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Diplomatic Conference on a Draft Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

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DIPLOMATIC CONFERENCE ON A DRAFT SECOND PROTOCOL TO
THE 1954 HAGUE CONVENTION FOR THE PROTECTION OF
CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

15 - 26 March 1999

SYNOPSIS OF DAILY PROCEEDINGS - PLENARY

The following pages contain a synopsis of the Plenary proceedings at the Diplomatic Conference on the Draft Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict which took place in the Hague from 15 to 26 March 1999.

On each day's synoptic report, there is the possibility of a direct link to the Chapter of the UNESCO prepared Draft of the Second Protocol (not the final, adopted text) that is being discussed. This window can be kept open while you consult that day's report. Furthermore, when reference is made to an Article or Chapter of the 1954 Hague Convention, it is possible to click on the Article number or Chapter in order to link directly to the relevant Article/Chapter in the 1954 Hague Convention. This window too can be kept open while you consult the relevant daily synoptic report.

There is also the possibility to link to the texts of the 1977 Additional Protocol I to the Geneva Conventions, the 1997 International Convention for the Suppression of the Terrorist Bombings, and of the 1998 Statute of the International Criminal Court, all of which were often referred to during the discussions on the Second Protocol to the 1954 Hague Convention.

DAILY REPORTS

Monday 15 March 1999

Tuesday 16 March 1999

Wednesday 17 March 1999

Wednesday 17 March 1999 - Addendum

Thursday 18 March 1999

Thursday 18 March 1999 - Addendum

Friday 19 March 1999

Monday 22 March 1999

Tuesday 23 March 1999

WORKING GROUP SESSIONS ONLY, NO PLENARY

Wednesday 24 March 1999

Thursday 25 March 1999

Friday 26 March 1999

DIPLOMATIC CONFERENCE ON A DRAFT SECOND PROTOCOL TO
THE 1954 HAGUE CONVENTION FOR THE PROTECTION OF
CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

Précis, Monday 15 March 1999

MORNING SESSION

Mr Federico Mayor, the Director-General of UNESCO, took the Chair. The Minister of Foreign Affairs of the Netherlands, Mr J. J. Van Aartsen, and the Secretary of State of the Netherlands for Culture, Dr F. Van Der Ploeg, welcomed the Delegates. Copies of their speeches have already been distributed.

Mr Adriaan Bos was elected Chairman of the Conference by acclamation.

The newly elected Chairman gave a brief background to the preparation of the Draft Second Protocol (HC/1999/1/rev.1). In view of the short duration of the Diplomatic Conference, he indicated the direction in which he hoped the discussions would proceed: it would be preferable that there be a general discussion on the Draft Second Protocol in Plenary on the first day, with the remaining working days of the first week being dedicated to a general Chapter-by-Chapter debate of the document. Proposals for amendments to the individual Articles could be delayed until discussions had progressed further.

Link Draft Agenda The Agenda was unanimously adopted.

mk Draft rules of Proc The President suggested that in view of the questions raised by some of the Delegates concerning the Rules of Procedure, the draft Rules of Procedure should be provisionally adopted in order to allow the proceedings to begin. The substantive questions relating to the Rules could be discussed during the course of the Conference. He invited Delegates to feel free to approach him with their comments or concerns on this document.

Several Delegations nevertheless raised some of the substantial issues related to the Rules of Procedure such as the distinction between States party to the Convention and Non-Contracting States; on the feasibility of conducting the Conference without the Rules of Procedure having been adopted; and on the proposal by a delegation that there must be unanimity on all decisions.

The President reiterated his desire that discussion on issues of substance be set aside for the moment and that the remainder of this first day be devoted to general debates on the document, followed by the Chapter-by-Chapter discussions, starting with Chapter 2.

Link Draft 2nd Part One State was concerned that only English and French were named as working languages and wanted Spanish included, failing which, steps should be taken to ensure the inclusion of Spanish speakers in all the drafting fora of the Conference. The President however drew attention to Article 43 (2) of the UNESCO prepared Draft Second Protocol Document which indicates that the Final Act of the Protocol will be translated into all the working languages of UNESCO before the signing ceremony.

AFTERNOON SESSION

Line A.C.
Some States thought that the Draft Second Protocol amounted to an amendment and that the ~~Article 39~~ procedure of the Hague Convention should be applied; others would have preferred a new Convention and yet others thought that the procedure of an Optional Draft Second Protocol was the best method.

Several States emphasised that the adoption of a Second Protocol should not affect the rights and obligations of the States who are party to the Convention but not to the Second Protocol.

Some States thought that other instruments of international humanitarian law were not sufficiently reflected in the Draft Second Protocol. Another view expressed the importance of a clear, coherent instrument that could realistically be accepted.

Several States mentioned the deficiencies of the current rules on "special protection" and the need for an improved system. Others highlighted the need to strike a balance between military interest and the interest in the protection of human life, and the protection of cultural property. The importance of provisions relating to "military necessity" was also stressed.

Considerable interest was expressed in the important issues of criminal responsibility and international jurisdiction for enforcement. Legal co-operation was seen as very important. Some Delegations thought that the penal sanctions should exactly reflect those in ~~Additional Protocol I~~ of the Geneva Conventions.

One State mentioned the importance of the draft provisions on occupied territory, and another doubted the wisdom of compulsory contributions to a fund. Three States (China, United Kingdom and United States of America) announced progress towards their participation in the Hague Convention.

The establishment of an Intergovernmental Committee was preferred by some Delegations but the provision of an alternative also received some support.

The afternoon session was concluded with the nomination and election of the members of the Credentials Committee and the Bureau. Germany, Iran and Russia were unanimously elected to constitute the Credentials Committee, with Mr R. Hilger (Germany) holding the Chair. Thailand, Syria, Argentina and Senegal were also unanimously elected as Vice-Presidents of the Bureau, while Mr Jenel (Hungary) was unanimously elected as the Rapporteur.

DIPLOMATIC CONFERENCE ON A DRAFT SECOND PROTOCOL TO
THE 1954 HAGUE CONVENTION FOR THE PROTECTION OF
CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

Précis, Tuesday 16 March 1999

*Line Draft
2nd Part* The discussions centred on the substantive issues raised by Chapter 2 of the UNESCO prepared Draft Second Protocol (Draft Second Protocol - document HC/1999/1/rev.1).

A few of the States felt that significant changes had to be made to the description of cultural property in Article 4. They felt that as it stands, the Article weakens the provisions of the Hague Convention and is contrary to the provisions of Additional Protocol I to the Geneva Convention.

Line 4(2) H.C In considering Articles 4 - 9 of the Draft Second Protocol and their relation to the provisions of Article 4(2) of the Hague Convention (on "imperative military necessity"), some States felt that there was a need to define the provisions of the Draft Second Protocol in a more precise and limited manner, outlining the conditions under which the concept could be invoked, in order that the conduct of States could be better regulated: some felt they should rely more on the provisions already existing in other instruments of international humanitarian law, notably Additional Protocol I to the Geneva Conventions. Others doubted that the present Draft Second Protocol made provision both for the attacker and the attacked. Some Delegations thought that Article 4(1) and 5 should be amended in order to ensure that under no circumstances would the former justify a hostile attack on cultural property, while the latter should preclude the consideration of cultural property as a military objective.

Some States felt a need to change the order of the sub-paragraphs of Article 6. When discussing the provisions of Article 6(a), it was proposed that the authorisation for attack against cultural property should be modified: some States wanted a higher level of approval, and others wanted more flexibility.

With regard to Article 5, some States felt that it should be redrafted so as to coincide with the provisions of Additional Protocol I to the Geneva Convention on "general protection". Furthermore, some expressed the view that this concept should be revised to remove possible justification for attack on cultural property. One proposal was that the distinction between protection in peacetime and in conflict should be removed and the separate provisions in this respect should be merged into a single Article. It was felt that there was a need for uniformity of these provisions with those of the Hague Convention.

The view was expressed that Article 7 should be revised in such a manner as to provide for a waiver where urgent circumstances so required; others did not agree.

With regard to Article 10, some States proposed that the provisions of sub-paragraph 1 relating to the protection of cultural property in occupied territories should not exclude the right of the occupying force to excavate; e.g. to protect a damaged site. Others disagreed. Others felt that the reference to the terms "integrity" and "authenticity" and the term "illicit" in sub-paragraph 2 should be clarified.

Many States made comments about the language of the Draft Second Protocol. They felt it failed to remove doubt, at the operational level, as to the type of action that could be taken in a given situation: in particular, that the concept of "military necessity" as reflected in Articles 6(d) and 9 needed to be clarified. Article 3 on the other hand needed to be amended to include a waiver, thus bringing it in line with the provisions of the Hague Convention

The Delegations were divided as to whether the provisions of Chapter 2 constituted a supplement to the corresponding provisions in the Hague Convention, or whether they were an amendment requiring the application of Article 39 of the Convention. Some Delegations who felt that the Protocol was a supplement considered nevertheless, that the language of the Chapter should be changed in a manner as to better reflect its supplementary nature.

Some of the States felt that any changes in the Draft Second Protocol that might lead to ambiguity, especially at the operational level, should be avoided.

Some Delegations who had not spoken during the general debate on the Draft Second Protocol on Monday 15 March, took the opportunity while presenting their views on Chapter 2, to make some general comments. One State in particular noted that establishing a body to administer the Draft Second Protocol, would require reflection on a future budget. On the issue of "individual criminal responsibility", some States felt that the Protocol should set up a different regime from that which already exists in the Statute of the International Criminal Court. Others indicated that since this concept and that of State responsibility had already been embraced by the international community, especially in the 1996 Statutes of the International Criminal Court and by Additional Protocol I to the Geneva Conventions, this Draft Second Protocol should align with these instruments in respect of these provisions.

In summarising the day's proceedings, the Chairman noted that there had been agreement that the provisions of the 1954 Hague Convention with regard to "military necessity" needed to be improved, and that this concept needed to be better reflected in the Draft Second Protocol.

The Chairman invited the Delegates who had made suggestions for the improvement of this provision in the Draft Second Protocol to constitute an informal Working Group and try to come up with a single text. Mr Thomas Desch (Austria) agreed to Chair such a group to work on Articles 4 - 9.

Finally, the Chairman of the Credentials Committee gave a preliminary report on the provisional work carried out by that Committee.

DIPLOMATIC CONFERENCE ON A DRAFT SECOND PROTOCOL TO
THE 1954 HAGUE CONVENTION FOR THE PROTECTION OF
CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

Précis, Wednesday 17 March 1999

The discussions on the third day of the Diplomatic Conference began with the provisions of the Draft Second Protocol for "enhanced special protection" contained in Chapter 3 of the UNESCO prepared Draft Second Protocol (HC/1999/1/rev.1).

Link Draft
2nd Part

Many States expressed the view that this Chapter, together with Chapter 4, is the most important since it demonstrates the supplementary nature of the Draft Second Protocol. Some supported what they considered to be the new level of protection contained in Chapter 3. Some States felt that the protection provided should however be extended to include the surroundings of cultural property under "enhanced special protection". Certain States felt there was no need for the new level of protection proposed in the Draft Second Protocol but others felt that, since the provisions of the Hague Convention had been unsuccessful, these supplementary provisions of Chapter 3 were essential.

Link Ch 2
H.C.

Many States felt that the provisions on Article 11 should reflect those of Chapter 2 of the Hague Convention and better distinguish the higher level of protection this Article provides. In particular some felt that this Article should reflect Article 8 of the Hague Convention which requires that specially protected cultural property must not be near a military objective nor used for military purposes.

A substantial majority of the Delegations felt that the provisions of Article 11(a) should be revised to refer to "humankind" as opposed to "all peoples": this term clearly underlines the common interest of safeguarding important cultural heritage. Others felt that the declaration of non-use of cultural property for military purposes should be a criterion for the granting of "enhanced special protection" to any cultural property. One State felt that the right of a country to protect its cultural property should be a human right and that this sub-paragraph should be amended accordingly.

With regard to Article 11(b) and (c), some felt that making the granting of "enhanced special protection" dependent on legislative and administrative actions taken at the national level, removed the superior level of this type of protection as accorded in Article 11(a) of the Draft Second Protocol, to a level no higher than the protection provisions of Article 8 of the Hague Convention. Others felt that sub-paragraphs (b) and (c) did not take into consideration the difficulties that could arise in a Federal State for example, or the difficulty that poorer countries could have in implementing these provisions, especially without international and technical assistance.

The view was expressed that some of the provisions of Article 12 should be moved to Chapter 6 since they concerned procedural matters under the responsibility of the Committee. It was also thought that perhaps they could be drafted as operational guidelines in which case, they should be considered as superseding those of the Regulations to the Hague Convention. Others felt that Article 12 should better clarify the relationship between special protection under the Convention, and "enhanced special protection" under the Draft Second Protocol, perhaps by using the term "enhanced protection".

One State proposed that Article 12(2) should allow Parties from one State to request inscription of cultural property located in a second State on the International List of Cultural Property under Enhanced Special Protection in order to protect the cultural property of minorities.

Two Delegates suggested amending Article 12(3) to make it clear that the recommendation of an NGO had no effect without a request by a State (Article 12(2)) and a decision by the Committee. While some States welcomed Article 12(5) which permits objections to the inclusion of cultural property on the List, others felt that it was necessary that a belligerent State should abstain when a vote is taken as to the inclusion of cultural property on the List; while others felt that the provision should be clarified to show that the Committee could overrule objections. With regard to Article 12(6) regarding emergency measures for obtaining "enhanced special protection", the view was expressed that this provision should remain unchanged. Some States felt however that there was a need for the process to be simplified in line with its emergency nature.

The view was expressed that Article 13 should be restructured to clarify when immunity could be lost. Others thought that Article 13 should clearly indicate "Party" in a singular sense in order to remove any interpretation of action being collective.

Many States thought that there was a need to clarify the conditions under which "enhanced special protection" would be lost (Article 14). Some expressed the view that any possible loophole to justify the loss of "enhanced special protection" should be removed from the provisions of Article 14 by making the conditions for loss "direct and indirect support of military operations". Others felt that the wording of Article 14 gave an unacceptable advantage to the owner of cultural property. It was suggested that phrases such as "other than its normal function" and "significant and direct support" be reconsidered. The Representative of the ICRC pointed out that, in Additional Protocol I to the Geneva Conventions, protection is no longer limited to only a few unique objects with all others being legitimate military objectives. Rather, attack is now only allowed on military objectives, with all other objects being protected. Therefore, the protection accorded these significant items needed to be substantially higher than the general protection.

The view was expressed that Article 15(a) was not practical at an operational level on the ground and that perhaps such responsibility should either be accorded to the highest level of operational command, or the sub-paragraph be amended with the inclusion of a proviso such as "where circumstances permit". The ICRC Representative stated that "enhanced special protection" would apply only to supremely important cultural property (other cultural property being in any event covered by the "general protection provisions") and thus, any attack on such objects would have very significant political implications and should therefore only be authorised at the highest political level.

One proposal was that Article 16 should be reformulated to include informing a State whose cultural property has had the "enhanced special protection" removed.

The view was expressed that Articles 14- 16 should be put in a normative package since they deal with conditions where "enhanced special protection" could be waived. The Secretariat explained that Articles 16 and 17 could be applied by the Committee in peacetime and even when conflict was not threatening, while Articles 14 and 15 regulated conflict situations alone.

Finally, the Chairman summarised the discussion on Chapter 3. He pointed out that there had been enough in the day's discussion to demonstrate the need for a higher level of protection, although the provisions of Chapter 3 might be revised to better reflect the higher level of "enhanced special protection", and define its relationship to the Hague Convention's protection regime. The Chairman announced that the Mrs Louise Terrillon-Mackay (Canada) had agreed to Chair an informal Working Group to work on the provisions of Chapter 3.

During the course of the discussions since the beginning of the Conference, Denmark and Ireland have added their names to those States proceeding towards participation in the Hague Convention.

DIPLOMATIC CONFERENCE ON A DRAFT SECOND PROTOCOL TO THE 1954 HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

Précis, Wednesday 17 March 1999 - Addendum

*Link 2nd
Draft Prot*

The latter part of the afternoon session on Wednesday 17 March 1999 and the early part of the morning session of Thursday 18 March were devoted to the discussions of Chapter 6 of the Draft Second Protocol (5HC/1999/1/rev.1) concerning the institutional issues.

What is the best type of body to administer the Draft Second Protocol? Some Delegations questioned the idea that an intergovernmental body was the best forum in which to take such fundamental decisions relating to the protection of cultural property of importance to all humankind; that this forum might be too political for any decisions to be reached. They suggested that perhaps an impartial, expert body should have the responsibility of taking such decisions. Other Delegations had a different view, believing that decisions about cultural property should only be taken within the context of an Intergovernmental Committee because of the potential political implications of such decisions. Some States felt that such a Committee could fairly reflect the cultural diversity of the States Parties; others that an intergovernmental body was essential to the implementation not only of the Draft Second Protocol, but also of the Hague Convention.

Other Delegations preferred to opt for the idea of a Bureau, put forward by UNESCO in the Draft Second Protocol, in view of the financial burden of the institution that will administer the Draft Second Protocol. Others preferred the Bureau option because it appears to have a lighter bureaucratic nature. Some would simplify its functions even further.

Some States felt that all the Articles of the Draft Second Protocol relating to the responsibilities of the Intergovernmental Committee should be under Chapter 6 and that the Chapter should therefore be reformulated to include certain provisions of Articles 12, 16 and 17. The view was also expressed that the reformulation of Chapter 6 should clearly define the respective roles of the Intergovernmental Committee, and those of the advisory bodies.

*Link 27
H.C.*

With respect to Article 25, the view was expressed that since the Draft Second Protocol is a supplementary document, it should revitalise the meetings provided for in Article 27 of the Hague Convention rather than make provisions for new meetings (Draft Second Protocol Article 25(2)).

The view was stated that the functions of the Intergovernmental Committee should include the monitoring of the provisions of the Hague Convention; this would further extend the role of the Committee from simply monitoring "enhanced special protection", to that of monitoring both this higher level of protection and general protection. Some Delegations felt that there was a need for Article 19(d) to be clarified to reflect the reason for and intended use of the Fund and that Article 29(g) should include a provision obliging the Committee to report on the use of the Fund.

Many States seemed to favour the idea that the contributions for the Fund (Article 32) should be purely voluntary. Other States felt that contributions should be compulsory to ensure the viability of the Fund.

The Chairman concluded the session by announcing that Mr Jelen (Hungary) had agreed to Chair an informal Working Group to work on the provisions of Chapter 6.

DIPLOMATIC CONFERENCE ON A DRAFT SECOND PROTOCOL TO THE 1954 HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

Précis, Thursday 18 March 1999

L. sic 2nd
Draft Prot.

The proceedings of Thursday 18 March 1999 centred upon the provisions of the Chapter 4 provisions of the Draft Second Protocol (HC/1999/1/rev.1) concerning jurisdiction and responsibility.

x 28 H.C.

Most States were in agreement that together with Chapter 3, Chapter 4 constitutes the core of the Draft Second Protocol and is a prerequisite for its success. It was felt that these two Chapters demonstrate the supplementary nature of the Draft Second Protocol and give the Hague Convention the enforcement mechanism that it lacks. One Delegate however asked for clarification on whether the sanctions provided for in Chapter 4 should be of a more general nature as in Article 28 of the Hague Convention, or whether they should be more specific as they are in the Draft Second Protocol. He felt that difficulties might arise for some States if they have to adopt new national legislation in order to execute Chapter 4.

Appreciation was expressed by many States for the two tier approach to violations adopted in Article 18 - grave breaches and other violations; they felt it reflected the method adopted both in Additional Protocol I to the Geneva Conventions (particularly Article 85 of Additional Protocol I to the Geneva Conventions which provides for grave breaches against cultural property) and in the Statutes of the International Criminal Court. They felt that this would avoid the creation of new crimes and ensure as large a participation as possible by the international community in the Draft Second Protocol. Another view expressed was that Article 18 introduced new offences, violations and breaches and that this should not be the case in a text (the Draft Second Protocol) which is supposed to be supplementary and optional. There were other States however, who accepted the provisions of Article 18 (Grave Breaches) as they stand since, 18(a) and (b) apply the notion of grave breaches only to cultural property that is under "enhanced special protection". 18(c), (d) and (e) on the other hand provide that, if violations against generally protected cultural property are of a systematic nature, are unlawful or wanton thus creating extensive damage, or are victim of reprisals, these violations will be considered as grave breaches also. The Representative of ICRC noted that in its enumeration of grave breaches, Article 18 does not include either intentional attack or pillage, both of which are now accepted as war crimes in the Statute of the International Criminal Court.

With regard to Article 19, the view was expressed that the creation by this Article of new categories of offences and criminals under national legislation was inadvisable, particularly in view of the difficulty of introducing new crimes into domestic law. Some therefore wanted to remove all reference to Article 19 in sub-paragraph (2) so that the obligation to enact the necessary legislation at national level relates only to the breaches enumerated in Article 18. One State thought it very difficult for some developing countries to enact the necessary legislation since such countries often did not have adequate records of their cultural property. It was also suggested that the Article, in particular its sub-paragraph (1), does not cover omissions and that it should therefore be reformulated. The view was expressed that guidelines need to be introduced in respect of 19(1) to indicate to States the type of national legislation that needs to be taken. While some States felt that

19(2) could be moved to Article 21 since it dealt more with matters of jurisdiction, others felt that this paragraph should not only be separate, but also apply to Articles 18 and 19 of the Draft Second Protocol. The view was expressed in respect of Article 19(3) that it is essential to keep these provisions in order to maintain the obligation on States to pass national legislation in respect of grave breaches.

There was general satisfaction at the inclusion of the notion of individual criminal responsibility in the Draft Second Protocol; it was however felt by some that the definition in Article 20 should be closer to the texts of existing instruments of international humanitarian law, in particular Additional Protocol I to the Geneva Conventions and the Statute of the International Criminal Court, and avoid the inclusion of ancillary crimes such as those in 20(2). Opinions were divided on the criminality of attempts. Some thought that 20(4) should be clarified and should only be applicable to grave crimes. Sub-paragraph (6) was felt by some to require allusion to hierarchy and to the law (as does Article 33 of the Statute of the International Criminal Court) since, at the operational level, the soldier would be more constrained by his obligation to obey a higher grade officer.

With regard to Article 21, the Representative of ICRC noted that firstly, contrary to the opinion of some States, the notion of international jurisdiction is one that is already embedded in existing instruments of international humanitarian law, namely Article 8(a) of the International Criminal Court Statutes. Furthermore, the experience of ICRC is that a two-tier system tends to heighten the difficulty of persuading States to enact national legislation. As such, in order to be able to adopt clear guidelines on international criminal jurisdiction, it is essential that there be a clear list of grave breaches and of criminal responsibility, both of which are generally accepted as requiring international jurisdiction. One view also expressed was that it was not appropriate to deal with international criminal law in an instrument intended to be optional and supplementary rather than universal.

Some States were happy to see the notion of criminal responsibility of States introduced into the Draft Second Protocol in Article 22 since they felt these provisions reflected generally accepted rules of customary international law, and that it supplemented Article 28 of the Hague Convention which makes no provision for State responsibility; others, referring to existing work on this subject in the International Law Commission, preferred to see it deleted. The Representative of ICRC drew the attention of the Conference to the fact that Article 91 of Additional Protocol I to the Geneva Conventions provides that States are responsible for all acts carried out by members of their armed forces and that this should be reflected in this Article.

Although some States welcomed the provisions of Article 23 as necessary for effective enforcement, others thought them to be different to the provisions that already exist in other instruments of international humanitarian law. The view was also expressed that the provisions in existing instruments on international humanitarian law being too vague, especially on the issues of extradition and co-operation, it is necessary that the provisions in Article 23 remain as they stand.

The Chairman summarised by concluding that the subjects raised in the discussions are crucial. Discussions had shown the need for further deliberation on the wording of the text of Chapter 4. There was general agreement on the enumeration of grave breaches in Article 18. It was clear that sub-paragraphs (a) and (b) clearly apply to cultural property under "enhanced special protection". There seemed however to be some disagreement as to the inclusion of sub-paragraphs (c) and (d) since they appear to refer to generally protected

property. There also appeared to be a consensus of opinion on the obligation on States to try or extradite those who are suspected of having committed grave breaches. Article 19 was considered more complicated, with some States wanting a system where legislation on some crimes was international and others left to the discretion of the States. Article 20 raised the question of whether international criminal responsibility should only be applicable to grave breaches or whether it should be extended to include other violations. There was also much discussion as to whether Article 22's provisions should draw more on the existing rules in instruments of international humanitarian law. The Chairman announced that Prof. H. Fischer (Germany) had agreed to Chair an informal Working Group to work on the reformulation of the provisions of Chapter 4 in the light of all the observations made.

DIPLOMATIC CONFERENCE ON A DRAFT SECOND PROTOCOL TO
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Précis, Thursday 18 March 1999 - Addendum

The discussion of the second half of the day centred mainly on the provisions of Chapters 5 (non-international armed conflicts) and 7 (Dissemination of Information and International Assistance) of the Draft Second Protocol (HC/199/1/rev.1).

Chapter 5

Some States doubted the applicability of Chapter 5, and others felt its scope should be limited so that not all the provisions of the Draft Second Protocol should be applicable in the event of a non-international armed conflict. The view was also expressed that 24(2) to (4) were inconsistent with the provisions of Article 19 of the Hague Convention and the spirit of some of the other provisions of the Draft Second Protocol.

A large number of States however welcomed the provisions of Chapter 5 as they stand in view of the threat posed by non-international conflicts to peace and development. Since such conflicts can be as violent as international conflicts, a large number of States were of the opinion that all provisions of the Draft Second Protocol relating to "enhanced special protection" should be applicable as appropriate. Some States suggested that these provisions should be included under Article 2 on the scope of the Draft Second Protocol. Some States sought clarification of the text. Others further endorsed Chapter 5 stating that, since the Draft Second Protocol deals with cultural property that is of value to all humanity, non-international armed conflicts must be subject to the same regime as international conflicts.

While some States felt that 24(2) and (3) should be maintained, others preferred to see them deleted. Some thought that 24(1) and (5) should be removed since they reflected the provisions of Article 19 of the Hague Convention, and be replaced with a paragraph stating that the provisions of Article 19 of the Hague Convention will be applicable in the event of a non-international armed conflict. These States were, however, not against the principle of putting non-international armed conflicts under the same regime as international armed conflicts in respect of cultural property under "enhanced special protection".

The Representative of the ICRC explained that non-international armed conflicts are very complex and that it is precisely because of this that they should be under the same regime as international armed conflicts. Government forces in non-international conflicts are trained to respect certain obligations and those fighting against them should be subject to the same obligations.

With regard to 24(5), one State requested a clarification on the services that UNESCO could offer in the event of a non-international armed conflict with respect to cultural property.

The Chairman concluded by stating that there was a need for some redrafting in respect of Chapter 5 and that this had to be done bearing in mind the regime already existing in the Hague Conventions.

Link 2nd
Draft Part

Link 19
H.C

Link 2nd
Draft Part

Chapter 7

Link 25
H.C.

The view was expressed by some, that the provisions of Chapter 7 with regard to dissemination are not needed and that the Draft Second Protocol should rely on the provisions of ~~Article 25~~ of the Hague Convention.

In respect of Article 33, the view was expressed that means of dissemination should not be limited to the provisions of 33(3)(b) to (d) but should allow for other means of dissemination. Another view was that Article 33 is far more ambitious than Article 25 of the Hague Convention and the provisions of ~~Additional Protocol I~~ to the Geneva Conventions in that the language is more obligatory; the question was asked as to the appropriateness of this and suggestions made for modification.

With regard to Article 34, it was suggested that the last part of the paragraph referring to Article 18 and 19 of the Draft Second Protocol should be removed in order to prevent confusion or a subjective interpretation of Article 34. Another view was that this Article is unrealistic as to the capabilities of the Committee/Bureau (depending on which solution opted for). It was also felt that the change in language of Article 34 and use of the term "serious violations", while in line with the use of the same term in Additional Protocol I to the Geneva Conventions, could lead to confusion in the Draft Second Protocol; it was felt that the Draft Second Protocol should remain with its use of "grave breaches".

Many States expressed concern that anybody working for the protection of cultural heritage should be singled out for special protection during a conflict (Article 37). Some thought that protection should also be extended to other NGOs and international workers. One State thought "shall protect" was too heavy an obligation while the ICRC suggested another precedent based on Article 71 of Additional Protocol I to the Geneva Conventions.

There was also some concern expressed as to Article 37 not providing for protected persons losing their protection in the event they become involved in the hostilities; furthermore, it was felt that the provisions of Article 1(a) are too broad and need to be more specific. It was also pointed out that Article 37 does define the type of protection that shall be offered. Some States felt that the language of Article 37(1) is, in general, too obligatory as it stands; it was felt that the language could be modified.

The Chairman concluded saying that the discussion had been very constructive and that the Delegates had made many useful suggestions for the redrafting of Chapter 7. He announced that the Secretariat would provide a redraft taking into account the suggestions made for improvement of the text.

DIPLOMATIC CONFERENCE ON A DRAFT SECOND PROTOCOL TO
THE 1954 HAGUE CONVENTION FOR THE PROTECTION OF
CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

Précis, Friday 19 March 1999

The discussions of the day centred on Chapter 8 (Execution of the Protocol), Chapter 9 (Final Clauses), and Chapter 1 (Relation of the Draft Second Protocol to the Hague Convention) of the Draft Second Protocol (HC/1999/1.rev.1).

Link 2nd
Draft Pact

Chapter 8

With regard to Articles 38 and 39, some Delegates questioned the need for making provision for the protection of Protecting Powers in the Draft Second Protocol when there is already protection for them in Articles 21 and 22 of the Hague Convention; the suggestion was made that if indeed a State had to be Party to the Hague Convention to be Party to the Draft Second Protocol, Articles 38 and 39 of the Draft Second Protocol should be removed and replaced by an Article which says Articles 21 and 22 of the Hague Convention shall apply. Others wondered whether the notion of Protecting Powers might not be difficult to apply in non-international armed conflicts.

Link 21 & 22
H.C.

The Representative of the ICRC was able to give the Conference the precedents for the inclusion of the provision on Protecting Parties in the Draft Second Protocol – Article 8 of the first three Geneva Conventions, Article 9 of the 4th Geneva Convention, and Article 5 of Additional Protocol I to the Geneva Conventions. These Articles made provision for the protection of third States who are responsible for looking after the interests of those involved in the conflict. They carry out this task in various ways, although their best-known activity is the protection of prisoners of war. Although the use of Protecting Powers has been rare since the end of the Second World War, it is important that provision for their protection while carrying out their activities remain in the Draft Second Protocol.

Some States felt that the use of the word “neutrality” in Article 39(2) could be confusing and that the sub-paragraph should be redrafted in a manner as to avoid its use. Others felt that Articles 39 and 40 should be reformulated so as not to exclude the intervention of the Director-General of UNESCO even when Protecting Powers have been appointed. The view was also expressed that conciliation should only be at the invitation of the parties to a conflict and not at the initiation of the Director-General (Article 40(1)).

The question was asked as to why the Director-General had to report on Committees to the Executive Board on its meetings (Article 42(1)); others asked for clarification on the meetings between the Director-General and the proposed General Assembly of States Party to the Second Protocol. With regard to Article 42(2), the view was expressed that it is necessary to redraft this sub-paragraph in a manner as to give the procedure for the revision of the Second Protocol, and that the inspiration for these procedures should be the corresponding provisions of the Hague Convention; others felt that this sub-paragraph should simply be deleted.

The Chairman concluded by noting that many suggestions had been made for better relating the Chapter 8 provisions of the Draft Second Protocol to the corresponding provisions in the Hague Convention. There were other substantial points for redrafting but these would be dealt with by the Drafting Committee.

Link 2nd
Draft Part

Chapter 9

Some countries felt that all the language versions of the Second Protocol provided for in Article 43 of the Draft Second Protocol should be equally authentic; some wanted to know if only the Director-General would decide on the official text of the translations or whether the States would have a say. Other States pointed out, that even if it were possible to provide equally authentic translations of the Second Protocol, they would not be equally authoritative; they requested that a procedure be found which would provide translations which are equally authentic and authoritative. One State suggested that provisions of Article 43 should reflect the corresponding ones in the ~~Hague Convention~~, while another pointed out that Article 33(2) of the Vienna Convention gives provision for authoritative versions of a treaty in languages in which it was not negotiated. Another view was that all "authentic" texts had to be negotiated at the Conference.

Link H.C.
C. ?

The Representative of the Director-General gave some clarification on the question of languages: she explained that in UNESCO, English and French are the working languages, the 4 other languages (Arabic, Chinese, Russian and Spanish) are official languages. An authentic language is accepted by States negotiating a legal instrument as an authoritative source of that text, for example for its interpretation in case of ambiguity.

Several States were opposed to Article 44 (no reservations permitted) feeling that not only could it inhibit the universal acceptance of the Second Protocol, but that there was no precedent for it in international humanitarian law. They explained that often, States are only able to adhere to treaties if they are able to make use of reservations. It was proposed that this Article should be made consistent with the provisions of the Vienna Convention on Treaties. Some States felt however that the provisions of the Draft Second Protocol are of fundamental importance and deserve a special legal status. They therefore felt Article 44 should be retained. They also felt that these provisions were very detailed on a specific topic and that in such a case, a no-reservations principle was permitted. They cited the ~~Landmines Convention~~ as a precedent.

The Chairman concluded by saying that the Secretariat would redraft Chapter 9 based on the different views and suggestions made during the discussions and that the various concerned delegations would be consulted on the issue of languages. He also said that the redrafting should keep consistency between the notions of "authentic" and "official".

Link 2nd
Draft Part

Chapter 1

It was agreed that Article 1 should be left for further discussion when it became clear what the substance of the Draft Second Protocol would contain and whether more definitions would be needed. With respect to Article 2, some States noted that the Draft Second Protocol has no corresponding provision to ~~Article 18~~ of the Hague Convention; it was felt that Chapter 2 should therefore include an Article on the scope of the instrument. Other States felt the Chapter should make mention of the fact that the Draft Second Protocol is a supplementary instrument, possibly in a separate Article.

Link 18
H.C.

Referring to Article 2(2) of the Draft Second Protocol, some States said that although Article 18(3) of the Hague Convention was the basis for it, its provisions should be modified to include modalities of acceptance by States not party to the Convention.

The Chairman concluded the discussion by noting that a united view had not been reached on the substance of Article 2. Questions had been raised on the scope of the Draft Second Protocol's application, on the status of States not party to the Convention and on whether the Draft Second Protocol is supplementary or an amendment. He said the views expressed on these and other issues needed to be clarified to see how they can be reflected in the text and that this Article would need further discussion at a later stage.

DIPLOMATIC CONFERENCE ON A DRAFT SECOND PROTOCOL TO THE
1954 HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL
PROPERTY IN THE EVENT OF ARMED CONFLICT

Précis, Monday 22 March 1999

The Chairman opened the day's Plenary session by confirming that Monday 22 and Tuesday 23 March 1999 would be devoted, for the most part, to Working Group sessions. He said he was encouraged by the serious efforts that had been made in the Working Groups to prepare texts over the weekend and that many of those texts promised a Second Protocol document that would be most satisfactory. He proposed that the Plenary should commence with the nomination and adoption of the Drafting Committee and proposed the following Delegates: Mr Ch. Held (Switzerland, Chairman), Australia, Cameroon, Egypt, France, Russia, Spain, United Kingdom, Mr E. Clément (UNESCO Secretariat). They were unanimously nominated.

The Chairman informed the Plenary of the proposed new texts that he felt he could now send to the Drafting Committee in order that they commence the process of preparing a new Draft Second Protocol document that could then be presented to the Plenary. The Chairman clarified that all these texts would have first been discussed in Plenary, and that the texts that the Drafting Committee will provide would be linguistically correct. This of course did not preclude further discussion on the substance in Plenary.

*Link
secretly
doc*

In respect of the Secretariat redraft of Chapter 7, one view was that information on listed cultural property (~~new Article 33(1)~~ of Document HC/1999/5/Add.2 - ~~old Article 33(1)~~ of Document HC/1999/1/rev.1) may need to be considered classified information except in the event of a conflict because of the threat (from terrorists for example) that could be posed for such property in times of peace. Other States expressed concern about the provisions of new Article 33(2) (Document HC/1999/5/Add.2 - ~~old Article 33(2)~~ of Document HC/1999/1/rev.1) feeling it unnecessary to specifically include a provision for the dissemination of information regarding the Second Protocol to soldiers who form part of a United Nations force when the earlier part of the sub-paragraph has already provided for its dissemination to them within the context of their national forces. Others questioned the introduction of this provision that is not reflected in the Hague Convention. The Chairman replied that there was no reason not to include a provision which does not exist under the regime of the Hague Convention since the Second Protocol is a supplementary document, and that new ~~Article 33(2)~~ would be re-examined in order to address the other concerns expressed with regard to this sub-paragraph.

*Link
secretly
doc*

In respect of the Secretariat redraft of Chapter 1, some Delegations expressed concern about new ~~Article 2~~ (Document HC/1999/5 - ~~old Article 2~~ of Document HC/1999/1/rev.1). The Chairman agreed that this revised text would not be sent to the Drafting Committee until a consensus of opinion had been reached on its content.

*Link
secretly
doc*

With regard to the Secretariat redraft of Chapter 9, some States questioned the numbers and length of time (for entry into force of the Protocol) expressed in ~~Article 48~~ (Document HC/1999/5/Add.4 - ~~old Article 48~~ of Document HC/1999/1/rev.1). It was felt that a more in-depth discussion was required on these issues before the revised Chapter 9 is sent to the Drafting Committee. The Chairman of the Drafting Committee responded saying that they had indeed looked at the provisions of Articles 43 to 52 but that matters on which consensus had not been reached at the substance level had been left untouched.

DIPLOMATIC CONFERENCE ON A DRAFT SECOND PROTOCOL TO THE
1954 HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL
PROPERTY IN THE EVENT OF ARMED CONFLICT

Précis, Wednesday 24 March 1999

MORNING SESSION

*Line
revised
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The Chairman opened the day's Plenary session with discussions on the revised ~~Chapter 2~~ document (HC/1999/5/Add.5).

The Chairman of Chapter 2 informal Working Group informed the Plenary that they first dealt with Articles 3 to 9 and then Article 10 of the original UNESCO Draft Second Protocol. With regard to Articles 3 to 9, the informal Working Group tried to harmonise the various concepts, making them shorter, more consistent and more practicable.

Article 3 raised little discussion. New Article 4 tried to build on the provisions of Article 4 of the Hague Convention not only by clarifying the term "imperative military necessity", but also by clarifying the situations in which either side in a conflict could make use of it. Furthermore, the Working Group tried to build in restrictions to stem possible abuse of waiver. The new Article 5 was inspired by Article 57 of Additional Protocol I to the Geneva Conventions on the precautions to take in the event of attack while the new Article 6 took its inspiration from Article 58 of Additional Protocol I to the Geneva Conventions on precautions against the effect of hostilities.

With regard to old Article 10 of the UNESCO Draft Second Protocol (new Article 7 in the document HC/1999/5/Add.5), the Working Group discarded draft new provisions that would apply both to occupied territories and to conflicts of a non-international nature so that the new Article 7 deals only with occupied territories. The Working Group had rejected the term "breach of integrity" since it had been difficult to reach a consensus on its meaning. The general idea had however been expressed in Article 7(1) of the revised text and this had been an acceptable solution. In Article 7(2), the Group had considered both the possibility of allowing no archaeological excavation in occupied territories, and that of allowing some excavation in territories when strictly necessary for the protection of cultural property. The latter option was chosen but such archaeological excavation must be in close co-operation with the national authorities.

On Article 4, one State felt that either the title of the Chapter should be changed, or a definition (inspired by the provisions of Article 4 of the Hague Convention) of what constitutes respect for cultural property should be included in the Chapter as a separate Article. Others expressed concern on the wording of new Article 4, in particular, Article 4(a) (i). Although the inspiration for this reformulation had clearly been ~~Article 52(2) of Additional Protocol I~~ to the Geneva Conventions, in defining the conditions under which cultural property becomes a military objective, it is only "use" that is referred to and not either the "nature", "location" or "purpose" of such cultural property. The whole definition is to be included in Chapter 1. Other States were satisfied with "use" feeling that "nature", "purpose" and/or "location" were not on their own sufficient to define a military objective and that only "use" should be considered.

The Representative of the ICRC drew the attention of the Conference to the ICRC commentary on Article 53 of Additional Protocol I to the Geneva Conventions that had been the inspiration for Article 4(a) (i) of the new Chapter 2 (paras. 2073 and 2079): that while the definition of "military objective" applies to all objects, it seems that an exception is intended for cultural property where attack is unacceptable in all circumstances.

With regard to Article 4(c), most States were happy with the level at which decisions should be taken for attack on cultural property. One State mentioned that this sub-paragraph should include a proviso to the effect that responsibility for such attack, even if the decision is taken by an officer commanding a battalion, should remain with the government of the attacking force. Other States felt that the phrase "...or larger, or a force smaller in size...otherwise;" was contrary to the spirit of the Second Protocol and should be deleted if indeed the aim of the Second Protocol is to enhance the protection of cultural property.

Some concern was expressed on the wording of new Article 7(2). One State felt that this new wording made provisions that are against the spirit of Article 5 of the Hague Convention. Another State expressed the view that the best way to protect archaeological sites is not to allow excavation, even in times of conflict; others were in agreement with the revised sub-paragraph feeling that only rescue excavation should be allowed. Some States felt that there should be a return to the wording in the original UNESCO draft on this matter, or that inspiration should be drawn from the provisions of the UNESCO Recommendations on the International Principles Applicable to Archaeological Excavations (1956). One State pointed out that there should be provision for a situation where there is no competent national authority; perhaps then the occupying force should be obliged to work with the Committee.

The Chairman of the informal Working Group on Chapter 2 responded to the various observations made. With regard to Article 4(a)(i), he said that "use" was the only term used in the definition of "military objective" because it was considered to be the most important. "Location", "purpose" and "nature" are secondary definitions which are not, on their own, sufficient to qualify cultural property under enhanced protection as a military objective.

The Chairman invited the informal Working Group on Chapter 2 to reconvene in order to try to find a balance between the need to protect cultural property, and the actions that have to be taken in certain military situations. He asked Delegations to bear in mind that the aim of this Conference is to give a higher level of protection to cultural property than already exists in the Hague Convention and other instruments of international humanitarian law. He asked them to focus on the issues of "military objective" and archaeological excavation and ensure that the standards that they produce be not lower than those already existing.

AFTERNOON SESSION

*Line 22-24
disc.* The Chairman of the informal Working Group for ~~Chapter 6~~ informed the Plenary on how they had reached the revised text (HC/1999/5/Add.6) which represented a compromise between the two propositions for the institutional body that had been in the original UNESCO draft for the Second Protocol. They had however not been able to come to agreement on a name for this body. They had agreed that Article 30 would be better situated in Chapter 3 because although its provisions relate to matters of procedure, they are also important as to substance.

The new text of Chapter 6 includes a clear enumeration of the functions of the institutional body, and guidelines for the use of the Fund that no longer has compulsory contributions. Furthermore, the definition of NGOs had been clarified so as not to exclude the participation of specialist NGOs and IGOs other than those mentioned in the draft.

Most of the Delegations expressed their satisfaction with the results of the informal Working Group; with the clarification of functions for the institutional body and with the reformulation of provisions related to the Fund; one State was concerned that there was no longer provision for compulsory contributions to the Fund.

Some felt that the functions of the institutional body should be more in line with those of the corresponding body under the World Heritage Convention. Others felt that geographical

distribution of the institutional body ((26(3) of HC/1999/6/Add.6) should be obligatory. One view was that the institutional body should have the possibility of giving assistance to developing countries, to protect their cultural property. With regard to the type of institutional body that was required, some States still felt that it should be an Intergovernmental Committee although the majority was happy with the compromise reached.

Link red set doc The Chairman of the informal Working Group on Chapter 4, reporting on its work, said that for the first time, "cultural property" was directly mentioned in an international humanitarian law instrument. A balance had been painfully struck between the rights of the attacker and those of the defender (Articles 18 and 19) and the Hague Convention had been given the enforcement machinery that it lacked. Certain offences had been criminalised and the responsibility of States to try or extradite had been emphasised. The Chairman of the informal Working Group on Chapter 4 made the following interpretative declaration:

"Nothing in this Protocol, including Article 19, in any way limits the State's ability to legislate, criminalise or otherwise deal with any substantive offences including conduct addressed in this Protocol. Nothing in Article 19 (2) (b) should be interpreted as in any way affecting the application of Article 19 (1) (a)."

He further noted that although there had been some provision for all these things in the past, they were scattered in different international instruments, many of which were the inspiration for the new Chapter 4. The new revised Chapter 4 not only brought all these provisions together in one instrument for the first time, but also dealt with new developments in international humanitarian law and criminal responsibility.

In the Plenary discussion of the new revised text, most Delegations were satisfied. One State noted that the new Chapter 4 did not have a title and suggested that this title should be "Enforcement"; another suggested that since the whole Second Protocol dealt with enforcement, Chapter 4 should be entitled "Individual Criminal Responsibility". Other States wondered why the provisions for State responsibility which had been contained in Chapter 4 of the original UNESCO draft had been removed from this Chapter since individual criminal and State responsibility are dealt with in the same Chapter in Additional Protocol I to the Geneva Conventions and this had been one of the inspirations for the revised Chapter 4.

A consensus having been reached on the provisions of this Chapter, certain Delegates emphasised the importance of the Chairman's interpretative statement on Article 19 and asked that it be recorded. The revised document was sent to the Drafting Committee.

Link!! red set doc The Chairman of the informal Working Group on Chapter 2 once again took the floor. The Group had met to address the concerns raised on Article 4(a)(i) and Article 7(2). In 4(a)(i), the word "use" had been replaced by the word "function" in the definition of a "military objective" so that the sub-paragraph now read: "that cultural property has, by its function, become a military objective, and".

With regard to Article 7(2), the part of the phrase that read "...as far as possible..." was now replaced by "...unless circumstances do not permit..."

There was no objection and the revised Chapter 2 was sent to the Drafting Committee.

DIPLOMATIC CONFERENCE ON A DRAFT SECOND PROTOCOL TO THE
1954 HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL
PROPERTY IN THE EVENT OF ARMED CONFLICT

Précis, Thursday 25 March 1999

MORNING SESSION

The representative of the Chairperson of the informal Working Group on the revised Chapter 3 document (HC/1999/5/Add.7) informed the Plenary that a smaller drafting group had addressed the various Articles and had submitted two working papers to the larger Group.

The first substantial change was that the new level of protection would be called "enhanced protection" rather than "enhanced special protection". Article 11 (renumbered Article 10 in the final text) deals with the conditions under which enhanced protection may be granted.

The previous Article 30 of the UNESCO draft was now included in the revised Article 12. This Article was sensitive because it determined who could request the inclusion of cultural property on the List and dealt with the issue of recommendations by NGOs. Only a party which has control over the cultural property could make the declaration required by Article 11(c) (renumbered 10 (c) in the final text). However, a Party with either "jurisdiction or control" could request the inscription of cultural property on the List (Article 12(2) and (9) - renumbered Article 11(2) and (9) in the final text). This was in keeping with the importance of these article for all humankind. The representative of the Chairperson of the informal Working Group on Chapter 3 did however draw the attention of the Plenary to the fact that in certain instances when only "control" was used, a minority of Delegations would still have preferred the use of "jurisdiction or control".

Article 13 (renumbered Article 12 in the final text) is central to the concept of enhanced protection since it states the obligations of both the attacker and the defender (in respect of cultural property under enhanced protection). Article 14 deals with the conditions under which enhanced protection can be lost and it reflects the language of Additional Protocol I to the Geneva Conventions. Loss of enhanced protection can only occur in wartime for breach of those conditions. On the other hand, the Committee will have the power to suspend or cancel enhanced protection in peacetime where any of the conditions of Article 11 (now Article 10) are not being met.

Some Delegations questioned the use of the absolute adjective "greatest" in Article 11(a) (now 10(a)) as they saw this as limiting; others thought it was necessary and distinguished it from "great" (protection) and "very great" (special protection) in the Hague Convention.

With regard to 11(c) (renumbered 10 (c) in the final text), one State preferred to see the last part of the sub-paragraph (referring to the confirmation of a State, by declaration, that cultural property will not be used for military purposes or to shield military sites) be deleted. Other States however stressed the necessity for including this latter part of the sub-paragraph that explains its importance: the declarations refer not only to present non-use, but also to future non-use. Some other States questioned the fact that 11(c) (now 10(c)) refers only to "control" and not to "jurisdiction". One participant State in the Working Group explained that this use was correct in this instance because it is only the State that has control of a territory that can make the required declaration.

One State was concerned by the power that Article 12(2) (now 11(2)) seemed given the Committee to "invite" Parties to request the inclusion of a cultural property on the List. Another

State was concerned that 12(2) did not seem to consider the situation of a State which, though it has jurisdiction of a certain territory (and by extension the cultural property contained therein), does not have control over the said territory. The situation was clarified when another State indicated that when 12(2) is taken with 12(3) (now 11(3)), it becomes clear that no State could abuse the provisions of sub-paragraph 12(2).

Some States felt that the use of "should" in relation to Article 12(6) (now 11(6)) was to encourage consultations of specialist NGOs by the Committee rather than leaving them on a completely discretionary basis.

With respect to sub-paragraph 12(9) (now 11(9)), one State questioned the 4/5 majority required to grant provisional enhanced protection to a cultural property as opposed to a 2/3 majority. The explanation for this was that since this constituted a higher level of protection, a higher level of agreement was required, even in emergency situations.

With regard to Article 14(i) (b) (renumbered 13(11) (b) in the final text), some States felt that this sub-paragraph should be aligned to Article 4(a) (i) (now 6(a) (i) in the final text) with the word "use" being replaced by the word "function". Some Working Group members were able to explain that "use" was the right term to use in this case since it was entirely possible that a State request enhanced protection for a military museum, for example, whose function would then be military but whose use is clearly not.

The decision was therefore taken to send Chapter 3 to the Drafting Committee.

Link research
Doc 6 The Chairperson of the informal Working Group on Chapter 1, ~~Article 2~~ (Mrs A. S. Connelly - Ireland) explained to the Plenary how that Group had arrived at the revised text (HC/1999/5/Rev.1) of that Chapter.

Few comments were made on the provisions of the revised Article 2. Some States felt that Article 2 ter should be the object of a sub-paragraph under Article 2bis. Others thought that the provisions of Article 24 (conflicts of a non-international nature) should be brought under Article 2. One Delegate thought that Article 2 bis(1) should not be limited and that the Second Protocol should apply "*inter alia*".

One State objected to the title of Article 2bis and reiterated the view that this Second Protocol is not a supplementary document but an amendment and that presenting it as a supplementary document was contrary to Article 40 of the Vienna Convention; another felt that Article 41 of the Vienna Convention applies.

Since a number of Delegations expressed a desire to take part in the informal Working Group on Article 2, the Group was reconvened.

EVENING SESSION

The Chairman informed the Plenary that the Second Protocol would be produced in six authentic texts (Arabic, Chinese, English, French, Russian and Spanish). The translations in all these languages will be sent to the members of the Drafting Committee to enable consideration and verification of the text prior to signing. In the event of problems with the text, an exchange of views could take place either in Paris, or in written form.

States appreciated the efforts made to have six authentic texts and emphasised their desire to have the translated text of the Second Protocol as soon as possible. The Representative of the

Director-General assured them that arrangements were already in place to ensure that the text be ready at the earliest possible time.

The Plenary then considered the redrafted text of the Preamble to the Draft Second Protocol (document HC/1999/5/Add.9). The suggestion was made that in para. 1 of the Preamble, the phrase "a more effective system of protection" be replaced by "an enhanced system of protection"; that in para 3, "Parties" should be changed to "High Contracting Parties"; that reference to the First Protocol should be deleted since being Party to the Second Protocol is not dependant on being Party to the First; that in para. 4, the phrase "...and international criminal law" be added at the end of the paragraph, while other opinions were that, rather than refer just to "international humanitarian law", the phrase should be reformulated to read "international law" (this latter suggestion was adopted by the Plenary). One final suggestion was that an additional, standard, paragraph of international treaties should be added to the Preamble:

"Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Protocol;"

The document was sent to the Drafting Committee.

*Link 2nd
draft doc* The Chairman invited the Plenary to consider Article 15 in Chapter 1 (Definitions) of the UNESCO prepared Draft Second Protocol (HC/1999/1/rev.1) and he pointed out that some of the informal Working Groups had referred new definitions to Chapter 1; such as "military objective" and "illicit". The Plenary agreed but no consensus was found for "parties to a conflict" and "non-governmental organizations". Chapter 1 was sent to the Drafting Committee.

*Link redraft
doc* With regard to Article 44 on Reservations (Chapter 9 - document HC/1999/5/Add.4) that had been discussed in an earlier session of the Plenary, some States felt that this article could be deleted. Other States felt that reservations could be allowed but with limitations as to particular issues and others thought that the "no reservations clause" should be maintained. A consensus emerged that Article 19 of the Vienna Convention on the Law of Treaties was sufficient to regulate the issue and that Article 44 of the Second Protocol could be removed. Chapter 9 was sent to the Drafting Committee.

The Chairperson of the informal Working Group on Articles 2 and 24 reported on discussions in the reconvened Group. Fundamental issues had been discussed and there had been many diverse views expressed. Probably no Delegation was entirely satisfied with the new revised texts that were being submitted - they were true consensus documents that were based on compromises on all sides.

*Link 2nd
draft doc* With regard to Article 21 (document HC/1999/5/rev.2), it was felt this Article should be split. After extensive discussion as to whether the Second Protocol was an amendment or a supplement, the latter view prevailed on the condition that a definition of the Second Protocol as a supplementary instrument be included in the final version of the Second Protocol text.

*Link redraft
doc* On Article 24 (document HC/1999/5/rev.1 - renumbered Article 22 in final text), concern was expressed about the jurisdiction of the State in whose territory a conflict occurs. As a result, a new provision was inserted (24(4)). Articles 24(2), (5), (6) and (7) were all drawn from provisions that already exist in other instruments of international humanitarian law.

The Plenary endorsed the revised Articles 2 and 24 and the document was sent to the Drafting Committee.

DIPLOMATIC CONFERENCE ON A DRAFT SECOND PROTOCOL TO THE 1954 HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

Précis, Friday 26 March 1999

The final session of the Plenary begun in the early afternoon of Friday 26 March in order to afford the delegates the opportunity to review the complete revised text of the Second Protocol before proceeding to the question of its adoption.

After declaring the final meeting of the Plenary session open, the Chairman invited the Plenary to make a Chapter by Chapter analysis of the text in order to determine whether there were any observations or comments to be made. The comments made were the following:

Preamble

No comments

Chapter 1

No comments

Chapter 2

One delegate expressed his strong opposition to the new Article 9(2). He felt that the unprecedented situation existing in some occupied territories had not been sufficiently taken into consideration.

In view of the fact that there were no other observations on Chapter 2, the Chairman pointed out that this Article, as well as the remainder of the Chapter, had been the subject of much discussion and that the text, as presented, was reached by consensus. He therefore appealed to the delegate to try to accept the text as it stood. The delegate agreed.

Chapter 3

One State pointed out that in Article 11(4), the reference to "parties" should be given a capital "P" (to indicate States Parties to the Protocol) and that "States" should be replaced by "Parties". Other States felt however that this change could not be made since this particular paragraph deals with situations that could involve States not party to the Protocol.

With regard to the new Article 13(1)(b), one delegate preferred to see the compromise word "function" replaced by "use" when defining the conditions under which immunity under enhanced protection can be lost. He felt this would make for a more coherent text and bring Chapter 3 in line with the provisions of Chapter 2 by treating cultural property in both Chapters on the same footing. The majority of States said that the discussions on Chapter 3 had only ever centred around "function". They said that if "function" had been used in Chapter 2 and "use" in Chapter 3, it was specifically to mark the distinction between the different levels of protection that each Chapter provides for - general protection in Chapter 2, and enhanced protection of cultural property of great importance to humanity in Chapter 3 - and to form a symmetry between this Chapter and the provisions of Article 10(c) regarding the declaration of non-use of cultural property for military purposes.

The Chairman confirmed that he had understood that this difference in language between Chapters 2 and 3 had been made deliberately. He appealed to the opposing delegate to yield to the

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The Chairman confirmed that he had understood that this difference in language between Chapters 2 and 3 had been made deliberately. He appealed to the opposing delegate to yield to the observations made in this respect. The delegate was however not in agreement that the application of the word "use" granted a higher level of protection than "function" and he felt that this was not in line with the compromise that had been made in the informal Working Groups on Chapter 2 and 3. He felt that the distinction between the two levels of protection should not be made in this manner but rather, by putting other conditions for protection within the provisions of Chapter 3. Although some States expressed an understanding for these observations concerning the Chapter, the decision was nevertheless taken to adopt the Chapter in view of its consensual nature and the fact that it was the correct reflection of the discussions which took place in the informal Working Group. In a spirit of compromise, the State concerned agreed to withdraw its objections.

Chapter 4

The Chairman of the Drafting Committee took the floor to point out two typing errors in the text in Article 18(2) where the term "State Party" had been used instead of "Party". One State pointed out that the same problem was to be found in Article 18(3) where "State" had been used instead of "Party". The Chairman of the Drafting Committee agreed that the substitution of "Party" for "State" in this instance would be consistent with the spirit of the paragraph.

Chapter 5

The Representative of the ICRC pointed out that there was a potential difficulty with the wording of Article 22 in so far as the word "Party" indicates State Party to the Second Protocol. She wondered if Article 22 as drafted was sufficiently clear that the obligations it incurred are not limited to the Party as represented by the government but to all Parties to a conflict. She suggested therefore that a definition should be included in Article one to this effect. Some States felt that the Article is quite logical as it stands; in Article 22(1 – 5) where reference is to the territory, "Parties" is written with a capital "P", while in Article 22(6 and 7) where the reference is to the personalities (whether governmental or non-governmental), "parties" is written with a small "p". Others felt that in other parts of the Protocol, when reference is made to "parties to a conflict", it should be with a small "p". The Chairman of the Drafting Committee replied to these points saying that their view had been that the ground rule of the Protocol is that it applies to the Parties to the Protocol and thus, they always referred to "Parties" with a capital "P". However it had been felt that the provisions of Article 22 were considered to apply to all parties to a conflict and that therefore in this instance "parties" should be written with a small "p". Some States thought that in view of the response of the Chairman of the Drafting Committee, the reference to "Parties to a conflict" in Article 12 should be written with a small "p" in order that they may also be bound by the Article's provisions. The Chairman of the Drafting Committee responded that they had understood that the provisions of the whole Protocol, including Article 12, were to be interpreted in the light of Article 22; in other words, if a provision of the Protocol is to be applied in a conflict of a non-international character, then it is to be applied not only to the States Parties, but also to the other parties.

The representative of the ICRC suggested that in order to clarify matters, perhaps the phrase "to the conflict" could be added at the end of Article 22(1). Some States supported this proposition. Some States felt however, that such potentially substantive additions at this stage of the discussions could lead to difficulties of interpretation since "Parties" in this instance refers both to Parties to the Protocol and Parties to the conflict. They were therefore against such additions. One suggestion was made that, if consensus could be reached on the issue, perhaps clarification could be achieved by making the reference to "Parties" in Article 12 "parties" so that it becomes clear that the obligations are incurred by all parties to the conflict.

One State suggested that as a compromise, the Final Act could include a sentence along the lines of the following: "The Conference understands the Protocol to apply in the event of a non-international conflict to all parties to the conflict." Many States were in agreement with this suggestion with one State suggesting that the sentence should include the phrase "in accordance with Article 22 of the Protocol". A consensus could not be reached on the inclusion of the following sentence in the Final Act: "*The Conference understands the Second Protocol to apply in the event of a non-international conflict, to all parties to the conflict, in accordance with Article 22 of the Protocol*". The Chairman of the Conference therefore suggested that the issue should be left until the moment when the Second Protocol would be translated into the other languages at which time, the exercise might help find a solution that would be acceptable to all. The Plenary was in agreement with this suggestion.

Chapter 6

No comments

Chapter 7

With regard to the part of Article 30(2) that remained in bold character and in brackets, some States saw no reason why this wording should not be included in the text. Many States felt that the sentence should end after "... armed conflict" since military contingents (both national or in United Nations operations) would already be sensitised to the provision of the Second Protocol within the context of the normal dissemination with which all State Parties are charged at the national level; others felt that only the reference to the United Nations operations should be removed but that the particular reference to the sensitisation of military contingents should remain. A consensus was finally reached on the removal of that part of the paragraph that remained in bold character and in brackets.

One State felt that the provision of Article 32(1) relating to international assistance was inconsistent with Articles 27(1)(e) and 29(1)(a) relating to the administration of the Fund. He felt the paragraph should be changed in order to include the notion of international assistance for the preparation of sites for enhanced protection and that reference should be made to Article 5 of the Second Protocol. The Chairman of the informal Working Group on Chapter 6 pointed out that the issue was discussed at length but that it was decided that the structure established under Chapter 6, including the Fund, is mainly designed to provide international assistance under enhanced protection. Attention was however paid to the opportunity of preparing sites for nomination. The text as it stood was a delicate balance of many differing interests and reflected the discussion that had taken place during the informal Working Group on Chapter 6.

The Chairman of the Conference drew the attention of the Plenary to a resolution that had been discussed. The resolution was inspired by the request and indication of the African Group who felt that the notion of enhanced property was far from the reality of African States, most of which do not yet have even an inventory of their cultural property, and who feel that for the moment they can only aspire to special protection. The Chairman wondered whether, bearing the provisions of this resolution in mind, it was necessary to make the amendments suggested to Article 32(1). Furthermore, in view of the fact that the suggested amendment appeared to have little support from the Plenary the Chairman wondered if the relevant delegate would be willing to

go with the consensus to let the text stand as is. The delegate was willing to go along with the consensus.

With regard to Article 34 that also remained bracketed, the Chairman of the Drafting Committee explained that the Committee had had no indication that its provisions had been properly discussed in Plenary, nor that any decision had been taken in this respect. Since there had not been any strong opinion expressed on this Article during the Chapter-by-Chapter discussion in the earlier sessions of the Plenary, the Chairman wondered whether the decision could be taken to include it in the final text of the Protocol.

Many States were however strongly against the provisions of Article 34. They felt that there had been a number of discussions around the role of NGOs and their position was that this role should be limited within the existing rules of international law. They felt that it was not the role of this Protocol to try to ascribe them with new roles and that, the provisions for their protection which already exist in Additional Protocol 1 and in the Hague Convention were sufficient. Furthermore, it was felt that should the decision be taken to include, this Article, more deliberation would be required on the meaning of "protect" in the context of the Article. In view of the strong views expressed, the decision was taken to omit the Article.

The NGO representative felt it was unfortunate that this Article had not been more fully discussed during the Conference. He confirmed that the Geneva Conventions do indeed make far reaching provisions for the "respect and protection" of cultural workers but recognised that the provisions of Article 34 went much further than most delegations were prepared to accept. He felt however that there should be some basis of recognition for cultural. He suggested that as a minimum provisions, the Article could be amended by removing all references to the International Committee of the Blue Shield and replacing it with "authorised persons", and deleting Article 34(1)(a) and (3). He felt that this sort of protection was essential since the protection provided by the Hague Convention was not enough as it stood. The two suggested new paragraphs for Article 34 would then read as follows:

1. *Parties to a conflict shall respect and protect authorised persons in charge of the protection of cultural property during armed conflict or when conflict is threatening.*
2. *Parties to a conflict shall also facilitate their work as far as possible.*

The Chairman of the Conference stressed that it was essential that any provision made in the Second Protocol for the protection of cultural workers could not go below those of the Hague Convention. He read the relevant provisions (Article 15) of the Hague Convention to the Plenary wondered whether an acceptable solution might be to delete Article 34(2) and (3) and amend Article 34(1) to read as follows:

"Parties to a conflict shall respect and protect authorised persons while they are working for the protection of cultural heritage during armed conflict or when conflict is threatening, as well as authorised persons in charge of the protection of cultural property during armed conflict or when conflict is threatening."

The majority States felt however that the Hague Convention provisions being generally applicable, it was unnecessary to make new provisions for the protection of cultural workers under the regime of the Second Protocol. Furthermore, they felt that any attempt to redraft Article 34 could only lead to difficulties, for example, with regard to the definition of "authorised persons". The decision was therefore taken to delete Article 34.

Chapter 8

No comments.

Chapter 9

With respect to Article 42 (*41 in the final text*) where some words remained in bold character, the decision was taken to follow the Vienna Convention on the Law of Treaties, and accept the terms "ratification, acceptance or approval". They were also accepted in the other parts of the Chapter where they appeared (Articles 44, 45, and 46 - 43, *44 and 45 in the final text*).

In respect of Article 46, one State preferred to see the term "denunciation" replaced by "withdrawal". Some States were happy to accept this but pointed out that the Vienna Convention on the Law of Treaties (Article 56) recognises many terms in this respect and uses not only "withdrawal from" and "termination", but also "denunciation" which is technical term that purports no negative connotation. Other States felt for these very same reasons, that there was no real merit in changing the term in Article 46 of the Second Protocol. The decision was taken to retain the term "denunciation".

Conclusion of the Conference

One State made a statement to the effect that it still had to some of the provisions of the text of the Second Protocol. It preferred to include the word "jurisdiction" in Article 10(c) so that the paragraph would read "... by the Party which has jurisdiction and control over the cultural property, ...". With regard to Article 11(4), this State would have liked to see the words "... situated in a territory, sovereignty or jurisdiction ...". In a spirit of consensus however, the State were in favour of the adoption of the Second Protocol, requesting only that their statement be included in the Report of the Conference.

The Chairman pointed out that one further correction had been brought to his attention concerning Article 13(1)(a) where the word "immunity" should be replaced by "protection". There was no objection to this correction. The Chairman then asked the Plenary if they were in agreement with the consensus adoption of the text as it now stood after the corrections of the session. The text was adopted by acclamation.

See also:

Report of the Credentials Committee

The Final Act of the Conference