

Jovan RISTOV

NI National conservation center, Skopje

**THE SECOND PROTOCOL OF 1999, ITS SIGNIFICANCE AND THE DEGREE OF
ITS NORMATIVE AND ACTUAL IMPLEMENTATION IN REPUBLIC OF
MACEDONIA**

Abstract: This article will outline the key questions on the Protocol, significant for its proper understanding (aims, objectives, position, legal effects), the significance of the Protocol as an international instrument for protection of cultural goods in the event of armed conflict, the obligations undertaken with its ratification by Republic of Macedonia, the situation and the current issues related to the implementation of the Protocol.

Key words: safeguarding, respect, military necessity, immunity of cultural property, international protection, implementation

This forum is to meet three anniversaries due in the first part of 2014: 60 years since the adoption of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, known as the Hague Convention of 1954 (HC) with the Regulations for the Execution of the Convention and its First Protocol; 15 years since the adoption of the Second Protocol to the HC (Second Hague Protocol) and 10 years of its entry into force.

In this occasion, few key issues regarding this Protocol will be reviewed.

Key issues regarding the second hague proocol

Basic information on the Protocol

The basic information regarding this document are systematically outlined in this *identification sheet*:

IDENTIFICATION SHEET		
1. TITLE:	<i>Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict</i>	
2. AUTHORITATIVE TEXTS:	<i>English, Arabic, Chinese, Russian, French, Spanish</i>	
3. ADOPTION:	3.1 – Place: <i>The Hague (Netherlands)</i>	3.2 – Date: <i>26 March 1999</i>
	3.3 – Procedure: <i>Diplomatic conference (15-26 March 1999)</i>	
	3.4 – Organizers: <i>UNESCO, Government of the Kingdom of the Netherlands</i>	
	3.5 – Representatives: <i>93 states (74 States Parties of the HC и 19 States observers), IC of the Red Cross and IC of the Blue Shield</i>	
	3.6 – Signatories: <i>114 States Parties of the HC and 19 States observers</i>	
4. MILESTONES:	4.1 – Open for signatures: <i>May 17th – December 31st 1999 (for the States parties of the HC, participants on the diplomatic conference in the Hague)</i>	
	4.2 – Accession: <i>after January 1st 2000</i>	
	4.3 – Census: <i>deposit of 20 instrument of ratification, acceptance, approval or accession (fulfilled: 9.12.2003)</i>	
	4.4 – Entry into force: <i>March 9th 2004 (3 months after the deposit of twentieth instrument of ratification, acceptance, approval or accession); thereafter, it shall enter into force, for each Party, three months after the deposit of its instrument of ratification, acceptance, approval or accession, except in case of hostilities - with immediate effect after the deposit of the instrument</i>	
5. SCOPE OF APPLICATION :	To the <i>States parties</i> of the Protocol, in time of <i>peace, armed conflict (international, non-international) and occupation</i> , regardless of the modalities	

6. <i>RESERVATIONS:</i>	No possibility for <i>reservations</i> (unlike <i>The First Protocol of the HC</i>)	
7. <i>DEPOSITARY:</i>	UNESCO (Secretariat, Secretary General of the UNESCO)	
8. <i>REGISTRATION:</i>	UN (Secretariat, Secretary General of the UN)	
9. <i>CLASSIFICATION:</i>	9.1 – <i>Class: International acts (IA)</i>	
	9.2 – <i>Subclass: Public-legal IA</i>	9.3 – <i>Category: International Treaties (IT)</i>
	9.4 – <i>Subcategory: Universal IT</i>	9.5 – <i>Group: Multidisciplinary IT</i>
	9.6 – <i>Subgroup: Military/humanitarian IT</i>	9.7 – <i>Type: Protocol</i>
10. <i>RATIFICATION:</i>	10.1 – <i>Total: 66 states</i> (as of 23 rd October 2013)	
	10.2 – <i>by RM: with Law of 23.01.2002, published on 18.02.2002, entry into force since 25.2.2002 (“Official Gazette of RM“ N. 13/02)</i>	
11. <i>REVISION:</i>	Revision of the text of the Protocol is not anticipated	
12. <i>DENUNCIATION:</i>	<i>Each Party may denounce this Protocol. The denunciation shall take effect one year after the receipt of the instrument of denunciation. However, if, on the expiry of this period, the denouncing Party is involved in an armed conflict, the denunciation shall not take effect until the end of hostilities, or until the operations of repatriating cultural property are completed.</i>	

Aims of the Protocol

The aims of the Second Hague Protocol are stated in its Preamble, formulated as follows:

- *to improve the protection of cultural property in the event of armed conflict;*
- *to establish an enhanced system of protection for specifically designated cultural property;*
- *to supplement the provisions of the HC of 1954 through measures to reinforce their implementation;*
- *to provide the High Contracting Parties to the Convention with a means of being more closely involved in the protection of cultural property in*

the event of armed conflict by establishing appropriate procedures therefore;

- *to reflect developments in the international Law into the countries' rules governing the protection of cultural property in the event of armed conflict.*

The Second Hague Protocol is not created to limit the intentions to wage war, nor may prevent initiation of military conflict. It has no such power or purpose.

Position of the Protocol

The Second Hague Protocol, as well as the First Protocol to the HC of 1954, is individual, independent international instrument. It complements the HC, so it is exclusively related therewith, without any relationship to any other international agreement.

The content of the Protocol relates to several branches and disciplines of the Law, in particular:

- International public law, given that it regulates relations between states;
- International military / humanitarian law, given that it regulates relations in wartime (declared or not declared), war (declared or not declared), occupation (recognized or unrecognized, with resistance or without armed conflict) and internal (non-international) armed conflict (for which the rules of international military / humanitarian law apply);
- International criminal law, given that it regulates relations concerning criminal responsibility, the investigation, extradition, legal cooperation in criminal proceedings, etc.;
- International monumental law, given that it is related to the protection of cultural goods in the event of armed conflict.

The Second Hague Protocol, as well as the HC and its First Protocol of 1954, belong to the so- called Hague Law of war, and not to the so called Geneva humanitarian law: the 4 Geneva conventions of 12 August 1949 (for the wounded and the sick, the shipwrecked, prisoners of war and civilians) and the two additional protocols of 1977 (I - for victims of international armed conflict and II - for victims of non-international armed conflict).

This positioning of *the Second Hague Protocol* is irrelevant seen through the aspect of international monumental law, taking into account that the Geneva acts related to the cultural heritage are also source of this law.

Content of the Protocol

The Second Hague Protocol contains 47 articles (whereas the HC contains 40, its Regulation – 21 and the First Protocol – 15).

Its provisions are systematized into 9 chapters, namely:

- Chapter I – Introduction (articles: 1-4);
- Chapter II – General provisions regarding protection (articles: 5-9);
- Chapter III – Enhanced protection (articles: 10-14);
- Chapter IV – Criminal responsibility and jurisdiction (articles: 15-21);
- Chapter V – The protection of cultural property in armed conflicts not of an international character (article: 22);
- Chapter VI – Institutional issues (articles: 23-29);
- Chapter VII – Dissemination of information and international assistance (articles: 30-33);
- Chapter VIII – Execution of the Protocol (articles: 34 - 38);
- Chapter IX – Final clauses (articles: 39-47).

The most important provisions related to the international monumental law are found in the chapters II, III, V and VI, namely:

- safeguarding of cultural property (article 5);
- respect for cultural property (article 6), precautions in attack (article 7), precautions against the effects of hostilities (article 8);
- protection of cultural property in occupied territory (article 9);
- enhanced protection (article 10), the granting of enhanced protection (article 11), immunity of cultural property under enhanced protection (article 12), loss of enhanced protection (article 13), suspension and cancellation of enhanced protection (article 14);
- the protection of cultural property in armed conflicts not of an international character (article 22);
- institutional framework (articles 23-29).

The Second Hague Protocol does not regulate the issue of affixing of the emblem of the HC to the cultural goods under enhanced protection.

The Second Hague Protocol, as well as the HC, does not apply to all cultural goods that make up the national cultural heritage of each Member State, but only to part of it. The term “cultural property” in the Second Hague Protocol has the same legal definition as in HC of 1954:

- movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

- buildings whose main and effective purpose is to preserve or exhibit the movable cultural property as defined above (museums, large libraries and depositories of archives),
- refuges intended to shelter, in the event of armed conflict, the movable cultural property as defined above;
- centres containing a large amount of cultural property, known as "centres containing monuments".

Basic Terminology

Important for the Second Hague Protocol, as for the HC itself, are few basic terms of the international military/humanitarian law, in particular:

- **Military necessity** - necessity, need, advantage, benefit or interest which permits use of armed forces against military objectives of armed conflict to defeat the enemy or to make the enemy to surrender, which is manifested as justified deviation from certain restrictions, if these restrictions impede the achievement of the military objective in a given situation.
- **Use in military purposes** - use of cultural goods for accommodation or shelter of armed forces and military equipment or if other military objectives are located in their immediate vicinity, even when this has been done tentatively, also if activities associated with military operations are carried there or if military equipment is produced therein;
- **Military object** - any object which by its nature, location, purpose or use effectively contributes to military action and whose total or partial destruction, seizure or neutralization provides some military advantage (barracks, fortifications, Defense Ministry and its structures, devices and plants, warehouses of military equipment, aviation devices and installations, roads, railroads, bridges, broadcasting stations, telephone exchanges, military industry and others).
- **Attack** - military action, or any act of violence against the enemy, regardless of whether it is offensive or defensive action;
- **Protecting power** - neutral or other State not party to the military conflict, but positioned as advocate of one of the parties to the conflict and recognized by international law;
- **Good service** - bringing the parties to the conflict to the negotiating table for starting direct negotiations, without mediation;
- **Mediation** - active participation and counseling for resolution of the dispute.

Significance of the Second Protocol

General notes

The significance of the Second Hague Protocol is multilateral. Some of its features are particularly important:

- It does not derogate from the model of international military - humanitarian protection of cultural goods, established in the HC, but it builds on by introduction of new, highest level of protection, called enhanced protection, different from the general and special protection provided by the Convention;
- It is based upon the same principles of protection as HC - the principle of safeguarding and the principle of respect - but it introduces higher standards of protection in the application of those principles, expressed in the emphasized balancing and limiting the principle of military necessity as opposed to the principle of humanity, not only with enhanced protection but primarily for general care, with its evident strengthening;
- It introduces 3 new instruments of international military-humanitarian protection (Inventory of cultural goods which enjoy international protection in the event of armed conflict; Preliminary list of cultural property nominated for granting of enhanced protection and International List of Cultural Property under Enhanced Protection), independently from the instruments envisaged in the HC and its Regulation (International list consisting of all persons qualified to carry out the functions of Commissioner-General for Cultural Property and International Register of Cultural Property under Special Protection);
- It establishes a new permanent institutional framework, which consists of: the Meeting of the Parties of the Protocol, the Committee for the Protection of Cultural Property in the Event of Armed Conflict (conditionally: Military Committee) and the Fund for the Protection of Cultural Property in the Event of Armed Conflict (conditionally: Military Fund for Cultural Goods), different from the institutional framework of the HC: Meeting of the Parties of the HC, a Commissioner-General for Cultural Property, Protecting Powers, representative for cultural property, special representative for cultural property in occupied territory, delegates of the Protecting Powers, inspectors of cultural property);
- It fills the legal gaps related to the individual criminal responsibility for war crimes against cultural goods, covering broad spectrum of incriminating acts (planning, instigating, ordering, participating,

helping prepare and execution), their classification with an emphasis on serious injuries, establishing competencies (investigation, punishment, extradition, cooperation, assistance) and embed these violations into the national criminal legislation;

- It broadens the scope of application of the Protocol to the domestic armed conflicts (so called non-international armed conflicts);
- It strengthens the international assistance and cooperation in the event of armed conflict.

Strengthening of general protection of cultural property

The strengthening of general protection of cultural property in the event of armed conflict, envisaged with the Second Hague Protocol, can be best understood through comparison of its provisions on respect for cultural property (articles 6, 7, 8 and 9), with the ones of the HC (articles 4 and 5). In this case, the comparison relates to the forms of respect for cultural property on one side and the anticipated waivers, i.e. cancellation of the immunity of the cultural property under general protection, manifested as a legal attack on the protected cultural property, on the other side.

In the HC of 1954 the accent is placed on two key components, namely:

- (a) - The High Contracting Parties shall refrain from:
 - any use of the property and its immediate surroundings or of the appliances in use for its protection for military purposes (article 4, par. 1);
 - any act of hostility directed against cultural property (article 4, par. 1);
 - requisitioning movable cultural property (article 4, par. 3);
 - any act directed by way of reprisals against cultural property (article 4, par. 4).
- (b) - The obligations mentioned in paragraph 1 of Article 4 may be waived only in cases where military necessity imperatively requires such a waiver.

With the Second Hague Protocol, the refrain is raised on the level of prohibition of unlawful waiver of the obligation for refraining, as a way to guarantee the immunity of cultural property under general protection. Despite this, new rules for limiting the imperative military necessity are set (not regulated with the HC). In this sense:

- the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size

or larger, or a force smaller in size where circumstances do not permit otherwise;

- the attack is considered as allowed (legal) in only two circumstances:
 - the cultural property has been made into a military objective and there is no feasible alternative available to obtain a similar military advantage, and the opposing party is given an effective advance warning (article 6, a);
 - there is a need for obtaining military advantage, no matter if the cultural property is not made into a military objective (article 6, b).

With the Second Hague Protocol two new provisions for respect of cultural property are envisaged, namely:

- (a) – precautions in attack, implying 4 measures (article 7):
 - do everything feasible to verify that the objectives to be attacked are not cultural property under general protection;
 - take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and minimizing, damage to cultural property;
 - refrain from any attack which may be expected to cause damage to cultural property which would be excessive in relation to the military advantage anticipated; and
 - cancel or suspend an attack on cultural property if it becomes apparent that the expected damage would be excessive in relation to the military advantage anticipated.
- (b) – precautions against the effects of hostility, implying 3 measures (article 8):
 - remove movable cultural property from the vicinity of military objectives;
 - provide for adequate in situ protection of the movable cultural property;
 - avoid locating military objectives near cultural property.

Enhanced protection

Enhanced protection is a new, third and highest degree of international protection in the event of armed conflict. The following table summarizes the key elements of enhanced protection.

ENHANCED PROTECTION

<i>KEY ELEMENTS</i>	<i>DESCRIPTION</i>
1. SUBJECT	Cultural property under general or special protection provided that it meets certain conditions.
2. CRITERIA/CONDITIONS	Cultural property may be placed under enhanced protection provided that it cumulatively meets these three conditions: • <i>value criterion: it represents cultural heritage of the greatest importance for humanity;</i> • <i>legal criterion: it enjoys highest level of domestic protection;</i> • <i>political criterion: it is not used for military purposes or to shield military sites and a declaration has been made by the Party.</i>
3. THE GRANTING OF ENHANCED PROTECTION	3.1 – Preliminary procedure: Announcement of the intent to request enhanced protection, by submission of Preliminary list of cultural property for which the State intends to request the granting of enhanced protection 3.2 – Regular procedure: (a) Submission to the Committee of request for inclusion in the international List of Cultural Property under Enhanced Protection (b) Parties may submit representations regarding such request to the Committee within sixty days; (c) the Committee should ask the advice of governmental and non-governmental organisations, as well as of individual experts; (d) A decision of the Committee to grant or deny enhanced protection (e) Entry in the International List according to the decision; (f) Notification of the Secretary-General of the UN and the States Parties of the Protocol.

	3.3 – <i>Emergency procedure</i>: in emergencies, upon the outbreak of hostilities, provisional enhanced protection may be granted, provided that only the value and political criterion are met.
4. LOSS OF ENHANCED PROTECTION	4.1 – <i>Suspension of enhanced protection</i>: (a) <i>in peacetime</i>: where cultural property no longer meets any one of the criteria ; (b) <i>during armed conflict</i>: use of cultural property in support of military action. In both cases the Committee brings a decision to suspend the enhanced protection of cultural property which results in removal of the property of the International List.
	4.2 – <i>Cancellation of enhanced protection</i>: (a) <i>in peacetime</i>: where the derogation of the criteria is of higher degree; (b) <i>during armed conflict</i>: where violations are continuous. In both cases the Committee brings a decision to cancel the enhanced protection of cultural property which results in removal of the property of the International List.
	4.3 – <i>Loss of enhanced protection automatically</i>: if the property has become a military objective; no special procedure nor decision making by the Committee; in such case the cultural property may only be the object of attack if (a) <i>the attack is the only feasible means of terminating such use of the property</i>; (b) <i>all feasible precautions are taken</i>; (c) <i>the attack is ordered at the highest operational level of command</i>; (d) <i>effective advance warning is issued to the opposing forces</i> and (e) <i>the time given to the opposing forces has expired</i>.

Serious violations of the Protocol

The term serious violations of the Protocol means intentional violations of the HC and its Second Protocol, described specifically as:

- attack of cultural property under enhanced protection;
- using cultural property under enhanced protection or its immediate surroundings in support of military action;
- extensive destruction or appropriation of cultural property protected under the Convention and this Protocol (property under general, special and enhanced protection);
- making cultural property protected under the Convention and this Protocol (under general and special protection) the object of attack;
- theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

In this case we are speaking of 9 offenses, qualified as war crime against cultural property. As a matter of fact, each one of the offenses mentioned has equal legal quality: they represent international crimes, of the category of war crimes, and as such can not be modified or voided by the provisions of the domestic legislation. In this sense, if they are committed during non-international armed conflict, they stay as they are – war crimes against international law.

These serious violations (read: war crimes) have to be incorporated in the domestic criminal law, taking into account that they represent international incriminations (international criminal acts, i.e. criminal acts against international law).

Peacetime obligations arising and their fulfilment

General obligations

The following are considered general obligations arising from the Protocol:

- translation of the Protocol into the official languages of the State and communicating these official translations to the Director-General of UNESCO (article 37, par. 1);
- submission to the Committee, every four years, a report on the implementation of the Second Protocol (article 37, par. 2);
- strengthening appreciation and respect by the entire population for cultural property and the Protocol by appropriate means, and in

particular by educational and information programmes (article 30, par. 1);

- incorporating guidelines and instructions on the protection of cultural property in the State's military regulations (article 30, par. 3.a.);
- developing and implementing, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes (article 30, par. 3.b.);
- communicating to one another, through the Director-General, information on the laws, administrative provisions and measures they adopt to ensure the application of this Protocol (article 30, par. 2. c. and d.)

Special obligations

The following are considered as special obligations arising from the Protocol:

- Preparatory measures taken in time of peace for the safeguarding of cultural property: (a) preparation of inventories of cultural property under international protection in the event of armed conflict, (b) undertaking of necessary technical measures (emergency measures for protection against fire or structural collapse, evacuation, in situ protection), and (c) designation of competent authorities responsible for the safeguarding of cultural property (article 5);
- Undertaking precautions against the effects of attack on cultural property (article 8);
- Submission to the Committee a List of cultural property for which the State intends to request the granting of enhanced protection (article 11, par.1);
- Incorporation of the violations to the Protocol into the domestic criminal law (article 15, par. 2);
- Establishing jurisdiction in the domestic law over the offences set as serious violations to the Protocol (article 16, par. 1);
- Extradition in cases of serious violations (article 18).

Fulfilment of obligations

The fulfillment of the obligations arising of the Second Hague Protocol is basically on the legislative level, and still only partially.

The Law on Protection of Cultural Property:

- provides that the cultural heritage should not be requisitioned, nor be subject of repression, attack or be used for military purposes (article 54);
- contains a separate chapter on protection of cultural heritage in the event of armed conflict, which deals with all relevant issues (articles 106-110).

The following documents, related to this Law, are adopted:

- Regulation on the special measures of protection of cultural heritage in the event of armed conflict and emergency (“Official Gazette of RM” No. 56/08);
- Rulebook on the content and manner of keeping the National inventory of cultural property under protection in the event of armed conflict (“Official Gazette of RM” No. 25/05);
- Rulebook on the use of emblems of cultural heritage, designated with international treaty (“Official Gazette of RM” No. 25/05);
- Rulebook on the form of the identification card and the appearance of the band on the sleeve of the officials for protection, or for control of cultural heritage in the event of armed conflict (“Official Gazette of RM” No. 25/05).

Until now, the following documents have not been adopted:

- Methodology on appraisal of damage to cultural heritage caused during and as a consequence of armed conflict (article 109 of the Law);
- Instructions regarding the implementation of preparatory measures for protection of cultural heritage in the event of armed conflict (article 107, par. 4.3. of the Law).

Despite this, in relation to the obligations incorporated in the Law, until now:

- marking of the cultural heritage with the international sign of the HC hasn’t been performed (art. 48, par. 3 and art. 107 par. 3.1.);
- National inventory of cultural property under protection in the event of armed conflict hasn’t been prepared (article 106);
- coordination board for protection of cultural goods in case of armed conflict hasn’t been established (article 159, par. 1.10)
- the envisaged plans haven’t been brought (for evacuation, protection against fire, structural collapse, in situ protection etc.)

The Chapter 34 of the Macedonian Criminal Code – Crimes against humanity and international law, entails among others, provisions for incriminated acts against cultural heritage (articles 404, par.2, 414 and 416). Thus, the serious

violations to the Protocol are not treated as separate offence (war crime against cultural property), but they are incorporated in the article – War crimes against the civil population, codified in a separate paragraph, together with offences against other categories of legal values (article 404 par. 2). Also, with the offence stated in the article 414 – Destruction of property under temporary protection or cultural heritage, the issue of legal protection of cultural property in the event of armed conflict is significantly extended, compared to the obligations arising from the Second Hague Protocol. Despite this, the respective laws determine the competences of the Macedonian courts in the cases of serious violations to the Protocol, including the extradition.

The cultural heritage is appropriately treated, on a general level, in the national legislation in the fields of crisis management, protection and rescue.

The fulfillment of the other general and special obligations arising from the Protocol, is still an open issue.

Instead of conclusion

Application of the Protocol involves a high threshold of actually present and practically manifested awareness for protection, but also a great deal of military and general culture. Therefore, the Hague Protocol of 1999 in itself does not guarantee better protection of cultural property in the event of armed conflict, nor prevention of future crimes against them, especially in areas where the overall population and the public authorities are not sensitized to the extent that will facilitate its application. Therefore, as an act that symbolizes the power of reason, the Second Protocol to the Hague Convention of 1954 implies fundamental approach to the protection of cultural property in the event of armed conflict and lengthy process of sensitization of the public. Whether and how it will be implemented primarily depends on the State and its relation to the obligations undertaken with the respective international agreement.

Bibliography

1. Vasileski V., *Megunarodno voeno pravo*, Skopje, 1998.
2. Vasileski V., *Megunarodno humanitarno pravo*, Skopje, 2002.
3. *Protecting Cultural Property in Armed Conflict, An insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Leiden-Boston, 2010.

4. Ristov J., *Haskiot protokol od 1999 godina – zastita na kulturnite dobra vo slucaj na vooruzen sudir*; Skopje, 2002.
5. Ristov J., Topuzovska L., *Temelni akti na UNESCO za zastita na kulturnoto nasledstvo*, Skopje, 2006.
6. Ristov J., *Instrumenti za zastita na kulturnoto nasledstvo*, Skopje, 2008.

Abbreviations

- HC – Hague Convention
- RM – Republic of Macedonia
- UN – United Nations
- UNESCO – United Nations Educational, Scientific and Cultural Organization
- IA – International act
- IT – International treaty