

Original Paper

The Protection of Cultural Property in the Event of Armed Conflict under Polish Criminal Law

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Abstract

The aim of this paper is to examine whether the Republic of Poland guarantees cultural property appropriate legal protection in the area of criminal law in the event of armed conflict. The author begins by analyzing the legal acts of international law and presenting the relevant regulations. In the next part of the paper, she examines the current provisions in Polish law. First, she explains the term “cultural property” and its relationship with the term “historic relic”. She then provides an exhaustive analysis of Article 125 of the Polish Penal Code, which is the main provision governing the protection of cultural property in the event of armed conflict. The author also discusses other relevant regulations of the Penal Code. She concludes by assessing the current state of Polish criminal law from the perspective of the protection of cultural property in the event of armed conflict.

Keywords

cultural property, historic relics, armed conflict, 1954 Hague Convention, Polish Penal Code

1. Introduction

The protection of cultural property, especially in the event of armed conflict, i.e., in a situation where cultural property is particularly at risk, is the responsibility of the whole international community. Efforts to ensure such protection should be undertaken not only by international organizations, but also by states. The aim of this paper is to examine whether the Republic of Poland guarantees cultural property appropriate legal protection in the area of criminal law in the event of war.

2. Discussion

The protection of cultural property in the event of armed conflict is guaranteed by public international law. The first instrument of international law to provide protection for cultural property in the event of armed conflict was the Regulations Concerning the Laws and Customs of War on Land, drafted in The Hague on 18 October 1907. Article 27 of the Regulations states: “In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand”. These Regulations also prohibit certain acts committed against cultural property and deem them punishable offences (Article 56: “The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings”). It should be stressed here that the Hague Regulations do not use the term “cultural property”, but rather refer to things which can be recognized as cultural property. Poland ratified the Hague Convention Respecting the Laws and Customs of War on Land and its annex, i.e., the Regulations, in 1927, committing itself in this way to respecting its provisions.

The most important international instrument regulating the issue addressed in this paper is the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict. Poland ratified this Convention as well as the Regulations for the Execution of the said Convention and a Protocol to this Convention (Protocol for the Protection of Cultural Property in the Event of Armed Conflict) in 1956. In accordance with Article 3 of the Convention “The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate”. Article 4.3 of the Convention declares: “The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and

any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party”. The second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict was drawn up in 1999 in The Hague Poland ratified it in 2011. In accordance with Article 15 (1) of the Second Protocol “Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts: a) making cultural property under enhanced protection the object of attack; b) using cultural property under enhanced protection or its immediate surroundings in support of military action; c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; d) making cultural property protected under the Convention and this Protocol the object of attack; e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention”. Article 15 (2) reads: “Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act”. Article 16 (1) of the Second Protocol stipulates that each state party “shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases: a) when such an offence is committed in the territory of that State; b) when the alleged offender is a national of that State; c) in the case of offences set forth in sub-paragraphs (a) to (c) of the first paragraph of Article 15, when the alleged offender is present in its territory”.

Under current Polish law, the obligation of the State to proscribe the activities referred to in the above-cited Article 4.3 of the Convention and Article 15 of the Second Protocol is guaranteed by Article 125 of the Penal Code. This provision reads: “§ 1. Who, in an area occupied, taken over or under warfare, in violation of international law, destroys, damages, removes or appropriates property or cultural property is liable to imprisonment for a period of between 1 year and 10 years. § 2. If the act concerns property of significant value or a cultural property of particular significance, the perpetrator is liable to imprisonment for a minimum term of 3 years”.

Prior to analyzing the above provision of the Polish Penal Code, it is important to determine what the actual object of such protection is. To do so the term “cultural property” should first be explained. This term was defined by Article 1 of the Hague Convention of 1954 in the following way: “For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; 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; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centers containing monuments’”. Although the Polish Penal Code employs the terms “cultural property” and “cultural property of particular significance” in the above-cited Article 125 and in Article 126, as well as in the provisions dealing with offences against property (Article 294 § 2 and Article 295 § 1), it does not provide any definition of them. In Polish criminal law doctrine these terms are considered abstract and requiring evaluation (Gerecka-Żołyńska, 1999; Trzeciński, 2011; Jakubowski, 2014; Łabuda, 2014; Księżopolska-Kukulka, 2007). In particular, interpretation of the term “cultural property of particular significance” poses many problems. Obviously, first it is necessary to examine whether a property has any cultural significance, and only in the next stage should it be established whether it is “particularly” significant.

The term “cultural property” was used in the Protection of Cultural Property Act of 1962. Although this statute is no longer in force, the definition of cultural property contained in it is still invoked and serves as a helpful tool for interpreting the terms in question. Article 2 of the statute declares: “A cultural property in the meaning of the statute is anything, whether movable or immovable, whether old or contemporary, which is of significance to cultural heritage and cultural development in view of its historical, scientific or artistic value”. At present, in matters pertaining to cultural property the Protection and Preservation of Historic Relics Act of 2003 applies. Instead of the term “cultural property”, the latter statute makes use of the category “historic relic”. In Article 3 (1) it defines a historic relic as follows: “an immovable or movable thing, their parts or units, being man’s work or connected with his activity, and constituting testimony to a past epoch or event, the protection of which lies in the public interest in view of their historical, scientific or artistic value”. In 2003, the term “property of contemporary culture” was introduced into Polish law. In accordance with Article 2 (10) of the Planning and Spatial Development Act of 2003, a property of contemporary culture is a “cultural property that is not a historic relic, such as monuments, memorial places, buildings, their interiors and details, units of buildings, urban and landscape assumptions, which are recognized as achievements of contemporary generations, if they are of high artistic or historical value”. All the above definitions are taken into consideration when interpreting the terms contained in the Penal Code. According to the literature, the definition of cultural property contained in the 1954 Hague Convention should be considered (Kulik, 2014; Zgoliński, 2016).

As regards the mutual relationship between various terms currently used in Polish law, the widely held view is that the term “cultural property” is broader than the term “historic relic”. Every historic relic is a cultural property, but not every cultural property is a historic relic (Zeidler, 2007; Trzciński, 2011; Kulik & Szczekala, 2010). A specific characteristic of a historic relic is that it dates from the past, while a cultural property, for example can be a painting recently completed by a contemporary renowned artist. This kind of painting should be referred to as a “property of contemporary culture”. It is rightly stated in the literature that when interpreting the term “cultural property of particular significance”, its significance not only for Polish culture, but also for foreign culture should be taken into consideration (Dąbrowska-Kardas & Kardas, 2016; Wilk, 2013), since culture is a universal value (Radecki, 1998). It has been correctly pointed out that “cultural property of particular significance” is not identical with high material value (Dąbrowska-Kardas & Kardas, 2016; Pływaczewski & Guzik-Makaruk, 2016; Wilk, 2013). The particular significance to culture of a given cultural property may result from its high historical, artistic or scientific value. A property with particular significance to culture should have a unique character (Góral, 2007; Kulik, 2014). Examples of this kind of property include, for instance, archive materials or a natural specimen, such as the “Bartek” oak that grows in Poland (Radecki, 1998; Kaczmarek & Kierszka, 2000; Marek, 2010). Cultural properties of particular significance in the meaning given in Article 125 § 2 of the Penal Code undoubtedly include objects entered in the “International Register of Cultural Property under Special Protection” (Gardocka, 2015; Gardocki, 2013; Kłaczyńska, 2014; Marek, 2010; Zgoliński, 2016; Szewczyk & Rams, 2017), and therefore placed under special protection by virtue of Article 8 of the Hague Convention. Other examples include historic relics entered in the Polish Register of Historic Relics, immovable property regarded as historical memorial in Poland as well as any object inscribed on the UNESCO List of World Heritage Sites, which should be recognized as cultural property of particular significance (Radecki, 1998; Trzciński, 2011). One example of an object located in the territory of Poland and inscribed on the UNESCO List of World Heritage Sites is the Nazi German concentration camp at Auschwitz. In 2009, the metal sign with the inscription “*Arbeit macht frei*” spanning the entrance gate to the camp, was stolen. The Polish public prosecutor and court rightly recognized that a cultural property of particular significance had been stolen (Błazejczyk, 2014).

When criminalizing behavior consisting in the destruction, damaging, removal or appropriation of cultural property in an area occupied, annexed or affected by warfare, Polish lawmakers used the concept of double unlawfulness (Wiak, 2015; Kłaczyńska, 2014; Gardocki, 2017; Marek & Konarska-Wrzosek, 2016). One of the elements of the offence in Article 125 § 1 of the Penal Code is “violation of international law”. Thus, Polish lawmakers themselves deemed the acts in question to be unlawful, and furthermore referred to unlawfulness at the international level.

The offence penalized in Article 125 § 1 of the Penal Code can be committed by anyone, i.e., by

civilians as much as by soldiers (Góral, 2007). In the Polish literature a view has been expressed that the perpetrator of this offence cannot be a citizen of the state in which fighting is taking place (the opinion of Fleming and Wojciechowska—see in Kłaczyńska, 2014). This view is inaccurate (so also Kłaczyńska, 2014). It should be pointed out that the Hague Convention deals not only with armed conflicts of an international character but also domestic armed conflicts. This is stated in Article 19 (1) of the Convention: “In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as, a minimum, the provisions of the present Convention which relate to respect for cultural property”. Moreover, States Parties to the Convention are also obliged to respect cultural property situated within their own territories (Article 4 (1) of the Hague Convention). It should thus be concluded that the offence in question can also be committed by a perpetrator who destroys, damages, removes or appropriates a cultural property belonging to his or her own nation (Kłaczyńska, 2014). A thorough analysis of the elements of the offence in Article 125 § 1 of the Penal Code reveals that besides the element “removes” there is no element “for the purpose of appropriation” which is a typical element of the definition of theft. On this basis it should be stated that the elements of the examined offence are carried out irrespective of the purpose of the perpetrator. However, it is possible to recognise that a perpetrator did not commit a crime if he had acted out of necessity (cf. Kłaczyńska, 2014) in a situation where, for example, he removed a cultural property to protect it from being destroyed by an army. The *mens rea* of the offence in question consists in the intention (Piórkowska-Flieger, 2016; Zgoliński, 2016; Hofmański, 2016; Wiak, 2015; Budyn-Kulik, 2014; Szewczyk & Rams, 2017; Drózdź, 2013; Gardocki, 2013). Hence, no such offence is committed, for example, in the case of accidental damage to a cultural property during a military action planned with the aim of saving that cultural property (Hofmański, 2016).

The level of criminal-law protection provided for a cultural property depends not only on the inclusion of the appropriate category of offence in the Penal Code, but also on the severity of the punishment to which the perpetrator of this offence is subject. In the case of the violation of “common” cultural property a perpetrator is liable to imprisonment for a term of between 1 year and 10 years. In the case of cultural property of particular significance a perpetrator is liable to imprisonment for a term of between 3 years and 15 years. These penalties are more severe than those provided for acts against cultural property committed in peacetime. By way of comparison, violations of cultural property of particular significance in peacetime are punishable by imprisonment for a term of between 1 year and 10 years (Article 294 § 2 of the Penal Code). Bearing in mind the penalties provided for other offences and the requirement of axiological proportionality in the punishment process, it is important to recognize that the penalties imposed for criminal acts against cultural property committed in the event of armed conflict are appropriate.

As regards to the scope of criminal-law protection provided by Polish law for cultural property in the event of armed conflict it is important to criminalize not only any direct attack on or interference with cultural property, but also behavior that has an impact on such actions. Under Polish law it is an offence to publicly incite or publicly praise the committing of acts involving the destruction, damaging, removal or appropriation of cultural property (Article 126a of the Penal Code). In addition, a person who does not fulfill the duty of proper control is deemed to have allowed an offence specified in Article 125 of the Penal Code to be committed by any person under his actual authority or control (Article 126b of the Penal Code). On the other hand, a person, who makes preparations to commit the offence specified in Article 125 is liable to imprisonment for a period of up to 3 years (Article 126c § 3 of the Penal Code). Here it is important to mention that under Polish criminal law the rule is that preparing to commit an offence is unpunishable. Preparation for an offence is only punishable when the law specifically provides for this (Article 16 § 2 of the Penal Code). By making punishable the act of preparing to commit offences against cultural property in the event of armed conflict, Polish lawmakers showed how seriously they view the protection of cultural property. Another source of protection for cultural property is Article 126 § 2 which proscribes the use of the protective emblem for cultural property during the course of warfare and in violation of international law (Article 126 § 2 of the Penal Code). This offence is punishable by imprisonment for a period of up to 3 years (Article 126 § 1 and 2 of the Penal Code).

All State Parties to the Hague Convention which ratified the Second Protocol are obliged to extend individual criminal responsibility to persons other than those who directly commit the act (Article 15 (2) of the Second Protocol). This obligation has entered Polish criminal law via Article 18 of the Penal Code, which establishes criminal responsibility not only for the direct perpetrator, but also for any co-perpetrator, leading perpetrator or perpetrator that “orders” the offence to be committed, as well as for the instigator and all persons aiding and abetting the perpetrator. The obligation of a State Party arising from Article 16 of the Second Protocol with regard to the range of jurisdiction over acts specified in Article 15 of this Protocol, is enshrined in Article 113 of the Polish Penal Code, which provides for universal jurisdiction. In accordance with this provision, irrespective of the regulations in force in the place where the offence was committed, Polish criminal law shall apply to a Polish citizen or a foreigner, with respect to whom no decision on extradition has been taken, in the case of an offence committed abroad which the Republic of Poland is obligated to prosecute under international agreements or an offence specified in the Rome Statute of the International Criminal Court. In the case of the present issue, the relevant international agreement mentioned in the above provision is the 1954 Hague Convention with both protocols.

3. Final Conclusions

In conclusion, based on the above analysis it can be concluded that Poland has fulfilled its obligations resulting from the Hague Convention and in the event of armed conflict guarantees cultural property appropriate protection in the area of criminal law. However, Polish lawmakers should stay vigilant and react to new threats to cultural property, as well as changes and new trends in international law. They should constantly adapt their legal regulations to the regulations in public international law in order to maintain appropriate level of criminal-law protection of cultural property in the event of armed conflict.

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