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**Item 4 of the Provisional Agenda: Policy/legal issues concerning inscription of properties on the List of World Heritage in Danger and the potential deletion of properties from the World Heritage List**

Legal considerations concerning the inscription of properties on the List of World Heritage in Danger and the deletion of properties from the World Heritage List (formerly WHC-02/CONF.202/8)

See also:

Item 12 of Summary Records of the 26th session of the World Heritage Committee (WHC-02/CONF.202/25)

**WHC-03/6 EXT.COM/4** Draft Decision on Policy/legal issues concerning inscription of properties on the List of World Heritage in Danger and the potential deletion of properties from the World Heritage List

**WHC-03/6 EXT.COM/INF.4B** IUCN Analysis of the legal issues in the Draft *Operational Guidelines* (formerly WHC-02/CONF.202/INF.12)

**WHC-03/6 EXT.COM/INF.4C** Report of the IUCN/WHC workshop "The role of in Danger listing in World Heritage conservation", Amman (2000) (title to be confirmed)

**WHC-03/6 EXT.COM/INF.4D** Report of the 30th Anniversary workshop "Legal Tools for World Heritage Conservation", Siena (11 - 12 November 2002)

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CONVENTION CONCERNING THE PROTECTION OF THE WORLD  
CULTURAL AND NATURAL HERITAGE

**30th Anniversary  
(1972-2002)**

**WORLD HERITAGE COMMITTEE**

**Twenty-sixth session**

**Budapest, Hungary  
24 - 29 June 2002**

**Item 12 of the Provisional Agenda: Policy and legal issues concerning the inscription of properties on the List of World Heritage in Danger and the potential deletion of properties from the World Heritage List**

**LEGAL CONSIDERATIONS CONCERNING THE INSCRIPTION OF PROPERTIES  
ON THE LIST OF WORLD HERITAGE IN DANGER AND THE DELETION OF  
PROPERTIES FROM THE WORLD HERITAGE LIST**

## **SUMMARY**

The main aim of this document is to analyse whether under the terms of the *World Heritage Convention* State Party consent is required for the inscription of a World Heritage property on the List of World Heritage in Danger and/or for the deletion of a property from the World Heritage List.

This document also aims to facilitate the World Heritage Committee's deliberations by:

- (i) presenting the context in which these issues have been raised and/or discussed in previous Committee sessions and the applicable regulations (i.e. the *World Heritage Convention* and the Operational Guidelines) (see Section I); and
- (ii) providing legal considerations based on the interpretation of the *World Heritage Convention* and general principles of international law (see Section II).

**Action required (see Section III):**

**After having reviewed this legal analysis, the World Heritage Committee may wish to:**

- (i) **Determine the working method (e.g. working group, expert meeting, etc.) it will follow for the discussion and decision relating to these issues during and/or following its 26th session; and,**
- (ii) **Orient its discussion towards policy decisions that will ultimately provide wording for the text currently in square brackets of the proposed revision of the Operational Guidelines (see WHC-02/CONF.202/14B), in order for them to be adopted by the Committee.**

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# I. OVERVIEW

## A. BACKGROUND

1. This document replies to the request made by the Delegate of Belgium at the 24th session of the World Heritage Committee (Cairns 2000)<sup>1</sup>. During the discussion of the state of conservation of the Kathmandu Valley (Nepal), the Delegate of Belgium formally requested UNESCO to provide legal advice to the World Heritage Committee (hereinafter the Committee) on whether State Party consent was required when inscribing a property on the List of World Heritage in Danger. This and other questions concerning State Party consent for the deletion of a property from the World Heritage List and for reactive monitoring were also posed by the Expert Meeting on the Revision of the Operational Guidelines (Canterbury, April 2000) and by the Drafting Group for the Revision of the Operational Guidelines (Paris, October 2001). These questions will be identified in Section I (Overview) and will be discussed in Section II (Legal Considerations) of this document.

## B. BRIEF SUMMARY OF THE REGULATIONS APPLICABLE TO THE WORLD HERITAGE LIST AND THE LIST OF WORLD HERITAGE IN DANGER

### (i) *The World Heritage Convention*

2. The *Convention concerning the Protection of the World Cultural and Natural Heritage* (hereinafter the *World Heritage Convention* or the *Convention*)<sup>2</sup> establishes a system for the international recognition of properties of outstanding universal value which form part of the common cultural and natural heritage. This system is administered by the World Heritage Committee<sup>3</sup>, an organ established by Article 8 of the *Convention*. The Committee is responsible for establishing, keeping up to date and publishing the World Heritage List and the List of World Heritage in Danger<sup>4</sup>.

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<sup>1</sup> See Report of the World Heritage Committee, 24th session (Cairns 2000) VIII.32

<sup>2</sup> Adopted on 16 November 1972 by the 17th session of the General Conference of UNESCO.

<sup>3</sup> Article 8 of the *Convention* refers to the Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, or the World Heritage Committee.

<sup>4</sup> See Article 11 of the *Convention*.

3. The *Convention* defines both Lists. Article 11 § 2 describes the World Heritage List as:

"a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of the *Convention*, which it [the Committee] considers as having outstanding universal value in terms of such criteria as it shall have established".

The *Convention* also states that "the inclusion of a property in the World Heritage List requires the consent of the State concerned".<sup>5</sup>

4. The first three sentences of Article 11 § 4 define the List of World Heritage in Danger as:

"a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under this Convention. (...) The list may only include such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers (...)."

Consequently, the first three sentences of Article 11 § 4 require that under ordinary circumstances (i.e. not in cases of "urgent need") the List of World Heritage in Danger will include World Heritage properties:

- (a) for which "major operations are necessary";
- (b) "for which assistance has been requested under this *Convention*"; and
- (c) that are "threatened by serious and specific dangers".

However, for the specific purposes of this analysis concerning issues relating to the consent of a State Party, only those provisions relating to "assistance [that] has been requested under this *Convention*" are analysed in detail. The conditions under (a) and (c) above do not have specific implications concerning State Party consent.

Furthermore, the last sentence of Article 11 § 4 states that:

"The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicize such entry immediately."

Consequently, the last sentence of Article 11 § 4 refers to the possibility of inclusion by the Committee of a property on the List of World Heritage in Danger in cases of "urgent need".

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<sup>5</sup> Article 11 § 3 of the *Convention*.

5. Furthermore, the *Convention* provides that the Committee shall define the criteria on the basis of which a property may be included in the World Heritage List and the List of World Heritage in Danger<sup>6</sup>. These criteria have been included in the Operational Guidelines for the Implementation of the World Heritage Convention (hereinafter the Operational Guidelines) adopted and revised by the World Heritage Committee.

## (ii) Operational Guidelines

6. The criteria and procedures for the inclusion and the deletion of a property in the World Heritage List were first elaborated in the **1980 Operational Guidelines**<sup>7</sup>. The provisions relating to the deletion of a property from the World Heritage List<sup>8</sup> can be summarised as follows: If the property has deteriorated to such an extent that it has irretrievably lost the characteristics which determined its inclusion on the World Heritage List, the Bureau will recommend to the Committee the deletion of the property from the World Heritage List. After having examined the Bureau's recommendation, the Committee will make a decision. However, according to the 1980 Operational Guidelines, the Committee shall not decide to delete any property unless the State Party has been consulted on this question.

The provisions established in the 1980 Operational Guidelines with regard to the procedure for the deletion of a property from the World Heritage List (and in particular those provisions concerning the requirement of State Party consent) have not been substantially modified during the subsequent process of revision of the Operational Guidelines (1980-1999).

7. At the 6th session of the Bureau of the World Heritage Committee (Paris 1982)<sup>9</sup> IUCN and ICOMOS were requested to prepare draft guidelines on the criteria and procedures relating to the inclusion of a property on the List of World Heritage in Danger. These

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<sup>6</sup> Article 11 § 5 of the *Convention*.

<sup>7</sup> For the text of the 1980 Operational Guidelines see <http://terra.hq.int.unesco.org/net/New/archive/opguide80.pdf> ; see also Report of the Bureau of the World Heritage Committee, 4th session (Paris 1980) V.12

<sup>8</sup> See paragraphs 24-32 of the 1980 Operational Guidelines, which can also be found in paragraphs 46-56 of the March 1999 Operational Guidelines with some minor changes. For the text of the March 1999 Operational Guidelines see [http://terra.hq.int.unesco.org/net/New/nwhc/pages/doc/dc\\_f10.htm](http://terra.hq.int.unesco.org/net/New/nwhc/pages/doc/dc_f10.htm)

<sup>9</sup> See Report of the Bureau of the World Heritage Committee, 6th session (Paris 1982) II.13

guidelines were adopted by the Committee at its 6th session (Paris 1982)<sup>10</sup> and incorporated in the **1983 Operational Guidelines**<sup>11</sup>.

8. In the report (prepared by IUCN and ICOMOS and presented to the Committee<sup>12</sup>) the List of World Heritage in Danger was described as being a short list (i.e. as the Committee only has the capacity of financing a limited number of operations). In addition, it was stated that inscription of a property on this List should be considered as an exceptional action for an emergency measure of limited duration. The main objectives of the List of World Heritage in Danger were described as follows:

"a) to support national efforts towards safeguarding the integrity of a property;  
b) to demonstrate to world opinion the reality of the danger threatening a property; and  
c) to contribute to the effectiveness of international fund-raising campaigns by identifying the property for which the public is being asked to contribute".<sup>13</sup>

In addition, it was stressed that "in adding criteria for the List of World Heritage in Danger it would seem appropriate to consider this List as fulfilling a transitional category; before deleting a property from the World Heritage List, the property should be classified as being in danger".<sup>14</sup>

9. The 1983 Operational Guidelines<sup>15</sup> do not make specific mention of the requirement of State Party consent for the inscription of a property on the List of World Heritage in Danger. They do however provide for the Committee to act in consultation with the State Party when adopting corrective measures and when deciding on a property's removal from the World Heritage List as well as from the List of World Heritage in Danger, when the property has deteriorated to such an extent that it has lost the characteristics which determined its inclusion on the World Heritage List.
10. However, these provisions were later modified in the **1994 Operational Guidelines**<sup>16</sup> based on the amendments proposed by the 1992 and 1993 Bureau and Committee sessions<sup>17</sup>. It must be noted that during the Committee's 15th session (Carthage 1991) -

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<sup>10</sup> See Report of the World Heritage Committee, 6th session (Paris 1982) IX. 27

<sup>11</sup> For the text of the 1983 Operational Guidelines see <http://terra.hq.int.unesco.org/net/New/archive/opguide83.pdf>

<sup>12</sup> See Report of the World Heritage Committee, 6th session (Paris 1982) Annex II, paragraphs 3.2 and 3.3

<sup>13</sup> See Report of the World Heritage Committee, 6th session (Paris 1982) Annex II, paragraph 3.1

<sup>14</sup> See Report of the World Heritage Committee, 6th session (Paris 1982), Annex II, paragraph 5.3

<sup>15</sup> See paragraphs 45-59 of the 1983 Operational Guidelines

<sup>16</sup> For the text of the 1994 Operational Guidelines see <http://terra.hq.int.unesco.org/net/New/archive/opguide94.pdf>

<sup>17</sup> See Report of the World Heritage Committee, 16th session (Santa Fe 1992), paragraph XIII; Report of the Bureau of the World Heritage Committee, 17th session (Paris 1993), paragraph VI; and Report of the World Heritage Committee, 17th session (Cartagena 1993), paragraph XIV.

and after having inscribed Dubrovnik on the List of World Heritage in Danger<sup>18</sup> - there was suggestion of an

“in-depth reflection of the *Convention* which could even lead (...) to the possible revision of its text (...). The most important questions to be studied concerned the restrictions that the *Convention* imposed in the interventions by the Committee, which could be compared to the right of intervention often evoked for questions of human rights and more recently environmental protection. In particular, the Committee was faced with this problem when it wished to inscribe a property on the List of World Heritage in Danger without waiting to receive a formal nomination and a request for technical assistance from the State Party concerned”.<sup>19</sup>

11. Moreover, the amendments made in the 1994 Operational Guidelines<sup>20</sup> (analysed below) were also the result of the recommendations drafted by a panel of experts (who met in Washington D.C. in June 1992) which were adopted as "Strategic Orientations"<sup>21</sup> by the World Heritage Committee at its 16th session (Santa Fe 1992). Amongst the recommendations included in the Strategic Orientations, it was proposed that

"Inscription on the List of World Heritage in Danger should not be seen as a sanction, but as the acknowledgement of a condition that calls for safeguarding measures, and as a means of securing resources for that purpose. The [World Heritage] Centre should promote this idea among States.

In compliance with Article 11 § 4 of the *Convention*, the possibility of inscribing a site on the List of World Heritage in Danger, without a prior request from the State concerned, should be included in the Operational Guidelines.

The assistance envisaged in Article 11 § 4 of the *Convention* should allow for messages from the Committee drawing attention to the potential or actual dangers threatening a site (...)".<sup>22</sup>

12. Thus in the 1983 Operational Guidelines, the Committee was to consult and adopt the corrective measures with the State Party, and the Secretariat was to ascertain the present condition of the property with the co-operation of the State Party. In the 1994 Operational Guidelines, however, this shall be done “as far as possible”<sup>23</sup> in consultation or in co-operation with the State Party.

13. The amendments introduced by paragraph 69 of the 1994 Operational Guidelines<sup>24</sup> describe the necessary requirements for a property to be inscribed on the List of World

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<sup>18</sup> See paragraph 61 above.

<sup>19</sup> Report of the World Heritage Committee, 15th session (Carthage 1991), paragraph 48

<sup>20</sup> See paragraphs 69-82 of the 1994 Operational Guidelines

<sup>21</sup> The Strategic Orientations were the result of a process which was initiated at the 14th session of the Committee (Banff 1990) where it was decided that 1992, the year of the 20th Anniversary of the *Convention*, should be the occasion for an in-depth evaluation of the implementation of the *Convention* prior to undertaking the preparation and the adoption of a future strategy.

<sup>22</sup> See Strategic Orientations (III. B. 23 - 26), Report of the World Heritage Committee, 16th Session (Santa Fe, 1992)

<sup>23</sup> See paragraph 75, 1994 Operational Guidelines

<sup>24</sup> Reproduced in paragraph 80 of the March 1999 Operational Guidelines



Heritage in Danger, in accordance with Article 11 § 4 of the *Convention*. Hence, they require that the property must be on the World Heritage List, that it be threatened by a serious and specific danger, that major operations be necessary and “that assistance under the *Convention* has been requested”. Nevertheless, this paragraph describes the concept of assistance in the following terms:

“the Committee is of the view that its assistance in certain cases may most effectively be limited to messages of its concern, including the message sent by the inclusion of a site on the List of World Heritage in Danger and that such assistance may be requested by any Committee member or the Secretariat”.

### C. COMMITTEE DELIBERATIONS (1994-2001)

14. During the period 1994-2001, no further amendments were made to the Operational Guidelines, with regard to State Party consent for the inscription of a property on the List of World Heritage in Danger or the deletion of a property from the World Heritage List. However, there were several instances when the Committee (or its members) made relevant statements concerning these issues.
  
15. During the 3rd extraordinary session of the Committee (Paris 1999), convened specifically to discuss whether or not to include Kakadu National Park (Australia) on the List of World Heritage in Danger, "delegates stressed the importance of the *Convention* as a tool of international co-operation for the purposes of heritage conservation, and commented that they did not want to see the prospect of in Danger listing for a World Heritage property interpreted as a threat or punishment".<sup>25</sup> Furthermore, the Committee prefaced its specific decision concerning Kakadu National Park, by emphasising

"The importance of Articles 4, 5, 6, 7 and 11 of the 1972 UNESCO *World Heritage Convention*. In particular the Committee emphasizes Article 6 (1) which states that:

Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage (...) is situated, and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate".<sup>26</sup>

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<sup>25</sup> See Report of the World Heritage Committee, 3rd Extraordinary session (Paris 1999) X.2

<sup>26</sup> See Report of the World Heritage Committee, 3rd Extraordinary session (Paris 1999) XI.1

16. At its 23rd session, the Committee (Marrakesh 1999) invited the World Heritage Centre and IUCN to organise a workshop on "The Role of World Heritage in Danger Listing in promoting international co-operation for the conservation of World Natural Heritage". The priority recommendations of the workshop (which took place in Amman, Jordan in October 2000) were transmitted to the 24th session of the Committee (Cairns 2000)<sup>27</sup> for noting and for consideration by the Expert Group on the Revision of the Operational Guidelines. One of these recommendations stated that,

"The Committee should ensure a process of thorough assessment and consultations prior to deciding whether or not a site is to be included in the List of World Heritage in Danger. Reasons and justifications for including a site in the "Danger-List" are of interest to the entire conservation community. (...)

While the Committee is the ultimate authority in all decisions concerning the inclusion of a site in the "Danger-List", the Committee should, as far as possible, seek consensus among all parties involved in the consultation process before including a site in that List. Such consensus is vital for co-operation among the State Party, advisory bodies, NGOs and other actors to implement plans and actions recommended by the Committee to remove prevailing threats to the site. However, in all cases the Committee must retain its authority to include a site on the List of World Heritage in Danger even if it has not been possible to reach consensus among all concerned parties".<sup>28</sup>

17. The issues concerning State Party consent for the inscription of a property on the List of World Heritage in Danger and/or when removing a property from the World Heritage List were discussed at the International Expert Meeting on the Revision of the Operational Guidelines which took place in Canterbury, United Kingdom in April 2000. The Canterbury Expert Meeting recommended that the provisions relating to the requirement that the State Party in question consent to the deletion of a property from the World Heritage List and to the inscription of properties on the List of World Heritage in Danger be clarified, in order to "facilitate the revision of the Operational Guidelines with a degree of confidence".<sup>29</sup> These included:

**a) In-Danger Listing**

- a) Is there authority under the *Convention* to include a property on the List of World Heritage in Danger without the consent of the State Party?
- b) Must the request for assistance referred to in the *Convention* and then elaborated in paragraph 80 (iv) of the [March 1999] Operational Guidelines come from the State Party affected?

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<sup>27</sup> See Report of the World Heritage Committee, 24th session (Cairns 2000) VIII.2

<sup>28</sup> See WHC-2000/CONF.204/INF.19 paragraph 3

<sup>29</sup> See Recommendation 7, Section 4 of the Report of the Canterbury Expert Meeting (WHC-2000/CONF.204/INF.10)

- c) Should paragraph 89 of the [March 1999] Operational Guidelines be constructed to imply requirement for State Party ‘consent’? The language used in paragraphs 86, 87, 88, 90 and 93 should also be considered in making this decision as it may be useful in indicating the intent of the drafters at the time.
- d) Depending on the answer from counsel the policy question may still exist: Is it desirable to require State Party consent for inclusion of properties on the List of World Heritage in Danger? If so then the Operational Guidelines must reflect that.

**b) Deletion**

- a) Is there authority under the *Convention* to delete a property from the World Heritage List?
- b) If so, who has the authority (Bureau or Committee)?
- c) Must there be State Party consent?
- d) Does the property have to be first on the List of World Heritage in Danger as a prerequisite for deletion?"<sup>30</sup>

18. During the 24th session of the World Heritage Committee (Cairns 2000) these issues were again raised, this time in connection with the discussion on whether or not to include the Kathmandu Valley (Nepal) on the List of World Heritage in Danger.

"The Committee, recalling that it had deferred the inscription of Kathmandu Valley on the List of World Heritage in Danger numerous times, expressed its disappointment that the State Party was not convinced of the constructive objectives of the List of World Heritage in Danger, as a mechanism for strengthening further political commitment and mobilising international technical co-operation and greater awareness at both national and international levels.

During the ensuing debate, discussions focused on the objectives of the *Convention* and international co-operation. The Committee underlined the need to ensure the credibility of the *World Heritage Convention*, its Committee and the World Heritage List, while effectively implementing the mechanisms provided under the *Convention* and appropriately assisting States Parties in safeguarding the World Heritage properties, especially when both ascertained [and potential] threats faced sites inscribed on the World Heritage List. Most members of the Committee agreed that it would be desirable to define procedures for examining cases such as Kathmandu Valley, where certain values or components justifying World Heritage inscription have been irreversibly lost".<sup>31</sup>

19. During this discussion, the Delegate of Belgium formally requested UNESCO to provide legal advice to the Committee on whether State Party consent was required when inscribing a property on the List of World Heritage in Danger. The Committee was reminded that the UNESCO Legal Adviser had no authority to provide any definitive interpretations of the terms of the *Convention*. The Committee decided to consider the issue of inscription of properties on the List of World Heritage in Danger in a broader context, in order to develop the appropriate criteria and procedure for the Committee to evaluate situations such as the conservation of the Kathmandu Valley (Nepal).<sup>32</sup> The 24th

<sup>30</sup> Recommendation 7, Section 4 of the Report of the Canterbury Expert Meeting (WHC-2000/CONF.204/INF.10)

<sup>31</sup> See Report of the World Heritage Committee, 24th session (Cairns 2000) VIII.32

<sup>32</sup> See Report of the World Heritage Committee, 24th session (Cairns 2000) VIII.32

session of the World Heritage Committee (Cairns 2000) accepted an offer by the Government of Morocco to host a meeting on this issue.<sup>33</sup> The meeting did not take place due to time and budget constraints.

20. During the meeting of the Drafting Group for the Revision of the Operational Guidelines (Paris, October 2001) the 2nd draft Annotated Revised Operational Guidelines were prepared. The Drafting Group reached closure on a majority of issues with the exception of a number of legal and policy issues. It was recommended that the following issues be considered by the Committee before the final version of the Operational Guidelines be adopted:

- "a) The role of State Party consent in reactive monitoring;
- b) The role of State Party consent for inscription of a property on the List of World Heritage in Danger; and
- c) The capacity of the World Heritage Committee to decide and the role of the State Party to consent to deletion of properties from the World Heritage List".<sup>34</sup>

21. However, and as indicated by the Director of the World Heritage Centre at the 25th session of the World Heritage Committee (Helsinki 2001) during the course of 2001 additional questions were raised. These additional questions, mentioned in the Report of the 25th session of the World Heritage Committee<sup>35</sup>, included

- a) What are the implications for a State Party that undertakes activities on a World Heritage property which are considered by the Committee to endanger the values for which the property was inscribed on the World Heritage List?
- b) What are the means available to the Committee to ensure that a State Party does not endanger the values for which the property was placed on the World Heritage List?
- c) What actions are available to a State Party which does not agree with the determination of the Committee that a property is in danger of losing the values for which it was placed on the World Heritage List?<sup>36</sup>

On this occasion the Director of the Centre further explained that a preliminary internal analysis had been prepared by UNESCO (April 2001), and that the Director-General of UNESCO had noted that further internal debate was necessary.

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<sup>33</sup> See Report of the World Heritage Committee, 24th session (Cairns 2000) VIII.32

<sup>34</sup> See WHC-01/CONF.208/6 paragraph 7

<sup>35</sup> See Report of the World Heritage Committee, 25th session (Helsinki 2001) III.5

<sup>36</sup> These additional questions have been briefly analysed in paragraph 79 above. The analysis as presented does not elaborate the full array of policies and procedures that may be available to the Committee under international law. To the extent that it also shows certain inadequacies or gaps in the effective implementation of the *Convention*, particularly with regard to new or unforeseen situations, the Committee may wish to develop in future its own tools (e.g. through consultative bodies, a

22. In March 2002 the Drafting Group for the Revision of the Operational Guidelines met at UNESCO Headquarters in Paris and prepared the 3rd draft Annotated Revised Operational Guidelines for examination by the Committee at its 26th session (Budapest, June 2002). In the report of the Drafting Group the legal and policy issues that had been previously identified by the October 2001 Drafting Group<sup>37</sup> were confirmed as requiring the decision of the Committee.<sup>38</sup> Document WHC-02/CONF.202/14B (3rd Annotated Revised Operational Guidelines) includes text in square brackets, which are noted as policy and legal issues<sup>39</sup> requiring the discussion and decision of the Committee.

#### **D. OVERALL CONCLUSIONS OF THE LEGAL ANALYSIS**

23. In 2002 the analysis requested by the Committee<sup>40</sup> was completed by UNESCO (see Section II of this document). As the requested analysis was of a legal nature, the legal opinion of international legal experts<sup>41</sup> was sought in the preparation of this document<sup>42</sup>. In presenting this analysis, it should be recalled that it is mainly for the States Parties to a treaty to make definitive interpretations of the terms of that treaty. However, in order to be of assistance, this analysis is provided on the questions raised so as to give elements for consideration by the States Parties to the *World Heritage Convention*.

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Protocol, etc.) in order to give a greater degree of certainty as to the means available to the Committee in circumstances such as those described in paragraph 21 above.

<sup>37</sup> See paragraph 20 above.

<sup>38</sup> See WHC-02/CONF.202/14A paragraph 95

<sup>39</sup> The policy and legal issues identified in WHC-02/CONF.202/14B also include issues relating to subjects other than those addressed above (e.g. issues relating to the provision of financial assistance for participation in the Committee session, cultural heritage criteria, partnerships etc.).

<sup>40</sup> See paragraph 1 above.

<sup>41</sup> The Secretariat is particularly grateful to Professor Luigi Condorelli (Professor of International Law, University of Geneva) and his assistant Mr Gionata Buzzini, for their contributions to this analysis.

<sup>42</sup> In February 2002 Belgium circulated a document prepared by Professor Erik Franckx (Director of the Centre for International Law, Free University of Brussels) entitled "Legal Advice on questions concerning the World Heritage Convention" to members of the World Heritage Committee. The World Heritage Centre also provided a copy of this document to the Advisory Bodies. Furthermore, the Centre is aware that IUCN is finalising a legal analysis to be submitted to the Committee as WHC-02/CONF.202/INF.12.

24. The main conclusions of the analysis are:

The response to the question regarding whether a State Party must consent to the inscription of a property on the List of World Heritage in Danger is as follows:

(i) The *Convention* does not explicitly require that the State Party concerned present a request for the inscription of a property on the List of World Heritage in Danger or give its consent to such inscription.

(ii) Under **ordinary circumstances** (and according to the first three sentences of Article 11 § 4 of the *World Heritage Convention*), the inscription of a property on the List of World Heritage in Danger pre-supposes that a request for assistance<sup>43</sup> has been submitted to the Committee under the *Convention*. However, if a State Party does request the inscription of a property on the List of World Heritage in Danger it may be considered as equivalent to a request for assistance under the *Convention*.

(iii) In the event of "**urgent need**", the Committee is empowered under the last sentence of Article 11 § 4 of the *Convention*, to inscribe a property on the List of World Heritage in Danger even if a request for assistance relating to that property has not been made under the terms of the *Convention*. Thus, and based on the interpretation of this text in accordance with Article 31 § 1 of the *1969 Vienna Convention of the Law of Treaties*<sup>44</sup>, in case of "urgent need" neither a request for assistance, nor a request for inscription on the List of World Heritage in Danger nor the consent of the State Party is required.

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<sup>43</sup> See paragraphs 36-38 above

<sup>44</sup> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

25. The response to the question regarding whether a State Party must consent to the removal of a property from the World Heritage List is as follows:

(i) Although the *Convention* does not contain any specific provision referring to the deletion of a property from the World Heritage List, the possibility of such a deletion must be considered as inherent to the spirit, object and purpose of the *Convention*. The Committee is responsible for examining whether or not the property in question still has the "outstanding universal value" for which it was included in the World Heritage List, and if this is not the case, it should be able to proceed to the removal of that property from the World Heritage List.

(ii) The consent of the State Party is not required for deletion of a property from the World Heritage List.

(iii) Although the prior inclusion of the property in question on the List of World Heritage in Danger is a possibility which may be envisaged by the Committee, depending on the circumstances, it is not a necessary condition for the deletion of that property from the World Heritage List.

## II. LEGAL CONSIDERATIONS

### A. INTRODUCTION

26. The issues discussed in this section refer to the interpretation of the *World Heritage Convention*. The central issue relates to whether or not the consent of the State Party concerned (i.e. the State where the World Heritage property is situated) is required for the purposes of the inscription of a property on the List of World Heritage in Danger. Clarification is also required of the condition laid down in Article 11 § 4 of the *Convention*, according to which a request for assistance must have been made "under the *Convention*" for a property to be inscribed on the aforementioned List. The distinction is made between inscription of a property on the List of World Heritage in Danger under ordinary circumstances (first three sentences of Article 11 § 4) and in the event of "urgent need" (last sentence of Article 11 § 4). Finally, it will be necessary to examine whether it is possible to delete a property from the World Heritage List, and if so, the conditions for such a deletion.
27. The answers to these questions must be formulated in light of the rules and principles of general international law applicable to the interpretation of international treaties, as codified in Articles 31 to 33 of the *1969 Vienna Convention on the Law of Treaties*. The most important of these principles is unquestionably that according to which any expression contained in a treaty must be interpreted in its context and in the light of the object and purpose of the treaty in question<sup>45</sup>. As regards the context, it is the treaty as a whole (including its preamble, annexes, etc.) that must first and foremost be taken into consideration<sup>46</sup>. In order to establish a proper basis for this analysis, a number of preliminary remarks need to be made, which are intended to reiterate and highlight the overall features of the *Convention*, the spirit which is characteristic of it, and the main aims pursued by it.

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<sup>45</sup> See Article 31 § 1 of the *1969 Vienna Convention on the Law of Treaties*: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

<sup>46</sup> See Article 31 § 2 of the *1969 Vienna Convention on the Law of Treaties*.



## B. PRELIMINARY OBSERVATIONS

28. The *Convention*, like any international agreement among States, is the expression and product of the sovereignty of the States Parties to it, who have simply and rightly exercised their sovereignty by freely deciding to negotiate and undertake to respect that *Convention*. It is therefore not surprising that the *Convention* should as a whole be very mindful of respecting State sovereignty. Article 3 sets the tone, underscoring the fact that it is for each State to identify and delineate the properties in its territory which form part of the natural and cultural heritage. Article 6 § 1 then expressly declares that, the recognition that the natural and cultural heritage constitutes a "world heritage" must take place "whilst fully respecting the sovereignty" of the State Party. Article 7 highlights that the term "international protection of world heritage" shall be understood to mean the "establishment of a system of international co-operation and assistance designed to support States Parties in their efforts to conserve and identify that heritage". Furthermore, certain important actions and decisions of the World Heritage Committee are subject either to having obtained the consent of the State concerned (such being the case for the inscription of a property in the World Heritage List<sup>47</sup> or for the co-ordination and encouragement of the studies and research needed for drawing up the World Heritage List and the List of World Heritage in Danger<sup>48</sup>) or to the requirement to enter into consultation with the State in whose territory the property is situated<sup>49</sup>.
29. From the analysis of the *Convention* it can be stated that the sovereignty of States is, however, compatible with the limitations of sovereignty which are freely (and hence in a sovereign capacity) entered into, namely binding commitments entered into by means of international agreements. All the obligations which States have in a sovereign capacity decided to assume by being parties to the *Convention* are characterised by the fact that they correspond, not to a bilateral logic (that is of an *inter partes* reciprocal arrangement or "give-and-take" agreement), but to a logic based on the general or common interest. Thus, the obligations created by the *Convention* are

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<sup>47</sup> Article 11 § 3 of the *Convention*.

<sup>48</sup> Article 11 § 7 of the *Convention*.

<sup>49</sup> Article 11 § 6 of the *Convention*.

*erga omnes* obligations, that is to say obligations whose violation is deemed to be an offence not only to the State directly affected by the breach, but against all the members of the international community (who can in turn seek its enforcement).

30. An analysis of the relationship between Article 4 and Article 6 reveals, in a particularly striking manner, the *erga omnes* nature of the obligations arising from the *Convention*. Indeed, Article 6 commits the States Parties to the *Convention*, first to recognising that the natural and cultural heritage situated on the territory of any State constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate (paragraph 1) and, secondly, to giving their help in the protection of the properties (inscribed in the World Heritage List and the List of World Heritage in Danger), if the State in whose territory it is situated so requests (paragraph 2). To these *erga omnes* obligations of all States Parties corresponds the right of each State Party to request international assistance and co-operation for the properties situated in its territory. Nevertheless, the exercising of this right is but one of the means enabling the State Party to fulfil its obligation of guaranteeing the protection of the natural and cultural heritage within its jurisdiction, in order for it to be transmitted to "future generations", a duty which "each State Party to this *Convention* recognises (...) belongs primarily to that State [where the property is situated]"<sup>50</sup>.
31. By means of indicative language, the *Convention* highlights the existence of an interest for the international community as a whole in the protection of certain properties which are of "outstanding universal value" (Articles 1 and 2), whose deterioration or disappearance would constitute "a harmful impoverishment of the heritage of all the nations of the world"<sup>51</sup>. Moreover the safeguarding and "transmission to future generations"<sup>52</sup> of these properties is of fundamental importance for all these peoples<sup>53</sup>, given that they "are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole"<sup>54</sup>.

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<sup>50</sup> Article 4 of the *Convention*.

<sup>51</sup> Second recital of the Preamble of the *Convention*.

<sup>52</sup> Article 4 of the *Convention*.

<sup>53</sup> Fifth recital of the Preamble of the *Convention*.

<sup>54</sup> Sixth recital of the Preamble of the *Convention*.

32. The preamble also underscores the need to supplement the efforts undertaken at State level<sup>55</sup> "by the granting of collective assistance which, although not taking the place of action of the State concerned, will serve as an efficient complement thereto", and highlights that such assistance is the responsibility of "the international community as a whole", precisely because of the general interest which is at issue<sup>56</sup>. Still in the same vein, it is clearly provided in the preamble that one of the essential purposes of the States Parties was to "adopt new provisions in the form of a convention establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value".<sup>57</sup> For the same reasons, the *Convention* mentions on several occasions the importance of international co-operation<sup>58</sup> in guaranteeing the effective protection of the properties in question, and sets up a body, the World Heritage Committee, which it entrusts with the mission of pursuing the general interest through different actions. The Committee is in particular responsible for drawing up the World Heritage List and the List of World Heritage in Danger<sup>59</sup>, for taking decisions on requests for International Assistance<sup>60</sup>, and for deciding on the use of the resources of the World Heritage Fund<sup>61</sup>.
33. There is no question therefore that there is a degree of tension within the *Convention* itself, between its concern to respect State sovereignty, and the need to undertake effective international action with the aim of safeguarding values perceived as transcending the individual interest which might be claimed by each of the States Parties to the *Convention* (as regards a property protected by the *Convention*). However, tension does not in this case mean contradiction, but rather a dialectical relationship. In other words, it would be fundamentally incorrect to present the respect

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<sup>55</sup> It is interesting to note that at the same time as the adoption of the *World Heritage Convention* by the General Conference (16 November 1972), a *Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage* was also adopted. This recommendation is intended "to induce States to safeguard all the components of their cultural and natural heritage" even though they might not be considered as "sites of universal importance". Notwithstanding the above, Article 4 of the Recommendation states that "the cultural and natural heritage represents wealth, the protection, conservation and presentation of which impose responsibilities on the States in whose territory it is situated, both vis-à-vis their own nationals and vis-à-vis the international community as a whole. Member States should take such action as may be necessary to meet these responsibilities".

<sup>56</sup> Seventh recital of the Preamble of the *Convention*.

<sup>57</sup> Eighth recital of the Preamble of the *Convention*.

<sup>58</sup> See in particular Articles 4 (second sentence), 6 § 1, 6 § 2 and 7 of the *Convention*.

<sup>59</sup> Article 11 of the *Convention*.

<sup>60</sup> Articles 13 and 19-26 of the *Convention*.

<sup>61</sup> Articles 13 § 6 and 15 of the *Convention*.

for State sovereignty and international protective action as being two competing or even opposing objectives. On the contrary, the clear aim of the *Convention* is to find a proper balance between the two objectives.

34. It is clear, in effect, that the preservation of the properties belonging to the world heritage requires a high degree of co-operation on the part of the State Party, co-operation which these States undertake to provide precisely by their acceptance of the *Convention*. Now, by acceding to this instrument, the States Parties to the *Convention* willingly agree to submit the exercising of their sovereignty to the achievement of the objectives of general interest pursued by the *Convention*. According to this logic, each State will -by a free sovereign act- propose to the Committee the inscription in the World Heritage List of a number of properties located in its territory. Inscription, which once approved by the Committee, subjects the properties concerned to a treaty regime based on the recognition of their "outstanding universal value"<sup>62</sup> and consequently on the need to safeguard these properties, if necessary by means of appropriate international action.
  
35. This function assigned to State sovereignty, whereby it is voluntarily subordinated by the States Parties in pursuit of certain objectives recognised as being in the general interest of all States Parties and their common heritage, constitutes the background which must constantly be kept in mind when interpreting the relevant provisions of the *Convention*.

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<sup>62</sup> In Articles 1 and 2 of the *Convention*, the expression is used for all the categories of property falling within the scope of natural and cultural heritage.

## C. STATE PARTY CONSENT AND THE INSCRIPTION OF A PROPERTY ON THE LIST OF WORLD HERITAGE IN DANGER

*Does the inscription of a property on the List of World Heritage in Danger require the consent of the State Party in whose territory the property concerned is located? How must the condition laid down in Article 11 § 4 of the Convention be interpreted, according to which assistance relating to this property must have been requested under the Convention?*

### (i) Analysis of the text of the *Convention*

#### *Analysis of the first three sentences of Article 11 § 4 - Inscription of a property on the List of World Heritage in Danger under ordinary circumstances*

36. Whereas Article 11 § 3 of the *Convention* provides *expressis verbis* that the inscription of a property in the World Heritage List requires the consent of the State in whose territory the property is situated, such a condition has not been laid down for the inscription of a property on the List of World Heritage in Danger. In this respect, the clarity of the requirement for the consent of State Party concerning the inscription of a property in the World Heritage List underlines all the more clearly the absence of such a requirement in Article 11 § 4, relating to the List of World Heritage in Danger. The first three sentences of Article 11 § 4 specify that a property for the conservation of which "major operations are necessary", and which is threatened by "serious and specific dangers", may only be included by the Committee on the List of World Heritage in Danger if it appears in the World Heritage List, and if "assistance has been requested under this *Convention*". As regards the request for assistance, it results from a literal and contextual interpretation of the *Convention*<sup>63</sup> that the assistance must have been requested by the State Party<sup>64</sup>; albeit the *Convention* does not expressly exclude the possibility of a request for assistance emanating from another entity.
37. The purpose of a "request for assistance" may be to secure, pursuant to Article 13 § 1 of the *Convention*, "the protection, conservation, presentation or rehabilitation" of a property. The "request for assistance" may, but not necessarily, take one of the forms of International Assistance indicated in Article 22 of the *Convention*<sup>65</sup>. The March

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<sup>63</sup> See Article 31 § 1 of the 1969 *Vienna Convention on the Law of Treaties* (see footnote 44).

<sup>64</sup> See, in particular, Articles 13, 19 and 21 § 1 of the *Convention*.

<sup>65</sup> This provision lays down the various forms of assistance that may be granted (studies, provision of experts, technicians or skilled labour, training of specialists, supply of equipment, low-interest and interest-free loans, and the granting, in exceptional cases and for special reasons, of non-repayable subsidies).

1999 Operational Guidelines provide details of International Assistance granted from the World Heritage Fund as Preparatory Assistance, Emergency Assistance, Training, Technical Co-operation and On-site Promotional Assistance<sup>66</sup>. Other types of assistance (i.e. not a specific request for International Assistance from the World Heritage Fund as defined above) could be requested (e.g. an expert mission to assess the state of conservation of a property). These other types of assistance are not detailed in the *Convention*.

38. The request for assistance under the *Convention*, which constitutes, as we have seen above, one of the conditions laid down in the first sentence of Article 11 § 4 of the *Convention*, should not be confused with a request or State Party consent for the inscription of a property on the List of World Heritage in Danger. Furthermore, it must again be noted that neither of these conditions are explicitly required by the *Convention*.
39. Certain aspects related to requests for International Assistance need further clarification<sup>67</sup>. First, and concerning the moment when the International Assistance should be requested, Article 20 of the *Convention* establishes that it may be requested as soon as the Committee "has decided, or may decide, to enter [the property] in one of the lists mentioned in paragraphs 2 and 4 of Article 11". This provision need not be interpreted literally, but rather in the spirit of Article 31 § 1 of the *1969 Vienna Convention on the Law of Treaties*<sup>68</sup>; that is, that the request ought to be formulated within a reasonable timeframe before the inscription on the List of World Heritage in Danger. However, and as will be seen when describing the Committee's practice with regard to the List of World Heritage in Danger (paragraph 57-67) it has occurred that International Assistance requests have been submitted at the moment of inscription of a property on the List of World Heritage in Danger.
40. Second, it cannot be concluded that a request for International Assistance alone will fulfil the conditions established by the first three sentences of Article 11 § 4 for the

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<sup>66</sup> See paragraphs 94 - 111 of the March 1999 Operational Guidelines.

<sup>67</sup> Given that there are no specific provisions relating to assistance in general, it might be inferred that the provisions relating to International Assistance in particular might also apply to the general.

<sup>68</sup> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

inscription of a property on the List of the World Heritage in Danger. This is due to the fact that in order for the Committee to inscribe a site on the List of World Heritage in Danger other conditions have to be met. These include provisions in the *Convention* relating to the need for "major operations" and the threat of "serious and specific dangers". Furthermore, as indicated in the March 1999 Operational Guidelines, there also needs to be a determination of ascertained or potential dangers or threats to the property in the context of the development of a programme of corrective measures, which may be carried out by the Advisory Bodies or other organizations with the assistance of the Secretariat, "as far as possible, in co-operation with the State Party"<sup>69</sup> as part of the overall process of Reactive Monitoring.

41. The process of Reactive Monitoring involves the reporting on the state of conservation of World Heritage properties under threat. This includes the submission of reports and impact studies by State Parties each time exceptional circumstances occur or work is undertaken which may have an effect on the state of conservation of the property. Reactive monitoring is foreseen in the procedures for the inscription of properties in the List of World Heritage in Danger (paragraphs 86-93 of the March 1999 Operational Guidelines) and the eventual deletion of properties from the World Heritage List (paragraphs 48-56 of the March 1999 Operational Guidelines).<sup>70</sup>
42. Finally, the question arises whether developed countries will be obliged to request International Assistance from the Committee when they desire a property to be inscribed on the List of World Heritage in Danger. The answer to this will be further analysed in paragraph 58, but in general terms it will be concluded that, based on the Committee's accepted practice, requests for inscription of a property on the List of World Heritage in Danger (albeit not required by the *Convention*) have been considered to fulfil the condition of assistance being requested "under the *Convention*".
43. Hence, it follows that from the moment a property has been included in the World Heritage List, and the State in question has made a request to the Committee for assistance relating to that property, the condition laid down in the first sentence of

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<sup>69</sup> Paragraph 87 of the March 1999 Operational Guidelines

<sup>70</sup> Paragraph 68 of the March 1999 Operational Guidelines

Article 11 § 4 according to which assistance must have been made "under this *Convention*" has been met. The Committee will then decide on a case by case basis, taking due account of the criteria laid down in the first three sentences of Article 11 § 4 of the *Convention* and in paragraphs 81-85 of the March 1999 Operational Guidelines, whether or not to include the properties concerned on the List of World Heritage in Danger.

***Analysis of the last sentence of Article 11 § 4 - Inscription of a property on the List of World Heritage in Danger in the case of "urgent need"***

44. If a request for assistance emanating from the State Party is normally necessary for the inscription of a property on the List of World Heritage in Danger, this need not, however, always be the case. Indeed, the last sentence of Article 11 § 4 stipulates that :
- "The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicise such entry immediately".
45. However, such a provision can have no real meaning unless it authorises the World Heritage Committee in case of urgent need, to make such an inscription as a matter of course and independently of whether or not a request for assistance has been made under the *Convention*. In other words, this provision confers a special power which may be used by the Committee, in case of urgent need, to include a property on the List of World Heritage in Danger at any time<sup>71</sup>. Such an interpretation is dictated by the principle of effectiveness (*ut res magis valeat quam pereat*), according to which each provision contained in an international convention has its own reason for being, and may not therefore be presumed to be non-useful<sup>72</sup>. In the case in point, the last sentence of Article 11 § 4 would be non-useful, and could even be deemed not to have been written, if it were intended simply to state that in case of urgent need, the Committee could proceed at any time with the inscription of a property on the List of World Heritage in Danger, only and only when the conditions normally required for such an inscription (i.e. those established in the first three sentences of Article 11 § 4 of the *Convention*) – and more particularly the condition that the request for assistance be made by the State Party – were also to be met.

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<sup>71</sup> For the purposes of this analysis, which concentrates only on issues directly relating to State Party consent, the interpretation of "at any time" and "publicize such entry immediately" are not examined herein.

<sup>72</sup> The principle of interpretation based on the principle of effectiveness was also applied by the International Court of Justice in the *Corfu Channel* case (Collection 1949, p. 24) and in the *Libya v. Tchad* case (Collection 1994, p. 23 § 47).



46. Such an interpretation is not unreasonable, as it makes it possible in a particularly satisfactory way to establish the balance between the two concerns expressed in the *Convention*, which are, first, to preserve as far as possible the sovereignty of the State Party and, second, to allow rapid and effective action at international level when a particularly serious threat arises with regard to a property which has been internationally recognised under the *Convention* as being of "outstanding universal value" and as belonging to the "heritage of mankind as a whole", that recognition being given at the request, it should not be forgotten, of the State Party.
47. Furthermore, it seems evident that the tension between the two concerns of the *Convention* remains latent when the State concerned shows itself disposed to collaborate with the Committee in order to meet fully the objectives of protection pursued by the *Convention*. This tension is only really manifested in situations where the State concerned does not agree to co-operate, seeking to give precedence to its own interests over the general interest protected by the *Convention*. Now, if the State concerned decides to abstain from making any request for assistance for the property in question, the Committee finds itself in a situation where one of the conditions normally required for the inscription of the property on the List of World Heritage in Danger is missing. Nevertheless, the last sentence of Article 11 § 4 enables the Committee to fully assume its role as guardian of the general interest conferred on it by the *Convention* when the Committee believes the situation to be of such "urgent need" as to require it.
48. This interpretation appears to be entirely consistent with the general spirit of the *Convention*. In particular, it cannot be claimed that it does not take due account of the sovereignty of the States Parties. Indeed, in accordance with Article 11 § 3 of the *Convention*, each State Party is entitled to refuse to include a property situated in its territory in the World Heritage List. But once that State Party has given its consent to such an inscription, it agrees by this freely exercised act of sovereignty to subject the property in question to the provisions of the *Convention* which recognises that the properties included in the World Heritage List are of "outstanding universal value" taking precedence over the individual interest of the State concerned. This precedence of the general interest, does not contradict in any way the sovereignty of the States,

since each State has freely accepted by means of a sovereign act to consent to certain specific properties, situated in its territory, appearing in the World Heritage List. Therefore, also accepting that the inscribed properties are subject to the provisions laid down for these properties by the *Convention*.

49. An important question arises regarding the characterization of a situation as a case of "urgent need" capable of triggering the extraordinary powers conferred upon the Committee by the last sentence of Article 11 § 4. As the *Convention* in no way defines this notion, its interpretation is a matter for the Committee. Although the Committee disposes of considerable latitude in its appreciation in this field, its discretionary power must be exercised for the ultimate purpose of serving the general interest identified by the *Convention*<sup>73</sup>. Of course, discretionary power does not mean arbitrary power. It goes without saying that the notion of "urgent need" (last sentence of Article 11 § 4) is not identical in meaning and application to the "serious and specific dangers" (second sentence of Article 11 § 4) with regard to the inclusion of property on the List of World Heritage in Danger under ordinary circumstances. Clearly something more is required. Some of those additional factors are reflected in the practice of the Committee. In light of the Committee's practice (see paragraphs 57-67) it is no doubt conceivable that one of the contributing factors to the aggravation of a situation to one of "urgent need" may be the lack of co-operation demonstrated by the State concerned. It may also include the disinterested, lax or directly harmful attitude that may be taken by the State Party with regard to a World Heritage property. Other factors, may, however, need to be further clarified or defined by the Committee.

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<sup>73</sup> It should be emphasised that the general interest which the Committee must constantly take as its inspiration in the exercising of its functions must not be considered as fixed and immutable. Indeed the *Convention*, like any international instrument, must be interpreted by taking into account developments in the law and hence new principles which may have been developed since it came into force (see in particular the decision of the International Court of Justice in the *Aegean Sea Continental Shelf* case, Law Reports 1978, p. 34 § 80).

## (ii) Analysis of the preparatory work of the *Convention*

50. An analysis of the preparatory work of the *Convention* appears to contradict the interpretation of Article 11 § 4 provided in the preceding paragraphs. In effect, the Governmental Committee of Experts which was responsible for preparing the draft convention, made the following observation concerning the inscription in the World Heritage List or on the List of World Heritage in Danger:

"The inclusion of a property in these lists requires the consent of the State Party concerned. Although a request by the latter will be necessary before a property may be included on the 'List of World Heritage in Danger', the Committee will be able to include a property in the 'World Heritage List' without the State concerned having requested it, but on condition that it consents"<sup>74</sup>.

51. However, besides the fact that a differentiation of this kind between the provisions applicable to the two lists is in no way addressed by the text of the *Convention*<sup>75</sup>, it must be pointed out that recourse to preparatory work for the purposes of interpretation is only admissible as a "supplementary means of interpretation" -in accordance with Article 32 of the *1969 Vienna Convention on the Law of Treaties*- when the interpretation given on the basis of Article 31 " a) leaves the meaning ambiguous or obscure, or b) leads to a result which is manifestly absurd or unreasonable".

52. Now, it cannot be claimed that the interpretation provided in paragraphs 36-49 is ambiguous or obscure: the overall economy of Article 11 § 4, as well as the observance of the principle of effectiveness lead to a clear conclusion: whereas normally the inscription of a property on the List of World Heritage in Danger presupposes a request for assistance made by the State Party, in situations of "urgent need" the Committee is vested with an extraordinary power to make such an inscription rapidly by setting aside this requirement.

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<sup>74</sup> Report of the *Intergovernmental Committee of Experts*, submitted to the General Conference of UNESCO in June 1972, § 29, Article 11.

<sup>75</sup> The *Convention* contains in this respect a provision – Article 11 § 6 – stating that the Committee "before refusing a request for inclusion in one of the two lists mentioned in paragraphs 2 and 4 of this article, [...] shall consult the State Party in whose territory the cultural or natural property in question is situated". This provision, which deals with the inscription of a property in one or other of the two lists in the same way, concerns the circumstances (probably the most frequent) in which the State concerned makes a request for inscription itself. It cannot thereby be deduced, however, that the Committee is not empowered to take the initiative itself of making the inscription of a property in one of the two lists, when all the conditions required for such an inscription are met.

### **(iii) Subsequent practice in the application of the *Convention***

53. The *1969 Vienna Convention on the Law of Treaties* states that as general rule for the interpretation of a treaty

"There shall be taken into account, together with the context:

- a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- c) any relevant rules of international law applicable in the relations between the parties."<sup>76</sup>

Hence, and as the relevant provision of the *World Heritage Convention* (i.e. Article 11 § 4) has been interpreted above taking into account its "context and in the light of its [the *Convention's*] object and purpose"<sup>77</sup>, the subsequent analysis will consider the following elements:

- a) the March 1999 Operational Guidelines (i.e. "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions");
- b) the practical application of Article 11 § 4 of the *Convention* (i.e. "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"); and
- c) a brief analysis of other relevant principles of international law, in particular of international environmental law (i.e. "any relevant rules of international law applicable in the relations between the parties").

### ***Analysis of the current Operational Guidelines (March 1999)***

54. The analysis of the provisions established by the Operational Guidelines concerning the List of World Heritage in Danger provide useful insight as they are an important element in the practical implementation of the *Convention*. However, it is necessary that they be considered with all the necessary prudence.

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<sup>76</sup> Article 31 § 3 b) of the *1969 Vienna Convention on the Law of Treaties*.

55. At first sight, certain wording of the March 1999 Operational Guidelines, seems to be at variance with the wording of Article 11 § 4 of the *Convention*. Although Paragraph 80 (ii) and (iii) includes reference to the threat of "serious and specific dangers" and the necessity of "major operations" as a requirement for a property to be included on the List of World Heritage in Danger (deriving from the third and first sentence of Article 11 § 4), paragraph 80 (iv) states that the request for assistance (first sentence of Article 11 § 4) may be requested "by any Committee member or the Secretariat". Furthermore, "the Committee is of the view that its assistance in certain cases may most effectively be limited to messages of its concern, including the message sent by inclusion of a site on the List of World Heritage in Danger"<sup>78</sup>.
56. However, the March 1999 Operational Guidelines may be interpreted in a consistent manner with the interpretation arising from the wording of the *Convention* itself. Certainly, the March 1999 Operational Guidelines widen the notion of assistance, as well as the circle of entities empowered to request that assistance. On further reflection, and given that the Operational Guidelines state that "in some cases" the request for assistance may take the form of a message- emanating where appropriate from the Committee (including the "message sent by inclusion of a site on the List of World Heritage in Danger" as referred to in paragraph 80 (iv) of the Operational Guidelines)- it may well be considered that, under the Operational Guidelines, in the special cases mentioned here, the condition that the request for assistance be made "under the *Convention*" would quite simply not apply. Therefore, given that the Operational Guidelines in no way defines the nature of the particular cases to which it refers in this context, it would be reasonable to consider that these "cases" were the "cases of urgent need" mentioned in the last sentence of Article 11 § 4 of the *Convention*. Thus interpreted, the Operational Guidelines constitute an element of practice confirming the interpretation of the last sentence of Article 11 § 4, which would seem to be dictated by the wording and the context, as well as by the object and the purpose of the *Convention*. However the criteria for differentiating between ordinary circumstances (i.e. first three sentences of Article 11 § 4) and "urgent need" have not been included in the Operational Guidelines.

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<sup>77</sup> See Article 31 § 1 of the 1969 *Vienna Convention on the Law of Treaties*.

<sup>78</sup> See also Strategic Orientations (III. B. 23 - 26), Report of the World Heritage Committee, 16th Session (Santa Fe, 1992)

*Practice relating to the application of Article 11 § 4 of the Convention*<sup>79</sup>

57. The practical application to date of Article 11 § 4 of the *Convention* also broadly supports the interpretation of this provision as proposed above (see paragraphs 36-52). The practice adopted in regard to the inscription of a property on the List of World Heritage in Danger certainly shows that, in a majority of cases, a property is included on the List as a result of a request for assistance presented either at an earlier date or at the same time as inscription. In a few cases such a request was presented only after the inscription of the property on the List of World Heritage in Danger.
58. The common practice has been that the State concerned not only present an International Assistance request, but also a request for inscription on the List of World Heritage in Danger (or express their agreement - albeit informally). However, it would be misleading to consider this latter practice as an indication according to which a prior request for the inscription of the property on the List of World Heritage in Danger would be necessary for such an inscription to be made (as it must be stressed that the *Convention* nowhere requires that a prior request for inscription on the List of World Heritage in Danger be presented to the Committee). This should be considered rather as a positive element reflecting the concern of the States Parties to fulfil obligations arising from the *Convention* (in particular, from Article 4) and, consequently their desire to co-operate in good faith with the Committee when a situation of serious danger affects a World Heritage property situated in their territory.
59. If a request for inscription from a State Party is not necessary – nor, moreover, the consent of that State – for a property to be inscribed on the List of World Heritage in Danger, the question nevertheless arises (in the light of the practical application of Article 11 § 4 of the *Convention*) whether the presentation of a request for the inscription of a property on the List of World Heritage in Danger can be considered as equivalent to a request for assistance under the *Convention*. The answer, as dictated not by the letter of the *Convention* but by its general spirit must be in the affirmative. Hence, in spite of the *Convention's* silence on this specific point, there is nothing to prevent a request (for inscription) being made to the Committee by a State which itself

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<sup>79</sup> The following analysis is primarily based on the summary records of the World Heritage Committee and Bureau as presented in the official reports.

has the financial and technical resources which enable it to effectively combat a "serious and specific danger" affecting a property located in its territory. Such an inscription may, not only raise awareness amongst the general public and that of the State authorities directly concerned with the seriousness of the situation affecting the threatened property, but also might justify the adoption by the State Party of special conservation measures and facilitate the allocation of a sufficient portion of the State budget to such measures. It should also be emphasised that assistance "under the *Convention*" does not replace the measures of various kinds which the State concerned is obliged to adopt with a view to the safeguarding of the property in question, but is designed to be a complement, to be provided to the aforementioned measures<sup>80</sup>.

60. Notwithstanding the fact that in the majority of cases the Committee has inscribed properties on the List of World Heritage in Danger after the State concerned requested this inscription, a number of properties have been inscribed on the List without a prior request being made. In this respect, it is worth noting that with the exception of one case<sup>81</sup>, in those cases where there was no request for inscription from the State Party there are no records that the States Parties concerned manifested any opposition to the inscription.
61. This is particularly true in the case of the *Old City of Dubrovnik*, which was included on the List of World Heritage in Danger by the Committee in 1991. It was inscribed in the absence of a prior request from the former Yugoslavia, but without the former Yugoslav government clearly opposing this inscription. However, what is of the greatest significance here is that the Committee decided to inscribe the property by referring on the one hand, to the many appeals that UNESCO had unsuccessfully made to the national authorities and, on the other hand, to the last sentence of Article 11 § 4<sup>82</sup>: in other words, precisely to the extraordinary power that this provision confers on the Committee in situations of "urgent need".

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<sup>80</sup> See, on the one hand, the seventh recital of the Preamble of the *Convention* which refers to "granting collective assistance which, although not taking the place of action by the State concerned, will serve as an efficient complement thereto", and on the other hand, Article 25 stating that "only part of the cost of the work necessary shall be borne by the international community. The contribution of the State benefiting from international assistance shall constitute a substantial share of the resources devoted to each programme or project, unless its resources do not permit this".

<sup>81</sup> This is the case of *Simen National Park* (Ethiopia), discussed in paragraph 64 above.

<sup>82</sup> See Report of the World Heritage Committee, 15th session (Carthage, 1991) paragraph 29.

62. The other cases in which the Committee has inscribed a property on the List of World Heritage in Danger without having received a prior request from the State concerned, may be regarded as similar, for the purposes which are of interest to us here, to the Dubrovnik case. At its 16th session (Santa Fe, 1992) the Committee included seven new properties on the List of World Heritage in Danger, four of them without a request for inscription being submitted by the State concerned. The Committee

"on the basis of state of conservation reports [and] even though there were no requests from the States Parties concerned, decided, in accordance with Article 11, paragraph 4 of the Convention to include the following sites on the List of World Heritage in Danger: *Angkor* (Cambodia), *Mt. Nimba Nature Reserve* (Côte d'Ivoire/Guinea), *Sangay National Park* (Ecuador)<sup>83</sup> and *Manas Wildlife Sanctuary* (India)".<sup>84</sup>

A similar situation occurred at the 20th session of the Committee (Merida 1996) with regard to the re-inscription of *Garamba National Park* (Democratic Republic of the Congo) on the List of World Heritage in Danger, where the Committee noted that "no commitment"<sup>85</sup> had been obtained from the national authorities. Moreover, and in the light of the interpretation of "urgent need" provided above<sup>86</sup>, it can be envisaged that the lesser degree of co-operation demonstrated by the States concerned, could have given rise to a situation of urgent need, or at least could have compounded such a situation.

63. It is now necessary to make some comments on the only three cases where it has been recorded that the State Party opposed the possible inscription of a property situated in its territory on the List of World Heritage in Danger. In the first case, the Committee did in fact make the inscription. In the other two cases, the Committee has not inscribed the properties on the List of World Heritage in Danger (see paragraphs 65 and 66 below).

64. Based on the evaluations provided to the Committee at its 20th session (Merida, 1996), it decided to inscribe *Simen National Park* (Ethiopia) on the List of World

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<sup>83</sup> As regards *Sangay National Park*, it should be noted that Ecuador had already requested International Assistance for this property. Therefore, the Committee was legitimately able to make the inscription regardless of whether or not there existed a situation of urgent need.

<sup>84</sup> See Report of the World Heritage Committee, 16th session (Santa Fe, 1992), X.I.E and VIII.13.

<sup>85</sup> See Report of the World Heritage Committee, 20th session (Merida, 1996), VII.37. Once again, the State Party had requested International Assistance for this site on several occasions.

<sup>86</sup> See paragraph 49 above.



Heritage in Danger. Although Ethiopia manifested its opposition after the property had already been inscribed<sup>87</sup>, further consultations and co-operation with the State Party have taken place and no further opposition from the State Party has been recorded (as the property remains on the List of World Heritage in Danger). Furthermore, Ethiopia had sent a request for assistance from the World Heritage Fund<sup>88</sup>, so that in accordance with the interpretation of Article 11 § 4 of the *Convention* proposed in paragraphs 36-52, the Committee was legitimately able to make such an inscription independently of the existence, in this particular case, of a situation of urgent need as the conditions established by the first three sentences of Article 11 § 4 (i.e. inscription under ordinary circumstances) had been met.

65. Concerning the opposition shown by Australia to the inscription of the *Kakadu National Park* on the List of World Heritage in Danger, the Committee has, for the time being, refrained from making such an inscription, basing its decision, amongst other things, on the spirit of co-operation underpinning the *Convention*. The Committee took this opportunity to emphasise the "vigilant role"<sup>89</sup> it was called on to adopt in this case.
66. With regard to the matter of the *Kathmandu Valley*, on several occasions the Committee had noted that Nepal had adopted no specific plans with a view to counteracting the deterioration of the site<sup>90</sup>. On the other hand, the opposition from the Nepalese authorities to the inscription of the site on the List of World Heritage in Danger, far from causing the Committee to permanently give up on the inscription, has generated the extensive legal debate currently in progress over the conditions of the inscription of a property on the List of World Heritage in Danger<sup>91</sup>.
67. Before concluding this brief discussion of the Committee's practice in the matter of the inscription of properties on the List of World Heritage in Danger, a short examination of a particular case where the Committee expressed its views at the time of the

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<sup>87</sup> See Report of the World Heritage Committee, 21st session (Naples, 1997), VII.16

<sup>88</sup> See Report of the World Heritage Committee, 20th session (Merida, 1996), VII.32

<sup>89</sup> See Report of the World Heritage Committee, 22nd session (Kyoto, 1998), VII.28

<sup>90</sup> See Report of the World Heritage Committee, 24th session (Cairns, 2000), VIII.32

<sup>91</sup> It should be pointed out, moreover, that Nepal has to date submitted 16 requests for International Assistance relating to this site, which would enable the Committee, if it deemed it necessary, to inscribe the property in question on the List of World Heritage in Danger, regardless of whether or not there existed a situation of urgent need.

inscription on the List of the *Yellowstone National Park* (United States of America) would be useful. In this case, although it can be considered that an informal request for inscription had been made to the Committee by the State Party, the Committee specified that

"even if the State Party did not request action, the Committee still had an independent responsibility to take action based on the information it had gathered. The Convention was referred to as an emergent tool to assist all States Parties in conservation"<sup>92</sup>.

In reality, the position adopted appears somewhat theoretical. Indeed, it is an observable fact that up to the present time, the Committee, in the absence of any request from a State Party, has only included properties on the List of World Heritage in Danger in situations of "urgent need" (a case of "urgent need" either generated or aggravated, as the case may be, by a lesser degree of co-operation on behalf of the State concerned)<sup>93</sup>, or in cases where the property in question had been the subject of one or more requests for International Assistance and all conditions established by the first three sentences of Article 11 § 4 had been met.<sup>94</sup>

### ***Other relevant principles of international law***

68. In analysing the provisions of the *Convention*, it is also necessary to take into account developments in international law and specifically in international environmental law, which might provide a broader and contemporary context for the interpretation of the provisions of the *World Heritage Convention*. In particular, in recent cases the International Court of Justice has confirmed that the *inter-temporal rule of treaty interpretation* (which establishes that treaties are to be interpreted by reference to the law as it was when it was drafted) is not always to be applied. This has been the case in several cases involving norms related to human rights and environmental rights. In the 1997 *Gabcikovo-Nagymaros* case, the Vice-President of the International Court of Justice was of the opinion that

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<sup>92</sup> See Report of the World Heritage Committee, 19th session (Berlin, 1995), VII.22.

<sup>93</sup> This applies particularly to the cases mentioned in paragraphs 61 and 62.

<sup>94</sup> We have seen (in paragraph 62) that in some cases where most probably there was "urgent need", the Committee would at any rate have been authorised to inscribe the property in question on the List of World Heritage in Danger, as the State Party had submitted to it a request for assistance. This was also the situation for *Ichkeul National Park* (Tunisia), inscribed on the List of World Heritage in Danger in 1996. In this case, although not explicitly mentioned, there probably also existed a situation of "urgent need". This can be concluded from the fact that the Committee was informed that the Bureau at its twentieth extraordinary session had considered the possibility of an eventual deletion of this property from the World Heritage List. See Report of the World Heritage Committee, 20th session (Merida, 1996), VII.36.

"A Court cannot endorse actions, which are a violation of human rights by the standards of their time merely because they are taken under a treaty, which dates back to a period when such action was not a violation of human rights. (...) No action should be permissible which is today considered environmentally unsound, even though it is taken under an instrument of more than 20 years ago".

Moreover, the judgement of the majority opinion (in the same case) stated that

"Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind -for present and future generations- of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when the States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".<sup>95</sup>

Consequently, the application of this doctrine allows for international law to evolve while adapting (and integrating) these developments into the existing bodies of law.

69. Furthermore, and in the particular context of the *World Heritage Convention*, it is also necessary to consider that the *Convention* is not an isolated legal instrument, but one which co-exists within a large body of international agreements. Thus, when interpreting the provisions of the *Convention* special consideration must be given to other existing (and well established) principles, such as the principle of intergenerational equity, of sustainable development and the precautionary principle. Only an analysis in such broad terms will permit the effective implementation of the *Convention* according to its highest principles and ideals.

#### **(iv) Conclusion**

70. The consideration of the March 1999 Operational Guidelines, of the practical application of Article 11 § 4 of the *World Heritage Convention* as well as of other relevant principles of international law, confirm the interpretation of this provision, presented in paragraphs 36-52, drawing on the wording of the *Convention* as interpreted in the light of the context, object and purpose of the *Convention*.

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<sup>95</sup> See International Court of Justice, *Gabcikovo v. Nagymaros* case (1997), paragraph 141.

71. Thus, the response to the first question regarding whether a State Party must consent to the inscription of a property on the List of World Heritage in Danger is as follows:

(i) The *Convention* does not explicitly require that the State Party concerned present a request for the inscription of a property on the List of World Heritage in Danger or give its consent to such inscription.

(ii) Under **ordinary circumstances** (and according to the first three sentences of Article 11 § 4 of the *World Heritage Convention*), the inscription of a property on the List of World Heritage in Danger pre-supposes that a request for assistance<sup>96</sup> has been submitted to the Committee under the *Convention*. However, if a State Party does request the inscription of a property on the List of World Heritage in Danger it may be considered as equivalent to a request for assistance under the *Convention*.

(iii) In the event of "**urgent need**", the Committee is empowered under the last sentence of Article 11 § 4 of the *Convention*, to inscribe a property on the List of World Heritage in Danger even if a request for assistance relating to that property has not been made under the terms of the *Convention*. Thus, and based on the interpretation of this text in accordance with Article 31 (1) of *the 1969 Vienna Convention of the Law of Treaties*<sup>97</sup>, in case of "urgent need" neither a request for assistance, nor a request for inscription on the List of World Heritage in Danger nor the consent of the State Party is required.

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<sup>96</sup> See paragraphs 36-38 above

<sup>97</sup> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

## D. STATE PARTY CONSENT AND THE DELETION OF A PROPERTY FROM THE WORLD HERITAGE LIST

*Can a property be deleted from the World Heritage List? Is the consent of a State Party required to this effect? Is it necessary for the property in question to have been previously inscribed on the List of World Heritage in Danger?*

### (i) Analysis

72. The *Convention* does not expressly provide for the possibility of a property being deleted from the World Heritage List. However, the last sentence of Article 11 § 2 of the *Convention* states that "an updated list shall be distributed at least every two years". This implies that the inscription of a property in the World Heritage List does not confer upon it a permanent and immutable status, but a status which may be subsequently called into question taking into account possible changes in circumstances (changes which might include not only new additions, but also removals from the List)<sup>98</sup>.
73. The possibility of a property being deleted from the World Heritage List was envisaged by the Committee and included in the Operational Guidelines at an early stage. It was included in the first version of the Operational Guidelines adopted in 1977, maintained throughout successive revisions to the Operational Guidelines, and is currently governed by paragraphs 46 to 56 of the March 1999 Operational Guidelines. More precisely, in the terms of paragraph 46 of the Operational Guidelines, the eventuality of such a deletion is to be examined by the Committee in the event:
- "a) where the property has deteriorated to the extent that it has lost those characteristics which determined its inclusion in the World Heritage List; and
  - b) where the intrinsic qualities of a World Heritage site were already threatened at the time of its nomination by action of man and where the necessary corrective measures as outlined by the State Party at the time, have not been taken within the time proposed".

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<sup>98</sup> At its 2nd session, the Bureau considered that a procedure for the deletion of properties from the World Heritage List should be developed and it requested the Secretariat to prepare a draft text. In this draft text it was expressed that "although the *Convention* does not explicitly refer to the possibility of deleting items from the World Heritage List, the stipulation that the List should be kept up-to-date would appear to imply that the List should be regularly reviewed and that only those properties which continue to meet the Committee's criteria should be maintained on the List and consequently that properties

74. The provisions adopted in the Operational Guidelines appear to be logical, given that it would not be appropriate for a property to continue to appear in the World Heritage List if the conditions forming the basis of the decision to include it in the List were now lacking due to an irremediable deterioration of the property having deprived it of its value. Thus, albeit not established explicitly in the wording of the *Convention*, the possibility of deleting a property from the World Heritage List must be considered as necessarily inherent to the general spirit of the *Convention*.<sup>99</sup> Furthermore, under the legal principle of *parallelism of forms*, the body competent to carry out such a deletion would be the same as that which, under the *Convention*, holds the decision-making power in matters of inscription in the World Heritage List, namely the World Heritage Committee<sup>100</sup>. Moreover, in the circumstances envisaged here, the Committee is not only authorised to carry out such a deletion, but is in fact called to do so under Article 11 § 2 of the *Convention*, which requires it to update the World Heritage List on a periodic basis.
75. To the question of whether the consent of a State Party is necessary for the Committee to carry out such a deletion, the answer must be no. According to Article 11 § 3 of the *Convention*, the consent of the State Party is certainly necessary for a property to be inscribed in the World Heritage List. However, that consent alone is not sufficient to cause such an inscription, given that in accordance with Article 11 § 2, the Committee "establishes" the World Heritage List, including in it the properties which the Committee "considers as having outstanding universal value in terms of such criteria as it shall have established". Consequently, given that it is the Committee who has the ultimate right to inscribe a property in the World Heritage List, then by extension it also has the right to decide whether to maintain (or not) a property in that List. A different solution would be manifestly incompatible with the fundamental aims of the *Convention*.

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which no longer satisfy the criteria should be deleted". Paragraph 2 of Document CC-79/CONF.003/10, presented at the 3rd session of the World Heritage Committee (Luxor, 1979).

<sup>99</sup> Hence, it would seem almost inconsistent for the *Convention* to allow the Committee to delete a property from the World Heritage List (as an extreme measure) and for it not to be able to take intermediary measures (such as the inscription of a property on the List of World Heritage in Danger).

<sup>100</sup> See Article 11 § 2 of the *Convention*.

76. It should also be noted that, in their successive revisions, the Operational Guidelines have never provided for the necessity of the State Party giving its consent for the deletion of a property from the World Heritage List. The current Operational Guidelines are limited to the recommendation, in this context, that *consultations* should be entered into with the State concerned<sup>101</sup>. For the rest, the Operational Guidelines specify that the Committee shall take a *decision* to this effect, which will be *notified* to the State Party<sup>102</sup>.
77. The question of whether the property to be deleted from the World Heritage List must previously have been included on the List of World Heritage in Danger, also requires a negative response. Of course, it is possible that a property under serious threat might still be saved, which would then justify, depending on the circumstances, its inscription on the List of World Heritage in Danger. However, the latter List is intended for properties which, although endangered, have a value such that they can be considered as still being part of the World Heritage. On the other hand, once a property has permanently and irrevocably lost the outstanding universal value which justified its inclusion in the World Heritage List, it would not be of any use to inscribe that property on the List of World Heritage in Danger. In this case, the solution implied by the general spirit of the *Convention* is quite simply to delete this property from the World Heritage List. In concluding the analysis of this issue, it must be noted that to date, no property has been deleted from the World Heritage List<sup>103</sup> (although there have been debates in the Bureau and Committee regarding possible deletions).

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<sup>101</sup> See especially paragraph 51, as well as paragraphs 48 and 50 (c) and (d) of the March 1999 Operational Guidelines.

<sup>102</sup> See paragraph 52 of the March 1999 Operational Guidelines.

<sup>103</sup> However, all removals of properties from the List of World Heritage in Danger have taken place after consultations with the State Party concerned.

## **(ii) Conclusion**

78. In conclusion, the response to the question concerning the removal of a property from the World Heritage List is as follows:

(i) Although the *Convention* does not contain any specific provision referring to the deletion of a property from the World Heritage List, the possibility of such a deletion must be considered as inherent to the spirit, object and purpose of the *Convention*. The Committee is responsible for examining whether or not the property in question still has the "outstanding universal value" for which it was included in the World Heritage List, and if this is not the case, it should be able to proceed to the removal of that property from the World Heritage List.

(ii) The consent of the State Party is not required for deletion of a property from the World Heritage List.

(iii) Although the prior inclusion of the property in question on the List of World Heritage in Danger is a possibility which may be envisaged by the Committee, depending on the circumstances, it is not a necessary condition for the deletion of that property from the World Heritage List.



## E. ADDITIONAL QUESTIONS

79. As indicated by the Director of the World Heritage Centre at the 25th session of the World Heritage Committee (Helsinki 2001) during the course of 2001 additional questions to those addressed above were raised.<sup>104</sup> Three additional questions have been briefly analysed below. The analysis as presented does not elaborate the full array of policies and procedures that may be available to the Committee under international law. To the extent that it also shows certain inadequacies or gaps in the effective implementation of the *Convention*, particularly with regard to new or unforeseen situations, the Committee may wish to develop in future its own tools (e.g. through consultative bodies, a Protocol, etc.) in order to give a greater degree of certainty as to the means available to the Committee in circumstances such as those described below.

*What are the implications for a State Party that undertakes activities on a World Heritage property which are considered by the Committee to endanger the values for which the property was inscribed on the World Heritage List?*

80. If a State Party undertakes activities which might endanger a property inscribed on the World Heritage List, it thus transgresses the treaty obligations to which it has subscribed<sup>105</sup>. It therefore commits an illicit international act, which engages its international responsibility, with all the consequences that general international law implies (notably, the obligation to halt the behaviour in question and, if applicable, to compensate for such damages). Furthermore, the State concerned exposes itself to actions not only from the World Heritage Committee, but also on the part of other States Parties to the *Convention*. In fact, given the *erga omnes* nature of the obligations recognised by the *Convention*, any State Party has a legal interest in demanding respect of the *Convention* by another State Party and has the right to exercise -within the limits imposed by the general international law- means of pressure aiming at the re-establishment of the respect of international commitments (such as countermeasures or retaliation).

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<sup>104</sup> See paragraph 21 above.

<sup>105</sup> See in particular Articles 4-8 of the *Convention*.

*What are the means available to the Committee to ensure that a State Party does not endanger the values for which the property was placed on the World Heritage List?*

81. The World Heritage Committee, the primary function of which is to ensure the protection of properties inscribed as World Heritage, disposes of a series of actions to encourage a State Party not to pursue the actions which threaten a property inscribed on the World Heritage List.

(i) The Committee can initiate the procedure to inscribe the property in question on the List of World Heritage in Danger, in accordance with Article 11 § 4 of the *Convention*, if the conditions for such an inscription are fulfilled.

(ii) Based on Article 13 of the *Convention*, the Committee may not grant International Assistance to the State in question for the property concerned, and even suspend or withdraw International Assistance already approved.

(iii) The Committee may draw the attention of the States Parties to the *Convention*, or other organisations<sup>106</sup> to the approach adopted by the State concerned, and if appropriate, request actions on their behalf, within the limits of their competence. Furthermore, the Committee, which must present a report on its activities to each ordinary session of the UNESCO General Conference<sup>107</sup>, could mention therein the problems being faced with regards to a particular property (inasmuch as it clearly relates to its activities) and the breach of treaty obligations by the particular State Party.

(iv) The Committee may call upon the competent UNESCO bodies to present a request for an advisory opinion from the International Court of Justice, in accordance with Article 96 § 2 of the *Statute of the International Court of Justice*.

(v) The Committee may also consider the removal of the property in question from the World Heritage List. This is an action which is not foreseen by the *Convention*, but which should be considered as inherent to the spirit of the *Convention*.

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<sup>106</sup> See Article 13 § 7 of the *Convention*.

<sup>107</sup> See Article 29 § 3 of the *Convention*.

*What actions are available to a State Party which does not agree with the determination of the Committee that a property is in danger of losing the values for which it was placed on the World Heritage List?*

82. A State Party which finds itself in such a situation disposes of a limited number of actions. It may, however:

(i) manifest its opposition and request the Committee to re-examine the situation and reverse its decision;

(ii) call upon the competent bodies of UNESCO so that they present a request for an advisory opinion from the International Court of Justice, in accordance with Article 96 § 2 of the *Statute of the International Court of Justice*;

(iii) denounce the *Convention* in accordance with its Article 35.

### III. ACTION REQUIRED BY THE COMMITTEE

83. After having reviewed this legal analysis, the World Heritage Committee may wish to:

- (i) determine the working method (e.g. working group, expert meeting, etc.) it will follow for the discussion and decision relating to these issues;
- (ii) orient its discussion towards policy decisions that will ultimately provide wording for the text currently in square brackets of the proposed revision of the Operational Guidelines (see WHC-02/CONF.202/14B), in order for them to be adopted by the Committee. In summary, the following paragraphs of the revised Operational Guidelines relating to the List of World Heritage in Danger, deletion from the World Heritage List and Reactive Monitoring will require the consideration and decision of the Committee:

#### Inscription on the List of World Heritage in Danger

Paragraph I.B.4 (ix)  
Paragraph I.D.15 (iii)  
Paragraph III.D.4 (ii) & (iii)

#### Deletion of properties from the World Heritage List

Paragraph I.B.4 (ix)  
Paragraph I.D.15 (vii)  
Paragraph III.D.10  
Paragraph III.D.12  
Paragraph III.D.17 (iii)  
Paragraph III.E

#### Reactive Monitoring

Paragraph III.C

84. Furthermore, and as noted in paragraphs 49 and 56 above, the Committee may wish to consider discussing the factors to be used to differentiate between ordinary circumstances (i.e. first three sentences of Article 11 § 4 of the *World Heritage Convention*) and "urgent need" (last sentence of Article 11 § 4 of the *World Heritage Convention*) for inclusion in the revised Operational Guidelines.