THE PROTECTION OF CULTURAL GOODS FROM THE ROERICH PACT TO THE HAGUE CONVENTION

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Abstract

The study premises and objectives:
The idea found at the basis of the discovery of a real value of cultural goods is underlined by the knowledge of their origins and history and of an environmental frame in which these have been produced. This theory could also be applied in regulations provided with certain newly introduced elements as: the absolute interdiction of thefts; the interdiction of destruction and execution of enemy property; the warning of before a terrestrial bombing with naval forces of ports, cities, villages, buildings or houses which are not defended
***The purpose on this paper** is based on the following question: "Which of the gaps of humanitarian international law regarding cultural goods are surfacing?"*
***The research models** used are: the interpretative method, the structuralist-systematic method necessary for the knowledge of rules of organization and functioning of law as a system of social organization; the epistemological method, with an important role in the verification of an authentic meaning, fully manifesting the exigency regarding the protection of cultural property.*
***The result of the study** is obtained by offering an answer which as argued in this paper, concluding on one side that the discrepancies appeared between provisions (or dispositions) of the Hague Convention of 1907 and the events of the First World War have led to an improved idea and to a completion of these norms.*
***Conclusions**: The preoccupation for the protection of cultural goods, of the people's cultural patrimony, thus continues, even if, despite all acts adopted, we observe that certain states destroy willingly the treasures of other peoples. We have thus reached the conclusion that more drastic measures must be adopted more severe sanctions must be applied to states that neglect the norms of humanitarian international law and the existent gaps must be eliminated. For this reason the Second Protocol of The Hague Convention of 1954 has been promoted, regarding the protection of cultural goods in case of armed conflicts.*

Keywords: *cultural goods, protection, the Hague Convention, UNESCO patrimony, armed conflict.*

Introduction

The domain covered by the theme of this study refers to the judicial regime of cultural property, which represented since the 20th century an increasing preoccupation of the international society, while party states became more aware of the need of an universal production of culture and art, which represents the material expression of the cultural, spiritual and national identity of each people and at the same time, represents the sum of definite components of human civilization in its ensemble..

The importance of this study results from the general belief of states regarding the inseparable character between the notion of cultural and national identity and the patrimony notion, which separated gradually from a thinking school accepted by most, according to which cultural property represents the basic element of the peoples' spiritual personality and of the humanity's cultural patrimony.

The objectives of this study obey the idea of protection of the universal cultural patrimony, in times of peace and in times of armed conflicts, on the basis of international instruments that are sufficiently clear and through engagements assumed by party states, in order to make possible an efficient coordination of actions and measures to be taken.

These will be fulfilled by the use of research methods indicated in the abstract of this paper which will lead to the obtaining of assumed finalities.

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The protection of cultural property in the event of armed conflicts is insured nowadays by the following international documents:

1.The Hague Convention of 1907 (the 4th and the 9th);

2.The Roerich Pact – signed in Washington on 15th April 1935

3.The Hague Convention of 14 May 1954 for the protection of cultural property in the event of armed conflict;

4.a) The 1st Protocol of the Hague Convention of 14 May 1954;

b) The 2nd Protocol of the Hague Convention of 14 May 1954 (May 1999);

5.The 1st and the 2nd Protocol of Geneva of 8 June 1977.

These regulations are available for the other countries that do no represents parties to these conventions, because they have a customary character.

Preoccupation regarding the protection of cultural property in the event of armed conflicts have existed, in one measure or another, during all history ages, starting with the Antiquity and continuing until nowadays with the Hague Conventions of 1899 and 1907, in the regulation annexed to the Second Conference and, respectively the Fourth Conference regarding the laws and customs of terrestrial war, the firm law norms were elaborated to regulate the protection of cultural property in case of armed conflict..

1. THE PRESENT STATUTE OF CULTURAL PROPERTY

The history of culture started at the same time with the apparition of man, with the first tools which he build in order to live. From Antiquity until today, in all countries, works of culture and art were created. These have circulated and still do in the entire world, taking their message across borders. Of course, we are not speaking of a physical circulation, but a spiritual one. In time there have been preoccupations for the improvement of an international cultural collaboration.

According to the Romanian diplomat Mircea Malita "Culture represents not only an evening show, a TV show, a weekend museum, leisure reading… Without values there are no decisions. The culture is a place where values are created, preferences are elaborated and hierarchy is established."

Their real value is highlighted by the knowledge and recognition of origins and history, their ambient environment which produced them. From here we can draw the conclusion that every state has the duty to protect its national patrimony build from cultural goods found on their territory against theft, clandestine digging, of illicit export and in the event of armed conflict.

In the case of international law norms that refer to the protection of cultural property in case of armed conflict, new elements were introduced, as for example:

a) The categorical interdiction of theft;

b) The interdiction of destruction and distain of enemy property;

c) The authority advertisement before starting a terrestrial bombing and the interdiction of bombing with armed naval forces of ports, cities, villages, homes or buildings which are not defended;

d) The interdiction to attack or bomb, by any means, cities, villages, homes and buildings with are not protected;

e) The interdiction or pillaging any city of home, even the conquering of it.

In the text of the 1907 Hague Convention a difference is made between cultural goods situated in regions that aren't protected and those with military protection, the first ones being compulsory to being declared.[6] in the same manner, obligations and criminal sanctions have been introduced for the belligerent party which disobeyed this Regulation.

All these provisions were in fact trials to solve this problem of cultural properties.

The gaps which pressured the humanitarian international law regarding cultural property surface with the start of the First World War, in 1914. During this war, great value historical moments were destroyed with intent, as the Reims Cathedral and the central monuments from Louvain and art collections were robbed. Some states, in order to protect their goods from war risks,

have transferred them to treasuries of other states, which were no longer returned. The excuse given with this occasion was "military necessity"[1].

The discrepancies seen between the provisions (or dispositions) of the 1907 Hague Convention and the events of the First World War lead to the idea of improvement and completion of these norms. In these conditions, during the 1923 Washington Convention, a commission of legal advisers elaborated the "Rules of air war", which contain two norms regarding the protection of cultural property, these being listed in art. 25 and art. 26 of these regulations[2]. But these regulations haven't become international law norms, because these weren't accepted by the party states.

Before the Second World War another "Treaty regarding the protection or artistic and scientific institutions and historic monuments" (The Roerich Pact) was signed. It was signed in Washington on the 15th of April 1935. This is the first document consecrated especially to the problems of cultural goods, establishing a system of protection for the two situations: in peace and in the event of war. The pact had a regional character, referring only to the American continent. It was signed by 21 states, from which only 10 ratified it.

During the 2nd World War the rules provided by the Hague regulation of 1907, regarding open town and cities were obeyed. No other rule was obeyed, because some of the states weren't parties to the conventions, or just out of contempt for the regulation adopted.

The disinterest shown by the states involved in the war towards cultural properties of other states is proved by the fact that in Belgrade more public and cultural buildings were destroyed, together with the national library (thousands of books and manuscripts were burnt) and Russian monuments and work of arts were destroyed, which were the results of demolishing the Soviet Union culture: 427 museums, 1.670 orthodox churches, 237 Romano-catholic churches, 69 chapels, 532 synagogues and 258 other buildings were destroyed, 1.710 Soviet town, over 70.000 villages. Besides the property destroyed, a lot of goods were stolen, without ever being recovered (paintings of the Dutch, Italian, German schools, China collections etc.).

2. THE VIENA CONVENTION VERSUS THE HAGUE CONVENTION

In the content of the Vienna Convention the following are provided: "when a treaty provides that it is subordinated to an anterior or posterior treaty or that is mustn't be considered as being incompatible with the other treaty, its dispositions will apply mainly:

- when all states are parties of the anterior treaty and of the posterior one, without the first one being expired or his application being suspended, the anterior treaty is not applied but in the measure in which its dispositions are compatible to those of the posterior treaty.

When the parties to the anterior treaty are not all parties to the posterior one:

a) if two of the state are parties only in the Hague Convention, and the two are parties in the Protocol, the Protocol will be applied.

b) if the two states are both parties to the Protocol and to the Geneva Convention, the priority will be given to the latter one, as a result of the clause "without prejudice".

c) the states that aren't parties at either of the two documents, not to the 1907 Conventions, their provisions will prevail[3]."

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[1] Andriţoi Claudia, "The alternative usage of law", Study published in "The 16th international scientific conference knowledge-based organization", 25-27.11.2010, Terrestrial Forces Academy, Sibiu, ISSN 1843-6722, http://www.ebscohost.com/titlelists/agh-journals.pdf, http://proquest.com.

[2] Cloşcă Ionel, Suceavă Ion, Drept internaţional al conflictelor armate, Documente, The publishing House and Press "Chance", Bucharest, 1993, pages 423-432.

[3] Idem.

The norms jus cogens have a special statute according to art. 53 of the Vienna Convention[4] which establishes that, no state can refer a practice or a treaty contrary to jus cogens even if it has an interest to do so[5].

The norms jus cogens have been perceived to be a part of positive law (the states practice). Thus, it is considered that if positive law represents the rules of a state then jus cogens is not positive law, but if, positive law represents law that are in force in the practice of international community, then jus cogens represents positive law.

In Prosecutor vs. Furundzija, International Criminal Tribunal or the Former Yugoslavia (ICTY) it has been declared that jus cogens cannot be violated by any state „*by international or local treaties or special customs or even general customary rules that are gifted with the same normative force*"[6].

Also, the Project of the International Law Commission (CIL) on the modifications of treaties through subsequent practices statute in art. 38 (which don't refer to jus cogens rules) that: „*a treaty can be modified through a subsequent practice in the application of the treaty with the approval of the parties to modify the provisions…*"[7] In *travaux préparatoires* CIL considered an implicit approval of the states which seems not to be an active practice but a silent approval. This article was erased by the Vienna Treaties Convention by art. 42[8] which confirm the possibility of treaty provisions that don't come from customs, and will become customs.

In the same manner, CIJ decided in the case *North See Continental* that it offers customary international law a prolonged and undisputed practice of the states. The frequency and the customary character are not enough to define customary international law, because "comity" also supposes frequent and repeated acts of courtesy (the same situation exists for international moral). The same case reappeared when CIJ decided in the *Lotus* case that the refrain to exercise a criminal jurisdiction on the actions realized on board of ships from international waters represented an international custom "*if such an except is based on the existence of their consciousness they have the duty to refrain*"[9].

In the Case Military *and Paramilitary Activities in and Against Nicaragua* (Nicaragua vs. U.S.)[10] CIJ established that there are other rules of international law than those accepted by the states. Besides the fact the role of state actors is growing in the forming process of international law, the states have remained the central subjects of this process, with their privileges in determining the fact that there is a new law[11].

The Committee of the International law Association regarding the realization of customary international law (general) has declared in its Final Report[12] a state superiority in determining

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[4] Vienna Convention on the Law of Treaties, Article 53,1155 UNTS 331, 8 International Legal Materials 1969, p. 679.

[5] Andriţoi Claudia, Analysis of the new paradigm of rights in the globalisation era", Study published in Annals of DAAAM for 2009 & Proceedings of 20th DAAAM International Symposium Publishing of research/scientific report as paper in ISI Proceedings, p.259-261, ISSN 1726-9679.

[6] Prosecutor v. Furundzija, International Criminal Court or the Former Yugoslavia (ICTY), 2002, 121 International Law Reports (2002) p. 213.

7 ***Arthur Watts***, The International Law Commission 1949-1998, Volume II: The Treaties, ***Oxford University Press***, 1999, p. 717-718.

[8] Art. 42(2) of the Viena Convention provides that the abrogation of a treaty may take place "only as a result of applying the treaty provisions or the present Convention".

[9] P.C.I.J., Seriile A, Nr. 10, 1927, p. 28.

10 B.N. Patel, The World Court Reference Guide: Judgments, Advisory Opinions and Orders of The Permanent Court of International Justice and The International Court of Justice (1922-2000), ***Martinus Nijhoff Publishers***, 2002, p. 487.

[11] Andriţoi Claudia, „Exegesis of the legal interpretation", Study published „The 15th international scientific conference knowledge-based organization", 26-28 November 2009, Sibiu, p.57-61, ISSN 1843-6722.

[12] The Final Report of The Committee, London Conference (2000) seen on www. ila-hq.org.

customary rules but the condition of the state consent as general precondition of customary international law. It has been sustained only the fact that a consent is compulsory for a corresponding rule of customary international law regarding the principle *pacta sunt servanda* thus *"the consent obliges the state that consented"* (the principle of protecting good belief). The states consent is not an obligatory precondition because the common belief says that the respective practice is legally obligatory and sufficient to create international customary law. The belief represents a sufficient precondition but not necessary, while opinio juris can be proved by any means or methods.

The preoccupation for the protection of cultural property continued even after that period, reaching the conclusion those more drastic measures must be taken; punishments more severe must be applied to states that neglect norms of international humanitarian law and the gaps still existent must be eliminated[13].

3. THE PROTECTION SYSTEM OF CULTURAL PROPERTY AFTER THE HAGUE CONVENTION OF 14 MAY 1954

The Hague Convention of 1954 for the protection of cultural property in the event of armed conflict is the main international instrument for the protection of cultural goods in the event of armed conflicts.

Holland, during 1939, presents a Convention project, elaborated under the management of the International Office of Museums. In 1948 the project was presented to a UNESCO sub-committee. Afterwards it has been submitted to the general Conference of 1952, which transmitted it to government for study. Between 21st of April and 14th of May, the Hague Conference has been convoked, where 56 states were presented, including Romania. At the conference the following were adopted:

- The Convention for the protection of cultural property in the event of armed conflict;
- The Convention Implementing Regulation;
- The Additional Protocol (recognized as Protocol I of the Convention, after which in1999 the second Protocol has been adopted).

The Convention entered into force on 7 August 1956.

Unlike the regulation of the 1907 Convention, the 1954 one establishes a sole criterion according to which cultural property is protected, their importance for the peoples' cultural patrimony.

According to the provisions of the Convention, the property protected was that expressly provided, with the exception of natural beauty sites[14] and cult places.

According to international law in this domain, the protection of cultural property has in sight two elements: defence and respect. Defence refers to the parties' obligation "to do", and this "to do" supposes the parties' obligation to take the necessary measures for the protection of cultural property. If a state hasn't taken these protection measures, this does not empower another state to destroy its goods. The adversary state has the obligation to respect the property of the contracting (party) state.

The respect of a state property devolves the obligation of "not do", which represent:

- The interdiction of using this property, of their protection devices and those near it for purposes that will expose it to destruction or deterioration;
- The abstention of any act of hostility towards them;
- The interdiction, prevention and in need, the imposing of termination of any vandalism act;
- The interdiction of requisitioning cultural property;
- The interdiction of repressions against these goods.

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[13] Stanislaw E. Nahlic, La protection internationale des biens culturels en cas de conflit arme, în Recueil des Cours de l'Academie de Droit intenational, vol. 120, I, 1967, pp. 77-78.

[14] For their protection UNESCO adopted a special Convention in 1972.

The idea that results from these provisions is that cultural property must be respected in times of peace and in the event of war, by its own citizens and by the citizens of other states.

In article 5 of the 1954 Convention we can see the obligation of occupation power to support, if it is possible, of national authorities of the conquered territory to insure the protection and the guarding of the cultural property found on this territory. From this provision it results the idea that the authorities of a state have the obligation of taking necessary measures for the protection of cultural property. If these don't have the possibility to take emergency measures, the conquering state will take preservation measures for the treasures of the conquered state.

The Convention provides in articles 16 and 17 the recognition sign for protected cultural property. "Article 16. Emblem of the convention

1. The distinctive emblem of the Convention shall take the form of a shield, pointed below, persaltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle).

2. The emblem shall be used alone, or repeated three times in a triangular formation (one shield below), under the conditions provided for in Article 17.

Article 17. Use of the emblem

1. The distinctive emblem repeated three times may be used only as a means of identification of:

(a) immovable cultural property under special protection;

(b) the transport of cultural property under the conditions provided for in Articles 12 and 13;

(c) improvised refuges, under the conditions provided for in the Regulations for the execution of the Convention.

2. The distinctive emblem may be used alone only as a means of identification of:

(a) cultural property not under special protection;

(b) the persons responsible for the duties of control in accordance with the Regulations for the execution of the Convention;

(c) the personnel engaged in the protection of cultural property;

(d) the identity cards mentioned in the Regulations for the execution of the Convention.

3. During an armed conflict, the use of the distinctive emblem in any other cases than those mentioned in the preceding paragraphs of the present Article, and the use for any purpose whatever of a sign resembling the distinctive emblem, shall be forbidden.

4. The distinctive emblem may not be placed on any immovable cultural property unless at the same time there is displayed an authorization duly dated and signed by the competent authority of the High Contracting Party."

International law norms refer to the social protection of cultural property represented by: refugees that shelter movable cultural property, movable centres, movable property of great importance that need to fulfil a few conditions:

- are found at a sufficient distance from any important military objective (aerodrome, radio station, institutions that work for national defence, railway station of a certain importance and channel of communication);

- not to be used in military purposes (for personnel movements or military material, even in transit), activities directly connected to military operations: Cantons of military personnel or the production of war materials. The following are not considered to be used for military purposes: supervision realized by armed forces of cultural property, not the presence near this property of police forces with the task of insuring public order;

- to be listed in the "International Register of Cultural Property under Special Protection", Kept by the general manager of UNESCO.

The contracting parties have the obligation of insuring immunity for these goods which enjoy a special protection. Is a party violates its assumed obligations, the other party insures immunity of these goods, but only if this violation situation exists.

The immunity of a cultural property may be lifted in exceptional cases, of unavoidable military necessity. These cases may be observed by the chief of an equal formation of superior one as importance of a division.

The 1954 Hague Convention is an important judicial instrument which determines the agreement between states and contributes to the keeping of international peace. At present, the 1954 Convention is ratified by 95 states, but its importance results from the fact that the principles mentioned in its text have become norms of international customary law. But all these Convention provisions will not reach their purpose if the party states won't respect them constantly. Information also plays an important role, because it offers data regarding theory, but especially regarding the lacunar practice in the domain[15].

Today, there is a struggle between the discoveries of an international "cultural identity", which is so necessary for the birth of a "New Europe". This vision of a New Europe represents a new "challenge" for UNESCO and implicitly, for the protection of cultural property.

The idea is that historical monuments and cultural property in general, represent factors of education. These goods are in fact the pride of a state.

Regardless of all these provisions, cultural property has been destroyed and rubbed, on many occasions being the preferred target of attacks. Sustaining examples for this statement are: during the Second World War, Luftwaffe received the order to bomb England, with retaliation, all the buildings with the sign referring to cultural property protection, and in return, the British have done the same thing to Germany. A recent example is represented by the situation in Afghanistan (the destruction of Buddha statues by Taliban leaders). The international public opinion was alerted by roomers according to which objects found in the patrimony of National Museum of Afghanistan were systematically destroyed. The Kabul authorities denied all accusation, but didn't allow access to foreign journalists in the museum, which was closed to public from 1992. Through unofficial means, occidental journalists have found out that 2000 years old Buddha statue has been destroyed inside the museum. In march, in Kabul, a delegation arrived formed of ambassadors from Italy, the Greece ambassador in Pakistan, a French representative and members of the Society for the Protection of Cultural Patrimony in Afghanistan. These were stupefied when the official of Kabul informed them that the destruction of cultural patrimony has become a matter of state politics in Afghanistan.

The Taliban Militias conquered Kabul and have taken control over the greatest part of Afghanistan in 1996, instituting a regime of terror. "Theology students" sustain that they have transformed this state in the "purest" Islamic state in the world. They apply a super-strict interpretation of Sharia (the Koran laws) in a country where the photos of living beings, movies, television and music are forbidden.

In Bamiyan we can still see the two tallest statues of Buddha in the world.

At the base of Ghorband mountain, in niches that overpass the height of 50 meters, two gigantic statues of Buddha have been sculpted. These statues, dating from the late Kuşana period, stand at the origin of the Buddhist statues from the East Turkestan and China and are connected by Indian origins, but also proto-Iranian. Mount Ghorband also hosted the home of king Kaniska. In these surroundings, the rocky walls that delimit the valley are pierced by numerous caves; most of them natural caves, but extended by man, where Buddhist monasteries were installed. The niches and the caves are richly painted, most of the times in the Gandhana style of Cusani.

The question asked was "how these destructions could be stopped?" (monasteries were riddled with gun bullets and gutted by bomb hits or grenade towers).

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[15] Emeric de Vattel, Le droit de gens ou principes de la loi naturelle appliquees a la conduite et aux affaires des nations et des souverains, Guillaumin et Cie, Paris, 1863, p. 168, 169.

In the project "Code of crimes against the peace and security of human kind", the International Law Commission gathered a list of offences that can be considered crimes against peace and security and demanded that those responsible of these crimes to be judged. Art. 22 mentions the terms "exceptional crimes of war", thus introducing here "deliberate attacks on goods of an exceptional religious, historical and cultural value." Unfortunately, Afghanistan is not a party of the 1954 Hague Convention, completed by the two Protocols and not of the Convention regarding the protection of cultural and natural world heritage[16].

The supreme leader of Afghan Taliban Mulla Mohammed Omar, considering that he hasn't done everything to create a "pure Islamic" state in the Middle Orient, gave a wicked order, that left no room for interpretation. "All the statues in the country will be destroyed, because these were used as idols by the unfaithful. The statues are still respected and could become in the future object of idolatry".

Taliban chef declared that "the keeping of these statues would contradict the Islam (…) while their destruction is a demand of Moslem law".

Taliban militia found in Bamiyan proved their "braveness" and their "initiative spirit" by attacking the gigantic Buddha statues with all their weapons: tanks, anti-tank missiles, grenades and even automatic weapons. There were no concrete data, but is has been estimated that at least two thirds of the entire number of statues have been destroyed.

On 9 March 2001 the Buddha statues were entirely destroyed. An eye witness stated that the two statues were blown up and "made into pieces". Regardless of all this, the press agency from the Islamic Afghan announced that on 7 March only the head of a statue was destroyed.

Despite the waves of international protests, the Buddha statues were destroyed entirely. Unfortunately these could not be saved.

But besides these negative examples there are also a few positive ones: USA interdicted during the war with Cambodia in 1973 the use of the B-52 plane in bombing at less than one kilometre from localities and monuments, temples, pagodas and cult places.

In the Preamble of the UNESCO Protocol the following words appear: "If wars take birth in the men's mind, peace must also take birth in their mind". If each of us would keep in mind these words, nothing would stand in the way of the protection of cultural property. Each of us must respect these goods, because there represent our image over borders.

Conclusions

Studying the representative doctrine of this century and the jurisprudence of states we observe that all great authors have identified the existence of customary norms regarding the immunity of private property, the interdiction of the right to rob cultural property, the bombing of this property etc.

In front of an explosion of preoccupations and idea, the law couldn't have remained passive. Through judicial norms, internal and international, we have tried to obtain the protection of cultural patrimony. In times of peace, through norms of international laws, we desire the protection of the integrity of national cultural patrimony and in the case of war; the same objective is desired through norms of humanitarian international law.

The arguments presented in this study suggest the conclusion that, on one side, a particular action may take birth from a customary law, despite the fact that states don't agree with it as legal obligation. On the other side, a particular action, capable of creating customary international law may be undetermined by the states contrary opinions.

From the intersection of both theories (the facultative character of the state consent and of the belief opinio juris) it would result that opinio juris compensates to the relative absence of practice

[16] Marcheggiano Arturo, Protecția bunurilor culturale în conflictele neinternaționale care comportă dezintegrarea statelor, in the Romanian Journal of Humanitarian Law, Year IV, 1996, no. 4 (14), pages 15-16.

and vice-versa. But what happens if, in the case of a putative international customary law, when the state is kept by a practice based on false conceptions and information regarding the existence of a particular legal obligation? The theory "*more practice, less of a need for a subjective element"* regarding customary law shows us how powerful and long must this practice of the states be in order to deduce opinio juris. But less practice may be replaced by a strong opinio juris to give birth to international customary rules.

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