

Marking of cultural property with the distinctive emblem of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

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This article analyses an interesting legal issue related to the interpretation of Article 17 on the use of the distinctive emblem of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter “the Convention”), following the query by Bosnia and Herzegovina in 1999 as to whether it is appropriate to mark destroyed cultural sites with that emblem. The first part is a general introduction to the marking of cultural property with the distinctive emblem, while the second part focuses in detail on the query made by Bosnia and Herzegovina.

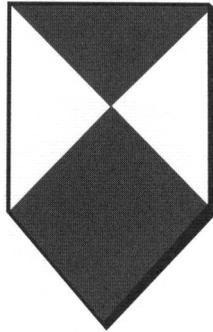
The marking of cultural property with the distinctive emblem of the Convention

The use of the distinctive emblem is mainly dealt with in Articles 6, 10, 16 and 17 of the Convention and in Article 20 of the Regulations for the Execution of the Convention.

Article 6, entitled “Distinctive Marking of Cultural Property”, stipulates that in accordance with the provisions of Article 16, cultural property may bear a distinctive emblem in order to facilitate its recognition. Article 16, entitled “Emblem of the Convention”, provides that the distinctive emblem of the Convention shall take the form of a shield, pointed below, per

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saltire 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). The second paragraph of Article 16 states that 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:



The main thrust of the marking system is contained in Article 17 entitled "Use of the Emblem". Its paragraph 1 specifies the conditions for the triple use of the emblem. Such use is permitted only in the following three cases: (i) for the marking of immovable cultural property under special protection; (ii) for the transport of cultural property under special protection and in urgent cases; and (iii) for the marking of improvised refuges under the conditions set forth in the Regulations for the Execution of the Convention.

Paragraph 2 lays down four conditions for the single use of the emblem, which can be summarized as follows: (i) marking of cultural property under general protection; (ii) a means of identification of the persons responsible for the duties of control in accordance with the said Regulations, and (iii) of the personnel engaged in the protection of cultural property; finally, (iv) marking of the identity cards mentioned in those Regulations.

Paragraph 3 prohibits the use of the emblem in any other cases than those mentioned in paragraphs 1 and 2 of this article, as well as the use of any other sign resembling the distinctive sign of the Convention for any other purpose. Lastly, paragraph 4 prohibits the use of the emblem on any immovable cultural property unless at the same time an authorization dated and signed by the competent authority of the relevant State party to the Convention is displayed. The provisions of Article 17 of the Convention are complemented by those of Article 20 of the Regulations for the Execution of the Convention, which provide States Parties with a large degree of discretion as to the placing of the emblem and its visibility.

To sum up, the Convention does not require States Parties to mark cultural property under general protection with the emblem of the Convention; that choice is left to their discretion. It does, however, make it obligatory for them to mark cultural property under special protection, the transport of cultural property under special protection and in urgent cases, and improvised refuges. All these cases relate to wartime, but from the practical point of view it is preferable to prepare the marking in peacetime.

To identify the reasons for this distinction, it is necessary to go back to the circumstances surrounding the elaboration and adoption of the Convention. The UNESCO Secretariat's draft Convention, contained in the Director-General's circular letter CL/717 of 5 February 1953, comprised the following two draft articles: Article 15 on the "Emblem of the Convention" (current Article 16) and Article 16 on the "Use of the Emblem" (current Article 17).

Draft Article 15 read as follows: "The distinctive emblem of the Convention shall take the form of a solid light blue equilateral triangle on a white circle."¹ It was accompanied by the following commentary:

"...One question of some difficulty is whether the distinctive emblem should be affixed in peace-time or only on the outbreak of hostilities. In the case of isolated refuges specially constructed for the purpose, there can be little doubt; the emblem should be affixed as soon as the Convention enters into force. The case is otherwise, however, with other refuges (certain historic castles or palaces, for example) or with important monuments situated in large urban centres; such marking, in peace-time, might raise difficulties on aesthetic and even psychological grounds, and this would be even more true in the case of a centre containing monuments. The draft, therefore, contains no provision on this point."²

Draft Article 16 stipulated the following:

"1. The distinctive emblem may be used only as a means of identification of: a) the immovable cultural property under special protection defined in Article 8; (b) the transport of cultural property under the conditions laid down in Articles 12 and 13; (c) the persons responsible for the duties of control in accordance with the Regulations for the execution of the Convention;

¹ *Records on the Conference convened by the United Nations Educational, Scientific and Cultural Organization held at the Hague from 21 April to 14 May 1954*, Staatsdrukkerij- en uitgeverijbedrijf, The Hague, 1961, p. 383.

² *Ibid.*, p. 312.

(d) the personnel engaged in the protection of cultural property; (e) the identity cards mentioned in the Regulations for the execution of the Convention. 2. During an armed conflict the use of the distinctive emblem in any other cases than those mentioned in paragraph 1 of the present article, and the use for any purpose whatever of a sign resembling the distinctive emblem, shall be forbidden.”³

The commentary on that draft Article stated that:

“Article 16, paragraph 1, limits the permitted use of the distinctive emblem to five cases. There had been an idea that its use should also be authorized in order to identify material exclusively designed for the protection of cultural property in the event of armed conflict. It was, however, feared that the value of the sign would be lessened by the considerable amount of such material, and was observed that in most cases the material would be deposited in the same place as the property under special protection, in the event it would receive the protection afforded by the emblem designating that property. ...”⁴

Both draft Articles were substantially redrafted in Working Group II and subsequently adopted in the current form.

It can be seen that the original draft Article 16 (current Article 17) mainly focused on the use of the emblem for cultural property under special protection and other related cases.

The practice of implementation of the provisions relating to the use of the said distinctive emblem is not very extensive and is almost exclusively contained in the Secretariat’s periodic reports on the implementation of the Convention. Professor Toman, in his authoritative article-by-article commentary on the Convention, states that:

“The reports of the High Contracting Parties contain little information on the subject. Only the Federal Republic of Germany, Austria, the Netherlands and Switzerland give any details of measures taken – armlets, identity cards, information leaflets on immovable property, special stamps (Switzerland) – and on the use of the single or repeated form of the emblem. Some countries, such as Switzerland, have produced explanatory notes regarding the shield for cultural property, the armlet and identity cards.”⁵

³ *Ibid.*, p. 384.

⁴ *Ibid.*, p. 312.

⁵ Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict (Commentary on the Convention of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international humanitarian law concerning such protection)*, Dartmouth Publishing Company Limited/UNESCO, Hants/Paris, 1996, p. 187.

The Secretariat's last periodic report on the implementation of the Convention, published in 1995,⁶ does contain some information on this subject. Nine countries (Australia, Belarus, Croatia, the Federal Republic of Yugoslavia, Hungary, Malaysia, Madagascar, Slovenia and Sweden) provided information about the marking of cultural property with the distinctive emblem of the Convention, and Egypt announced that such marking was planned.⁷ In addition, the German, the Swiss and the Ukrainian national reports contained brief references to the marking of cultural property.⁸ Finally, Croatia reported cases of the intentional targeting of marked cultural property by the then Yugoslav People's Army in 1991 and afterwards.⁹

The intentional targeting of marked cultural property may, under certain circumstances, constitute a grave breach of international humanitarian law.¹⁰ One of the worst aspects of such offences is that they will probably result in the reluctance of States party to the Convention to mark cultural property for fear of providing a potential adversary with a "hit-list", and thus undermine the very basis of that law – mutual trust between the belligerents.

When preparing its 2003 periodic report on the implementation of the Convention,¹¹ the Secretariat requested, among other things, information on the implementation of Chapter V thereof, entitled *The Distinctive Emblem*. Thirteen High Contracting Parties (Belgium, Bosnia and Herzegovina,

⁶ *Information on the Implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague 1954, 1995 Reports*, UNESCO document, Ref. CLT-95/WS/13, Paris, December 1995. For more about the reporting under the Convention, see the author's article, "Reporting system under the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict", *International Review of the Red Cross*, Vol. 82, No. 840, December 2000, pp. 1001-1016.

⁷ *Ibid.*, second document, p. 1006.

⁸ *Ibid.*, first document, pp. 24-25, 44 and 48, respectively.

⁹ *Ibid.*, first document), p. 23.

¹⁰ Article 85(4)(d) of Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts), on the "Repression of breaches of this Protocol", stipulates the following: "4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol: (...) (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives".

¹¹ The report is still in the draft form and will be distributed as soon as it has been translated into Arabic, Chinese, French, Russian and Spanish.

Finland, Germany, the Holy See, Liechtenstein, Norway, Poland, Slovenia, Spain, Sweden, Switzerland and Turkey) provided information on various aspects of the marking of cultural property, such as the adoption of regulations on marking or the selection of cultural objects to be marked in case of necessity.

Query of Bosnia and Herzegovina as to the appropriateness of marking destroyed cultural sites with the distinctive emblem of the Convention

Following the query with regard to destroyed cultural property, made by Bosnia and Herzegovina at the beginning of 1999, the Secretariat decided to submit this issue for consideration to the fourth meeting of States party to the Convention that was held in Paris on 18 November 1999. It was prompted to do so for two main reasons. Firstly, the Secretariat's principal functions under the Convention are of a purely technical character, such as the provision of technical assistance under Article 23, or depositary functions (e.g. circulation of information on ratification, accession and succession or preparation of certified copies of the Convention). Consequently, the Secretariat is not authorized to interpret the Convention. That responsibility falls strictly within the power of States Parties. Secondly, the meeting of States party to the Convention was the most appropriate forum for an exchange of views on this matter,¹² so as to seek a consensual decision whereby a common understanding of States Parties as to the interpretation of the Convention could be reached.

In its information document¹³ the Secretariat proposed two solutions: (i) submit this issue to national authorities of States Parties with a view to studying it and providing the Secretariat with their observations; or (ii) in case of divergences of views, envisage the possibility of requesting, via UNESCO's General Conference, an advisory opinion of the International Court of Justice ("the Court") under Article X(2)¹⁴ of the Agreement between the United

¹² Article 27(2) of the Convention, entitled "Meetings", reads as follows: "2. Without prejudice to any other functions which have been conferred on it by the present Convention or the Regulations for its execution, the purpose of the meeting will be to study problems concerning the application of the Convention and of the Regulations for its execution, and to formulate recommendations in respect thereof." To date, five meetings of States party to the Convention have taken place, in 1962, 1995, 1997, 1999 and 2001.

¹³ Information document *Point 8 of the provisional agenda – Marking of cultural property with the distinctive emblem of the Convention* (UNESCO document CLT – 99/206/INF.2 of September 1999).

¹⁴ Article X(2) reads as follows: "2. The General Assembly authorizes the United Nations Educational, Scientific and Cultural Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities, other than questions concerning the mutual relationship of the Organization and the United Nations or other specialized agencies." *Basic Texts*, 2004 edition, UNESCO, Paris, 2004, p. 177.

Nations and the United Nations Educational, Scientific and Cultural Organization (1946) authorizing the latter to request advisory opinions of the Court on legal questions arising within the scope of its activities. Article X(3) of the same Agreement provides that "Such request may be addressed to the Court by the General Conference or by the Executive Board acting in pursuance of an authorization by the Conference."¹⁵ From the practical point of view, if the States Parties decided to take this course, they would have to request the General Conference to put the matter before the Court and an item would have to be included on the agenda of the Conference, which would subsequently have to decide whether to comply with the request.

When considering this issue, the meeting of States Parties was not in favour of requesting the advisory opinion of the Court. It proposed instead that the matter be referred to the relevant national authorities of States Parties for their views and that these be subsequently communicated to the Secretariat for it to prepare a working document for the fifth meeting of States party to the Convention.

No communication in this connection from States Parties had been received by the Secretariat before the fifth meeting of States Parties (Paris, 5 November 2001). The Secretariat, however, decided to keep the matter on the meeting's agenda in view of its interest for the interpretation of the Convention and the subsequent practice of States Parties.

During the relevant discussion at the fifth meeting of States Parties, Bosnia and Herzegovina reiterated the importance of preserving the memory of destroyed cultural sites. However, in view of its national policy of reconciliation in the region, it expressed its wish not to submit the matter to the International Court of Justice for an advisory opinion. It therefore proposed that this item be definitely withdrawn from the agenda of the meeting of States Parties. The statement by Bosnia and Herzegovina was followed by an extensive discussion which may be summarized as follows: Argentina drew attention to the relevance of giving consideration to the marking of partially destroyed cultural property; Germany stated that the possibility of marking destroyed cultural property with the emblem of the Convention should not be excluded from the outset, citing as an example the ruins of the Kaiser Wilhelm Church in Berlin which is on the national register of heritage sites. Poland mentioned the discretion left to States Parties in selecting cultural property to be thus marked. Following the discussion Professor Adul Wichiencharoen (Thailand), Chairperson of the meeting, proposed that this

¹⁵ *Ibid.*, p. 177.

issue be kept on the agenda of the next meeting of States party to the Convention. The Secretariat then asked the participants to provide it with their substantive comments so that it could prepare a working paper for the next meeting. At the time of finalizing the present analysis two replies have been received. One State was essentially in favour of marking partially destroyed cultural sites with the emblem; the second placed emphasis on the marking of such sites with a view to their possible reconstruction. The latter also stressed the need to avoid any possible abuse of the use of the emblem.

To conclude, the issue raised by Bosnia and Herzegovina with regard to the marking of destroyed cultural property with the distinctive emblem of the Convention was not an abstract question of international humanitarian law which would be of interest to few international law scholars. On the contrary, it is an issue that may be of relevance in future armed conflicts and its interpretation by States party to the Convention would certainly facilitate implementation of the Convention and help to avoid distrust between future belligerents. It is regrettable that neither the fourth nor the fifth meeting of States party to the Convention have accepted the idea of requesting the advisory opinion of the International Court. Such an opinion would certainly have clarified the interpretation of Chapter V on use of the distinctive emblem, thus facilitating a common understanding of this issue among States Parties, and would also have made the Convention more visible.

Résumé

La signalisation des biens culturels au moyen du signe distinctif de la Convention de La Haye de 1954 pour la protection des biens culturels en cas de conflit armé

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Cet article examine les questions juridiques liées à l'interprétation de l'article 17 – relatif à l'usage du signe distinctif – de la Convention de La Haye de 1954 pour la protection des biens culturels en cas de conflit armé, suite à la question posée en 1999 par la Bosnie-Herzégovine quant à l'opportunité de signaler au moyen de cet emblème les sites culturels détruits. La première partie de l'article est une introduction générale sur le thème de la signalisation des biens culturels au moyen de l'emblème, tandis que la seconde étudie en détail la question posée par la Bosnie-Herzégovine et, en particulier, l'analyse qu'en ont faite deux réunions des États parties à la Convention en 1999 et en 2001.