

**DER INTERNATIONALE RECHTSRAHMEN ZUR VERHÜTUNG DES
HANDELS MIT KULTURGÜTER IM INTERNATIONALEN KULTURRECHT**
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Abstrakt: Der vorliegende Artikel untersucht die bestehende internationale Rechtsordnung zur Verhinderung des Handels mit Kulturgütern im Rahmen des internationalen Kulturrechts. Der Artikel analysiert sowohl bestehende internationale Verträge im Bereich der Verhinderung des Handels mit Kulturgütern als auch Soft-Law-Normen - Empfehlungen und Resolutionen internationaler Organisationen. Auf der Grundlage der Analyse wurde eine Reihe von Maßnahmen zur Verbesserung der usbekischen Kulturgesetzgebung vorgeschlagen.

Schlüsselwörter: Kulturgut, kulturelles Erbe, illegaler Handel, illegaler Handel, Antiquitäten, Museen, Register, Übereinkommen, Abkommen, Verordnung, UNESCO, Unidroit, Usbekistan.

**THE INTERNATIONAL LEGAL FRAMEWORK FOR THE PREVENTION OF
TRAFFICKING IN CULTURAL PROPERTY
IN INTERNATIONAL CULTURAL LAW**
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Abstract. The present article explores the existing international legal system for the prevention of trafficking in cultural property within the framework of international cultural law. The article analyses both existing international treaties in the field of prevention of trafficking in cultural property and soft law norms - recommendations and resolutions of international organizations. On the basis of the analysis, a number of measures have been put forward to improve Uzbekistan's legislation on culture.

Keywords: cultural property, cultural heritage, illicit trafficking, illicit trade, antiques, museums, registry, convention, agreement, regulation, UNESCO, Unidroit, Uzbekistan.

Cultural property, including cultural heritage and cultural and spiritual heritage, is the heritage of all humanity, regardless of nationality. In this regard, President of the Republic of Uzbekistan Sh.M. Mirziyoyev rightly notes: "To preserve the unique spiritual heritage, to introduce it to the wider foreign community and to pass it on to new generations in its original form¹.

Due to the fact that cultural values also represent a huge material value at the international level, the illicit trafficking of cultural values is flourishing. In this regard, there is a need for international legal protection of cultural property, which is carried out within the framework of international cultural law and is based on conceptual provisions

implemented in conventions, agreements and recommendations adopted both within the framework of international organizations and on a bilateral basis.

The modern international legal concept of protection of cultural property is based on the paradigm of the common heritage of humanity. The content of the concept of the common heritage of humanity is disclosed in the six UNESCO conventions and recommendations of this organization on the protection of cultural heritage; in the UNIDROIT Convention on Stolen Cultural Property; conventions and agreements of the Council of Europe and the CIS countries and is reduced to the following:

- Each culture contributes to the development of human civilization; civilization will be impoverished if its achievements are lost;
- Protection of the cultural heritage is the business not only of the state on whose territory outstanding cultural monuments are located, but of all states;
- The protection of cultural monuments implies international cooperation in the preservation, conservation and restoration of sites of universal value;
- Property issues are not of fundamental importance for the common heritage of humanity;
- Parts of the common heritage are of a national character;
- The common heritage of humanity in the field of culture entails the recognition of the need for common use of cultural property².

As noted by S.S. Ryndin, "there are more than 60 instruments of international law in the world, including "soft law", UNESCO regulations, bilateral and multilateral agreements governing the cooperation of States in the field of identification, preservation and protection of cultural heritage³". Thus, there are six UNESCO conventions directly related to the protection of cultural heritage:

- Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954⁴;
- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970⁵;
- Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972⁶;
- Convention for the Safeguarding of the Intangible Cultural Heritage of 17 October 2003⁷;
- Convention on the Protection of the Underwater Cultural Heritage of 6 November 2001⁸ ;
- Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005;

As fairly marks out V. Neshatayev, standard regulation of existence of cultural values has difficult complex character. The complex consists of the principles and rules of international law of both public, and private character⁹. While norms of public law regulate questions of control of movement of cultural values, the private law covers points of law of property, signing of the contracts and transition of an ownership right.

However legal regulation in the called spheres is interconnected and differs in difficult hierarchical interaction. Now this international legal complex includes the following elements:

(a) The peremptory principle - the principle of the "right of everyone to enjoy cultural property" and related rules governing the human right to cultural property¹⁰. The implementation of this principle allows for the proportionate restriction of the right of ownership of cultural property in order to maintain the necessary and urgent need to preserve public order;

(b) Details of the principle in other public rules governing the import and export of cultural property considered as movable and immovable property of the material world¹¹. In both cases, both international and national elements should be considered;

(c) Private law rules covering the establishment of ownership, contracting and transfer of rights to cultural property.

Besides, V.O. Neshatayeva in the dissertation work notes that "the military conflicts served as a prerequisite for development of legal protection of cultural values. In this regard in the 20th century the international legal acts regulating protection of cultural values were drafted¹²".

As we told above, the great value is attached to questions of prevention of an illegal turn of cultural values recently. A number of international legal acts¹³ among which the Convention on protection of cultural values in case of armed conflict adopted at the international conference in The Hague on May 14, 1954¹⁴ was the first is about it adopted. The convention of 1954 provides the following measures:

- (a) Prohibiting the use of these properties, the facilities for their protection, and their immediate surroundings for purposes which may lead to the destruction or damage of these properties in the event of armed conflict;
- (b) Prohibition, prevention and suppression of any acts of theft, robbery or illegal appropriation of cultural property in any form, as well as any acts of vandalism against these properties;
- (c) Prohibition of requisitioning and taking any repressive measures against cultural property.

The First Additional Protocol of 1977 to the 1954 Convention prohibits any hostile action against those historical monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples. The Protocol complements the system of guarantees for the protection of cultural property introduced by the 1954 Hague Convention.

The most important cultural property is specially protected and included in the International Register of Cultural Property maintained by the Director-General of UNESCO; a copy of the Register is kept by the Secretary-General of the United Nations and each party to the military conflict. As soon as they are included in the International Register, valuables are granted military immunity and belligerents are obliged to refrain from any hostile act against them.

The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970 occupies a special place in the international legal system for the protection of cultural property.

The main objective of the Convention of UNESCO of 1970 is prevention of illegal import, export and transfer of property on cultural values. The convention provides a number of the mechanisms providing achievement of this purpose. For example, Article 7(a) of the Convention authorizes the participating states "to take all necessary measures, according to the national legal system, the acquisitions by the museums and other similar institutions directed to prevention (it is allocated by me. – N.F.), located in their territories, the cultural values coming from other State Party of the Convention which were taken illegally out after entry into force of the present Convention".

Besides, Article 6(a) of the Convention provides for the establishment of a special certificate by which the exporting State certifies its authorization for the export of cultural property and Article 6(b) sets out the *prohibition on the export of cultural property without such a certificate* (emphasis added by me: N.F.).

The 1970 UNESCO Convention attempted to include private institutions involved in trade in cultural property. For example, Article 10 sets out the *obligation of antique dealers (antique dealers) to establish a register* (I have designated N.F.) containing information on the origin of each cultural object, the names and addresses of suppliers, a description and the value of the object sold. Antique dealers are also required to inform the purchasers of the cultural property about the possible extension of the export ban to the property.

Also other international legal acts regulating problems of return of cultural values to the country of their origin or to legitimate owners are interesting. So, in 1995 in Rome the diplomatic conference adopted the Convention UNIDRUA on kidnapped persons or illegally taken out cultural values.

The main objective of the Convention was to establish a legal framework to regulate relations between States with regard to the restitution of stolen cultural property and the return of illicitly exported cultural property, as well as to promote cooperation in the field of art trade and cultural exchanges.

It should be noted that the Convention UNIDRUA of 1995, considering shortcomings of the Convention of UNESCO of 1970, sought to include private collections in definition "cultural values". So, in Article 1 of the Convention of UNESCO of 1970 cultural values are understood "as values of religious or secular character which are considered by each state (it is allocated by me. – N.F.) as representing value for archeology, the prehistoric period, history, literature, art and science and which belong to the listed below categories ...". In Article 2 of the Convention UNIDRUA of 1995 cultural values are understood as "values which in terms of religious or secular have importance for archeology, background (anthropology), history, literature, art or science" and which belong to one of the

categories listed in the Convention. Thus, developers of the Convention UNIDRUA intentionally departed from referring cultural values to the concrete state, and used broader definition.

Unfortunately, a number of states refused to sign the Unidroit Convention of 1995. Accordingly, to date, international legal regulation in the area of auctioning of cultural property only addresses the issues of control over the cleanliness of circulation and restitution of stolen or returned illegally exported cultural property.

In this regard, the Convention obliges the owner of a stolen cultural object to return (restore) it. Specific legal mechanisms for the restitution of stolen cultural property are set out in Chapter 2 of the 1995 UNIDROIT Convention.

The International Code of Ethics for Dealers in Cultural Property recommended by the UNESCO bodies can play a role in preventing illicit trafficking in antiquities. It ensures the coherence and integrity of the various laws relating to the acquisition of antiquities and provides international recognition to dealers who have adopted the Code through the use of a special symbol. In turn, dealers in cultural property should ensure that the origin of antiquities is legal. Furthermore, the acquisition of cultural property from reputable dealers in the art world who are voluntarily bound by the Code of Ethics may be an important argument in determining whether the owner has exercised due diligence to establish the right to compensation for cultural property that has been illegally sold and is subject to restitution. This provision derives directly from Article 4 of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. In our opinion, the Republic of Uzbekistan should accede to this Convention and adopt and implement other international legal instruments. broader definition.

Existing international legal instruments relating to cultural property offer different ways of resolving disputes.

Article 17(5) of the 1970 UNESCO Convention provides for a good offices mechanism: "At the request of at least two States Parties to the Convention, which are in disagreement as to its application, UNESCO may offer its good offices in order to reach an agreement between them".

Article 8(2) of the 1995 UNIDROIT Convention provides for the possibility of referring the dispute to a *court* or other *competent authority* or to *arbitration* (emphasis added).

The Convention on the Protection of the Underwater Cultural Heritage of 6 November 2001 contains the most detailed list of possible ways of settling disputes concerning cultural property. Thus, Article 25 of the Convention ("Peaceful settlement of disputes") provides for recourse to the following means: *negotiation* (Article 25(1)); *mediation* with UNESCO as mediator (Article 25(2)); more formal procedures under Part XV of the United Nations Convention on the Law of the Sea, i.e. arbitration and recourse to the *International Court of Justice* (emphasis added).

In addition, non-governmental organizations such as the International Law Association have proposed a new mechanism, the so-called *cooperation regime*, as an alternative scheme to reduce the number of disputes concerning cultural property.

The aim of the new regime was to create an alternative scheme of relations in the field of cultural property. The International Law Association pointed out the weakness of existing conventional mechanisms for their protection and preservation, as well as the inability of such mechanisms to resolve disputes arising from the return of cultural property.

Besides to universal international treaties, agreements and conventions, there are also acts of a regional nature.

In terms of the date of adoption, the first instrument in the field of protection of cultural property is the European Cultural Convention adopted on 19 December 1954 in Paris. The member governments of the Council of Europe, which signed the convention, considered that the aim of the Council of Europe was to achieve even greater unity among its members in order to protect and implement the ideals and principles that constitute their common heritage.

According to Articles 1 to 3 of the Convention, Parties should take appropriate measures to protect and promote the development of national contribution to the common cultural heritage of Europe, to consider the objects under their control which are of cultural value to Europe as an integral part of the common cultural heritage of Europe, to take appropriate measures for their protection and to ensure their reasonable access.

Thus, cultural property is protected by both national and international law. Each state is responsible for the preservation of its cultural heritage, and pursues a policy aimed at the organization of restoration work, restoration and promotion of objects.

Within the framework of the European Union (EU), the EEC Council Regulation (EC) No. 3911/92 of 9 December 1992¹⁵ on the export of cultural property is in force. Article 2, paragraph 1, of the Regulation establishes the mandatory requirement to issue an export authorization for cultural property outside the customs territory of the Community. Such a permit may be refused if the cultural property is part of the national heritage (Art. 2, para. 2).

Within the Commonwealth of Independent States (CIS), a number of documents may be noted. First of all, we should note the Agreement on the return of cultural and historical property to its countries of origin signed in Minsk on February 14, 1992¹⁶. In order to implement the agreed measures to prevent and suppress cases of theft of cultural property, a new Agreement on Cooperation of the CIS Member States in the fight against theft of cultural property and ensuring its return in 2007 was concluded.

Over the past years, the CIS has accumulated a regulatory framework for cooperation in the field of preservation of cultural property, the development of which used universal and regional documents. They can be referred to as such:

- Agreement on the Return of Cultural and Historical Property to its States of Origin of 14 February 1992¹⁷;
- Agreement on Cooperation of Customs Services on the Return and Detention of Cultural Property Illicitly Exported or Imported on 15 April 1994¹⁸;
- Regulation on the order of return of illegally exported and imported cultural property, approved by the decision of the Council of Heads of Government of the CIS on October 9, 1997;
- Agreement on the export and import of cultural property of 28 September 2001, which specifies the above documents.

Among these documents, the Decision of the Heads of Government of the CIS member states of October 9, 1997 on the approval of the Regulations on the procedure for the return of illegally exported and imported cultural property is particularly notable¹⁹. It should be noted that this Regulation on the procedure of return of illegally exported and imported cultural property dated 9 October 1997 regulates the procedure of return to the country of origin of illegally exported cultural property.

The Republic of Uzbekistan is currently a party to a number of international legal treaties and conventions, such as the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1972 Convention for the Protection of the World Cultural and Natural Heritage, and Uzbekistan has ratified the 2000 Convention against Transnational Organized Crime. Resolution No. 536-II²⁰ of the Oliy Majlis of the Republic of Uzbekistan on 30 August 2003. Uzbekistan's national legislation also contains a number of special legal acts regulating the circulation of cultural property. Nevertheless, it should be noted that the state of the regulatory framework does not fully meet its requirements, as is evident in the absence of a clear legal definition of cultural property. Thus, for example, national legislation lacks the concept of "antiques" and there are no mechanisms of control and supervision over the preservation of cultural heritage.

Summing up, we would like to note that the profound changes taking place in the system of interstate relations have a serious impact on culture, in connection with which a completely new branch of international law is being formed - international cultural law. At the same time, it should be noted that modern international law, recognizing the fundamental importance of combating illicit trafficking in cultural property, differs in this part by a high degree of declarability, does not contain clearly developed practical measures to combat this negative phenomenon, placing much emphasis on the problem of protection of cultural property during armed conflicts.

Despite the obvious urgency of the problem of legal regulation of trafficking in cultural property, the universal norms developed at the international level cannot cope with the growing number of contentious legal issues with regard to cultural property. In addition, the rules enshrined in States' national legislation vary and contain different legal regulatory mechanisms. As a result of the high economic and cultural

attractiveness of cultural objects, the lack of sufficient regulation at the international level and the existing differences in national legal systems, the number of disputes relating to cultural property increases every year.

As the analysis of international legal instruments shows, the existing conventional system of combating the illegal export of cultural heritage is very weak, and UNESCO recommendations are not always and not fully complied with. Other forms of international cooperation are mainly limited to the public exchange of information on a bilateral basis between the competent authorities of States on stolen and illicitly exported cultural property.

Considering importance of a problem of preservation of historical and cultural heritage of the people of the Republic of Uzbekistan, it is obviously necessary to accelerate ratification of the Convention YuNIDRUA on kidnapped persons or illegally taken out cultural values of 1995 and also considering unity of language, traditions and the culture of the people of Central Asia, to initiate creation of a uniform cultural zone of Central Asia, with adoption of the relevant interstate contract with participation of all five Central Asian states and Afghanistan that can serve as a starting point for restoration of integration processes in Central Asia.

References

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³ Ryndin S.S. "Cultural Value" as an object of protection of modern international law // Eurasian Law Journal. - – M., 2011. -№ 6 (37). - – C. 72.

⁴ See the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict // UNESCO International Instruments. - M.: Logos, 1993.

⁵ See: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 // UNESCO International Instruments. - M.: Logos, 1993.

⁶ In order to streamline the application of the Convention, UNESCO adopted the Basic Principles and Rules for the Use of the World Heritage Emblem in Paris on 3 July 2003. Although the emblem is not mentioned in the Convention concerning the Protection of the World Natural and Cultural Heritage, the World Heritage Committee has encouraged its use since its approval in 1978 to mark sites protected by the Convention and inscribed on the World Heritage List.

The emblem is a symbol of the Convention, expresses the commitment of States Parties to the Convention to its principles and serves to mark sites inscribed on the World Heritage List.

Furthermore, the emblem has great potential for raising funds, as its use increases the market value of the products with which it is associated. The emblem is used by the World Heritage Centre, the Publishing Division and other UNESCO divisions/offices, delegations and National Commissions responsible for the implementation of the Convention in each of the States Parties to the Convention, and World Heritage properties

⁷ See: 2003 Convention for the Safeguarding of the Intangible Cultural Heritage // UNESCO International Instruments. - M.: Logos, 1993.

⁸ See: Convention on protection of underwater cultural heritage of 2001//International regulations of UNESCO. – M.: Lagos, 1993.

⁹ Neshatayeva V. Cultural values: price and right. – M.: Publishing house of Higher School of Economics, 2013. – Page 14.

¹⁰ For the first time the human right to cultural values was recorded in the most general form in Article 27 of the Universal Declaration of Human Rights of December 10, 1948 "each person has the right to participate freely in the cultural life of society, to enjoy art, to participate in scientific progress and to use its benefits". Gradually this right was acquired also by contractual fixing: the states participating in the International Covenant on Economic, Social and Cultural Rights of December 19, 1966, confirmed recognition of the right of each person for participation in cultural life (Article 15 of the Pact)

¹¹ Carducci G. The Growing Complexity of International Art Law: Conflict of Laws, Uniform Law, Mandatory Rules, UNSC Resolutions and EU Regulations // Hoffman B.T. Art and Cultural Heritage: Law, Policy and practice. – Cambridge: Cambridge University Press, 2006. – P. 70, 74.

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¹⁴ See: The convention on protection of cultural values in case of armed conflict of 1954//the International regulations of UNESCO. – M.: Lagos, 1993.

¹⁵ Council Regulation (EEC) No. 3911/92. On the Export of Cultural Goods. 09.12.1992 // http://eur-lex.europa.eu/Result.do?TI=V2&T2=1992&T3=3911&RechType=RECH_naturel&Submit=Search

¹⁶ See: Agreement on return of cultural and historical values to the states of their origin (Minsk, on February 14, 1992)//Bulletin of international treaties. – Minsk: Secretariat of the CIS, 2000. – No. 7.

¹⁷ It is possible to carry the reached agreement on establishment of the Intergovernmental Commission for creation of the mechanism and practical work on return of cultural and historical values to the most important provisions of the Agreement, determination of categories of the cultural and historical values which are subject to return, providing access to experts of the national commissions for acquaintance with funds of the state museums and archives

¹⁸ The agreement fixes mechanisms of exchange of samples of forms of allowing documents and prints of the seals of the cultural values which are in legal turnover, other interesting information and also return of illegally moved cultural values;

¹⁹ See: Regulations on an order of return of illegally taken out and imported cultural values (Minsk, 9 October, 1997)//the Bulletin of international treaties. – Minsk: Secretariat of the CIS, 2000. – No. 7.

²⁰ See: Collection of international treaties of the Republic of Uzbekistan. – T.: MFA of RU, 2004. – No. 1