

MACEDONIA

Legal Aspects of Protection of Cultural Heritage in the Case of Non-International Armed Conflict

This text involves several specific issues referring to legal protection of cultural heritage in the case of non-international armed clashes. The occasion for writing this text is the use of the cultural monuments in the Republic of Macedonia for military purposes and targets of attacks, their deliberate damage and destruction, vandalism and vengeful behaviour toward them, blockade of the protection service and also the omissions made in the attitude toward the protected heritage and the disregard of the obligations arising from the Hague Convention of 1954.

What happened in the Republic of Macedonia in 2001, but also what it did or failed to do regarding political, military, security, diplomatic, inter-ethnic, confessional and other relevant aspects to overcome the conflict, is undoubtedly liable to analysis from different viewpoints. In fact, due to their stratification, controversy, absurdity, uniqueness and interference of different kinds, the events of 2001, herein referred to as the 'Macedonia case' are beginning to be subject to more detailed considerations.

Part of the so called 'Dossier 2001', i.e. 'Macedonia case', more as a consequence and reflection than as a motive and reason, consists of the events related to the cultural heritage in the regions of the country affected by the crisis. So, we note events adverse to the laws and the customs of war – that is, flagrant violation of the regulations of the international military law: use of cultural heritage as military structures and targets of attack, their deliberate damage and destruction, vandalism and so on. We also note the blocking of the service for protection of cultural heritage, non-functioning of the institutional frame of general protection pursuant to the Hague Convention of 1954 and its Book of Regulations for Effectuation, sluggishness of the 'international community' and its 'new mechanisms' as substitutes of the official organisms and mechanisms of the Book of Regulations for Effectuation of the Convention, and so on. On the other hand, also noted are the complete neglect of the obligations of the State (prescribed by the Hague Convention of 1954), absence of measures for protecting heritage against predictable consequences from armed clashes, insufficient education, improvised management of protection in conditions of military crisis, and so on. Without any risk of exaggeration, it can be said that the 'Military dossier' of protection of the cultural heritage in the Republic of Macedonia, as part of 'Dossier 2001', offers sufficient reasons for a more detailed and longer consideration of the problem of protection of cultural heritage in the case of armed conflicts.

Within the frames of the main topic of professional dispute, we shall focus our attention on a specific issue – *the protection of cultural heritage in the case of non-international armed clashes*. Some legal aspects are involved that point to the *limited effect of the model of the so-called international military-humanitarian protection of cultural heritage*.

Prior to this, we would like to say something briefly about the very notion of *military non-international conflict* and its main characteristics.

Notion and Main Characteristics of a Non-international Armed Conflict

The Hague Convention of 1954 does not contain a definition of 'non-international armed conflict'. Neither does such a definition

exist in the Hague Protocol of 1999, which refers to the protection of cultural heritage in the case of armed clashes. Alternatively, the Geneva protocol II from 1977 (Article 1, Paragraph 1 of that protocol) does contain a corresponding definition of this notion.

According to the Geneva Protocol II, referring to the protection of victims of non-international armed conflicts, the notion involves the situation when armed clashes take place in a certain country between its armed forces and disloyal armed forces or other armed groups under command that control part of the territory of the State, which enables them to wage continuous and directed military operations. In other words, the prerequisite for existence of the said type of conflict is the fulfillment of three conditions:

1. minimum intensity of violence, higher than that during ordinary internal riots;
2. minimal military organisation under responsible command, capable of establishing respect of military law;
3. minimal control over a territory enabling performance of longer and concentrated military operations.

When talking about *non-international armed conflicts*, it is official to talk about the status of: *rebels, resistance forces, plotters, guerillas* and the like. At the same time, the parties in such conflicts are referred to as: *hostile, opposing*, etc. It should also be particularly taken into account that the forces opposing the governmental ones have no acknowledged status of a *conquering party*, as is otherwise the case in *international armed clashes*. Furthermore, the State bears the responsibility for the acts of the opposing forces and the *internal law* is applied for the violations done. Still, when certain categories of *subjects* or *structures under protection* are considered, only regulations of a humanitarian nature pertaining to the international military law are applied. A typical example of this is the application of the Hague Convention of 1954 in cases of non-international armed conflict.

The following presents the problem related to the general protection of cultural heritage provided by the Hague Convention and its Second Protocol, in the case of a non-international armed conflict.

Application of the Hague Convention of 1954 in the Case of Non-international Armed Conflict

The Hague Convention deals with the problem of protection of cultural heritage in the case of a non-international armed conflict in a quite specific way. In fact, the solutions pursuant to Article 19 of the Convention extensively determine the model of protection of cultural heritage itself.

So in the case of a *non-international armed conflict*, the parties of the conflict are obliged to apply at least those provisions of the Convention referring to the *respect* of cultural heritage. In practice, this means that the obligations pursuant to Article 4 of the Convention are only to be considered as an *absolute minimum*. Or, more precisely, the following forms of respect toward cultural heritage are considered:

- restraining from use of cultural heritage, its surrounding and means for its protection for military purposes;

- restraining from any hostile act (military action) against cultural heritage;
- restraint from reprisals, i.e. any repressive measures against cultural heritage, particularly of the type of revenge;
- prohibition of any act of robbery or unlawful appropriation of cultural heritage in any form;
- prohibition and prevention of any act of vandalism directed against cultural heritage.

Considering the first two items (forms of restraint), the Convention allows *withdrawal of the immunity of the cultural heritage* in the case of *imperative military need*. So that the absolute minimum of five items is, in fact, made relative and reduced to the last three items, while the use of the protected heritage for military purposes and the attack upon them may gain legality. The main problem is that a legal gap has been left in the Convention itself regarding the *principle of imperative military need*.

The second main characteristic of the model of protection through the Hague Convention is that, in the case of a non-international armed conflict, all the remaining provisions of the Convention, or part of them, can be applied under the only condition that: the parties of the conflict conclude an agreement (Article 19, Paragraph 2). In the Macedonia case, this in practice means that the State may refer to the Hague Convention with the exception of Article 4, only in the case of a signed agreement with the forces opposing its defensive security forces and only refer to those provisions for which an agreement has been made. Otherwise, as in the discussed case, only Article 4 of the Convention with the stated possibility of withdrawal of immunity holds.

In contrast to the Convention, the issue is quite differently considered in its Second Protocol of 1999. However, this protocol has neither been ratified nor effectuated in the Republic of Macedonia. Hence in the 'Macedonia case' any reference to the Hague Protocol of 1999 is superfluous.

UNESCO's Role in the Case of Non-international Armed Conflicts

The role of UNESCO in the case of a non-international conflict is strictly stated. So, according to Article 19, Paragraph 3 of the Convention, UNESCO may offer its services to the parties of the conflict.

In addition, when the execution of the Convention and its Book of Regulations is considered, UNESCO is authorised to launch initiatives and provide technical assistance at the request of the State-member of the Convention, within the frames of its programme and capabilities (Article 23).

The Problem of Legal Qualification of the Armed Conflict in Macedonia

When facing the 'language of arms' in its territory, each country

more or less faces the dilemma as to how to qualify such a 'language'. Evidently, the law does not give many qualifications, but those given are clear: *war*, i.e. *international armed conflict*, *inner armed conflict* or *inner riots*. The problem is that each of the stated legal qualifications has certain legal and political consequences. Within that context, the legal regime of protection of cultural heritage, particularly when application of the said international acts is considered, depends on the legal qualification of the events.

If the events in the Republic of Macedonia are qualified as a *non-international armed conflict*, as already stated above, the effect of the Hague Convention is limited.

On the other hand, in the case of inner riots, tensions, rebellions, sporadic and isolated acts of violence and alike, the international law is superfluous. Such situations are completely covered by interior laws. In practice this means that, when cultural heritage is in question, we cannot talk about application of either the Hague Convention of 1954 or any international legal protection.

The third legal qualification is *armed conflict between two or a number of states as well as a conflict between a state and an international organisation*, as subjects of the International Law. Noted in the 'Macedonia case' is also the thesis about 'aggression by a UN Protectorate'. Regarding the cultural heritage, the said qualification means full application of the international military law.

In any case, the question about legal qualification of the events in 2001 in the 'Macedonia case' remains unclosed. In addition, the political and legal qualifications are not harmonised. In practice, the consequences of such a situation shall additionally be manifested, at least considering the cultural heritage. This will certainly not be reduced only to the aspect of criminal responsibility for the criminal acts against cultural heritage perpetrated during the war.

In Lieu of Conclusion

The existing model of international military-humanitarian protection of cultural heritage is created neither to dissuade people from waging wars, nor to prevent armed conflicts, including those of a non-international character. It does not have such a power and purpose. Provided that the regulations that are the basis of this model are respected, it can only act preventively and contribute, to the best possible extent, to the sparing of cultural heritage during hostile effects or reducing the war damage to the minimum.

The main disadvantage of the existing model of protection is that it is based on the doctrine of a desirable balance of interests but with nuanced subordination against the imperative military need. To that effect, until the principle of imperative military need is not excluded or marginalised, measures remain to be taken for responsiveness and on-time management of protection of cultural heritage against predictable consequences from armed conflicts.

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Ohrid Declaration on the Protection of Cultural Heritage in the Event of Armed Conflict

The participants of the Urgent Regional Workshop 'The Cultural Heritage at Risk in the Event of Armed Conflict – Macedonia Case' held in Ohrid, Republic of Macedonia, 20–24 February 2002:

expressing sincere gratitude to the organisers – the Macedonian National Committee of ICOMOS and the State Institute for Protection of the Monuments of culture for their extraordinary efforts and dedication in organising this topical and specific regional international workshop, as well as the Ministry of Culture of the Republic of Macedonia and the Embassy of the Kingdom of the Netherlands in the Republic of Macedonia, for their full support of this Urgent Workshop;

welcoming the readiness of Macedonian authorities for a comprehensive presentation of the 'Macedonia Case' in conditions when certain animosities and military activities are still going on in the Republic of Macedonia and the access to the areas where damaged, looted or destroyed monuments of culture is not everywhere allowed and many sites are dangerous to visit;

recalling the Hague Convention of 14 May 1954 on protection of cultural assets in the event of armed conflict and accompanying acts;

aware that the protection of cultural assets in the event of armed conflict is a very complex system of measures, activities and procedures, the implementation of which is conditioned by a large number of internal and external factors and considering that the international model of military-humanitarian protection does not provide always the expected results;

being however sure that the negative impact of military activities may be diminished by timely and systematic implementation of appropriate measures of protection and preservation of cultural assets;

taking the 'Macedonia Case' as a pretext;

With the aim of stimulating the process of upgrading and implementing national models of cultural heritage protection in the segments that are the subject of organised activity before, during and after armed conflicts;

based on proposals from the working groups and deliberations during the final plenary session, adopted on 22 February 2002 as a final act of the Urgent Regional Workshop, the following **Ohrid Declaration** is adopted:

I. Activities before the Armed Conflict

1. Increasing awareness

It is recommended to give a greater stress to an increase of protection awareness. Such campaigns should be directed to two main groups: (a) the general public and (b) particular target groups such as politicians, legislators, the military, law-enforcement bodies and customs agencies. The campaign should be carried out through all relevant channels, including the media. In areas where

this is a feature, cultural diversity should be promoted from the aspect of cultural heritage. It is desirable that general public understanding is established through special information programs and projects while the dissemination of information to particular target groups should be through special training programs and projects.

2. Identification of protected assets

To facilitate the identification of unmoveable and moveable assets as the subject of protection in the case of armed conflict, it has been considered that, where this has not been done, a particular stress should be given to the establishment and regular updating of national and other inventories of protected assets. Such inventories may be kept in written as well as in electronic form. It is recommended that the identification of protected assets be facilitated through topographic maps, especially for assets that are of international, national and regional significance. The topographic maps should be updated and include all possible actual changes.

3. Technical measures

At peace time, together with regular conservation, restoration works and other technical protection measures should undertaken to ensure the protection of cultural assets from the consequences of armed conflict. This primarily includes measures for the protection of assets from the risks of fire or destruction, preparation for evacuation of moveable assets, and procurement of appropriate materials for asset protection in situ. This includes special measures of an architectural nature, provision of safe shelters, elaboration of evacuation plans, provision of appropriate packing materials etc.

4. Risk assessment

Risk assessment plans should be regularly updated and revised to respect all factors of risk, natural as well as human. Such plans should include, but not be limited to, active protection of the unmoveable and moveable assets, evacuation and emergency planning.

5. Military measures

It is recommended that all members of the military and security agencies be familiar with the location and history of cultural assets, especially those that are of international, national and regional significance. Also, relevant military training should include special courses that will enable good knowledge of the 1954 Hague Convention and its follow-up documents, as well as knowledge of other international agreements on cultural heritage protection.

6. Administrative measures

To be able to manage the consequences of an armed conflict or natural disaster, all relevant administrative structures should be strengthened. Such strengthening should reflect in the collaboration with all other actors, such as education and scientific institutions and the non-governmental organisations on cultural heritage.

7. Legal measures

Having in mind that international agreements, even those that refer to cultural heritage, have legal jurisdiction only in the countries that have ratified them, we appeal to the countries that have not yet done so to become signatories to all relevant international agree-

ments on cultural heritage protection, including the Second Protocol to The Hague Convention adopted in 1999. Also it has been recommended that laws and other national regulations be adopted for the implementation of ratified international agreements on cultural heritage protection in the case of armed conflict, as well as for other international agreements on this topic.

8. Bilateral agreements and regional co-operation

With the aim to strengthen the existing framework of cultural heritage protection, every State should make the effort to conclude bilateral agreements with countries in the broader region to which it belongs, thus advancing regional co-operation.

II. Activities during Armed Conflict

9. Protection implementation matrix

Relevant international agreements in the field of military and humanitarian law basically provide for immunity of cultural assets through a differentiated regime of general, special and strengthened protection. In this respect the responsibilities of the countries that are signatories of these agreements are clearly defined. On the other side, any national system for protection of cultural heritage more or less regulates the implementation of cultural heritage protection in a state of war through laws or regulations and other rules, including disaster emergency plans.

However, in practice, contrary to peacetime planning, there is a need for additional tasks and role determination for the various participants in relation to cultural heritage protection in armed conflict, irrespective of whether a state of war has been declared or not. In this respect it has been assessed that it is necessary to develop a generic model for the determination of tasks through the adoption of a matrix for the protection of the cultural heritage in a time of armed conflict. This matrix may be used as a formula for checking i.e. a means of analysis.

The matrix itself involve four categories: a) civilian state authorities responsible for cultural heritage protection (museums, libraries, archives centres, laboratories etc.); b) parties to the conflict including 'our own forces' and the 'opposing forces'; c) peace-supporting forces, and d) international and non-governmental organisations. Each participant involved in the matrix has or may have a properly defined role and task, depending on concrete circumstances. The basic tasks/activities during an armed conflict, as elements of the matrix, are listed under the headings below.

10. Physical safeguard

To prevent cultural heritage becoming a legal military target, but also to avoid its destruction, burning, looting or any other act of vandalism, immediately after the outburst of animosity or immediately before it, physical protection of selected structures and site should be undertaken. There should be an assessment of what kinds of protection measures should be used to justify the deployment of guards.

11. Monitoring

For certain selected sites and structures, for which a measure of physical protection is not applied, monitors should be provided. The aim of this is to prevent destruction, looting and vandalism.

12. Technical protection in situ

This measure is undertaken for diverse kinds of structures and sites, especially for those that have characteristically artistic and other contents. Based on previously provided materials (see Point

III below) technical protection should be undertaken (walling up, earth fill, paving, strengthening etc.) based on an appropriate order by the competent body.

13. Dismounting

Certain parts of immovable cultural assets, for which a high degree of risk has been determined, should be dismantled and sheltered at an appropriate place, in accordance with the plan and previous order of the competent body.

14. Evacuation

Evacuation is implemented according to set plans and when an evacuation order has been received. This measure involves special transport within the frontiers of the country but also on the territory of another State and strict respect for predetermined procedures.

15. Conservation measures

During an armed conflict it is desirable to practice only preventive conservation and other temporary measures of direct protection to prevent further destruction. The control of the physical state of the protected assets and documentation of changes is of extraordinary importance.

16. Measure of precaution

During an armed conflict each responsible command should undertake precaution measures from an attack and precaution measures against the consequences of an attack. The first group of measures refers to precaution in selecting targets, means and methods of attack, while the second refers to the dislocation of cultural assets that are found in the vicinity of military structures, or provision for in situ protection if they are not dislocated, and avoidance of the deployment of military force in the vicinity of cultural assets.

17. Co-operation of military and civilian authorities

The civilian authorities and public services on cultural heritage that continue to work in conditions of military conflict should co-ordinate their activities with the responsible military command, and in this respect, collaborate with the military units and personnel appointed for cultural assets protection.

18. Personnel identification

Civilian authorities and public services personnel for the protection of cultural heritage must be provided with properly issued identification cards and armbands displaying international identification marks set by the 1954 The Hague Convention. The identity cards and armbands should be prepared in accordance with national regulations, even at peacetime, and distributed immediately after the start of animosities. The identity cards and armbands are also issued to other individuals in accordance with the Convention and The Rules for its implementation.

19. Mediation, assistance.

As well as the institutional frames of international control set by the Rules for Implementation of the 1954 Hague Convention, experience has indicated the need to engage other participants. Most often these are 'Peace support forces' and a significant role may be played by international governmental and non-governmental organisations, such as the UN, EU, ICRC, OSCE, Blue Shield. In this context the concept of 'Civilian military co-operation' (CIMIC) is recommended.

20. Investigations

During armed conflict, investigations and other activities in respect

of discovering, apprehending and determining criminal responsibility of perpetrators of war crimes against the cultural heritage should not be excluded, as well as the determination of other responsibilities of the perpetrators of crimes against protected assets.

III. Activities after the Armed Conflict

21. National Crisis Council

If this has not already been done during the armed conflict, it is recommended that a National Crisis Council be established i.e. a body with an appropriate name, for example 'National Council for Emergency Interventions'. This Council should be composed of representatives of the various ethnic and religious groups if such a structure is necessary for the country on whose territory the armed conflict is taking place. The activity of such a body is significant, especially in the conditions when it cannot be determined with certainty if the armed conflict has ceased i.e. when the post-conflict period started.

22. Priority list

It is recommended to elaborate and adopt a priority list of endangered cultural heritage, parallel with organised activities to determine war damage or immediately after that.

23. Endangered cultural heritage

Efforts should not be spared to upgrade national laws on cultural heritage protection, where such laws do not contain provisions on endangered cultural heritage as a specific and priority category. Also, according to the Priority List of Heading 22 of this declaration, the endangered cultural heritage should be protected according to special programs or it should be given priority in financing and implementing regular programs of the appropriate public services.

24. Owner information

Proprietors and other owners of protected immovable and moveable assets should receive all relevant information in respect of planned activities to rehabilitate the armed conflict damage, from the responsible bodies and public services. These should include conditions, procedures and manner in which they can execute their

rights, especially in the case of subsidy, loans or other forms of assistance from the State including compensation for determined damage.

25. Role of religious leaders.

In countries or communities where multiple religions exist and are active, if not before or during the armed conflict, it is desirable that religious leaders advocate the strengthening of confidence and respect for the cultural heritage irrespective of the religion to which it belongs. The making of separate or joint public statements may have great effect on the understanding of religious followers.

IV. The 'Macedonia Case'

26. Concern, condemnation, encouragement, appeal

In respect of the destruction and damage to cultural assets in the 'Macedonia Case' the participants of the Urgent Regional Workshop:

- a. *express* their deep concern for the state of the cultural heritage after the recent armed conflict;
- b. *condemn* manifested vandalism, revengeful and other acts of violence against protected sacral monuments and other religious structures, but also of their use as military objects and attack targets;
- c. *encourage* the competent Macedonian authorities, especially the governmental and non-governmental organisations, in their efforts to provide a greater voice to the 'Case Macedonia' with all relevant information on the destruction and damage to cultural assets being distributed to interested international organisations;
- d. *urge* the international community, at the request of the Macedonian authorities or at their own initiative, to offer financial, technical and other kinds of assistance on a non-commercial base for the rehabilitation of the war damage on cultural heritage and its reconstruction.

27. National Blue Shield Committee

The establishment of a National Committee of the Blue Shield for Macedonia is recommended.

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