the Committee has received a request...”, in the third sentence, the reference to Article 11(2) is not in line with the Second Protocol and should therefore be deleted. Article 11(5) of the Second Protocol is very clear on this issue: the basis of representations must only be the criteria mentioned in Article 10.

On page 11, in the paragraph starting with “The Committee immediately informs...”, the words “of the Second Protocol” are redundant, as whenever we speak of “Parties” in the present Guidelines this term refers to the Parties to the Second Protocol.

On page 13, the table of contents should be brought in line with the headings (and content) of the enhanced protection request form. Thus, under 3., points 3.1 and 3.2 should be deleted, and 3.3 should become 3.1.

On page 14, in the box containing a list of required annexes to the request, some words are missing in the description of annex 3. It is thus suggested to insert “measures taken” after “Legislative and administrative”.

Furthermore, the formulation “or an abstract of the texts on the protection of cultural property” is inappropriate, because (an abstract of) normative texts cannot replace a description of practical (administrative) measures taken, such as the planning (as well as the implementation and exercising) 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 (Article 5 of the Second Protocol, which also applies to cultural property for which enhanced protection is requested). Thus, the word “or” should be replaced by “and”.

On page 16, box 1.4, the wording is not clear: Please explain what is meant by “For immovable cultural property, indicate area of the cultural provided shall be provided”.

On page 17, box 4.1: It might be questioned why this box is needed at all. First, relevant legislation concerning the implementation of the 1954 Hague Convention and its two Protocols should anyway be regularly provided by States in their national reports (for which an electronic model questionnaire has recently been uploaded on the UNESCO website). Second, boxes 4.4 and 4.5 already address all necessary information on legislation that is required to the process of granting enhanced protection to a specific cultural property. It is thus suggested to delete box 4.1 (which was not contained in doc. C54/19/14.COM/8 – and is also not reflected in the table of contents on page 13 of the present document).

-----