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ANALYTICAL REPORT

Mechanisms for the Protection and Restitution of Cultural Property in the Event of Armed Conflict between the Russian Federation and Ukraine

CULTURE!



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List of abbreviations and acronyms

| | |
|------------------------|--|
| UN GA | General Assembly of the United Nations |
| AP | Protocols Additional to the Geneva Conventions of 12 August 1949 |
| AP I | Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977 |
| ICOM | International Council of Museums |
| ICOMOS | International Council on Monuments and Sites |
| ICRC | International Committee of the Red Cross |
| INTERPOL | International Criminal Police Organization |
| ICPRCP | UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property |
| 1954 Convention | 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict |
| IHL | International humanitarian law |
| IAC | International armed conflict |
| ICC | International Criminal Court |
| NATO | North Atlantic Treaty Organization |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| UNIDROIT | International Institute for the Unification of Private Law |
| UNODC | United Nations Office on Drugs and Crime |



Introduction

Cultural property is one of the most significant sacrifices of armed conflict. Humanitarian issues, such as rescuing people, supplying resources, etc., are a much higher priority during military operations than the preservation of various facilities: libraries, archives, galleries, museums, historical and religious buildings, archaeological sites, collections, etc. While there is no denying the priority of humanitarian work, it is also necessary to insist on the importance of protecting, preserving and mitigating damage to cultural property during and after armed conflict.

For ten years, the Russian Federation has been continuously attacking and damaging Ukraine's cultural heritage, both by implementing a colonial forced assimilationist cultural policy and by directly carrying out bombings and regular shelling, acts of theft of cultural property, and the total destruction of cultural identity. Numerous monuments that are not included in local or state registers, monuments of local and regional significance, natural heritage monuments, as well as monuments on the UNESCO World and Natural Heritage List and candidate monuments for these lists are under threat, including Ancient City of Tauric Chersonese and its Chora and Mangup Kale, Askaniya-Nova National Steppe Biosphere Reserve, Mykolaiv Astronomical and Odesa Observatories, St. Borys and Glib Cathedral in Chernihiv, Kamyana Mohyla in Zaporizhzhia region, the historic centre of Odesa and Lviv, Derzhprom (House of State Industry) in Kharkiv, and many others.¹

Unfortunately, the issue of protecting Ukraine's cultural heritage was not as urgent during the ten years of armed conflict as it has become after 24 February 2022. Today, the efforts of the state and the public sector in the field of culture are mainly aimed at raising funds for restoration or renovation work, organising various cultural events to support Ukrainian culture abroad and in Ukraine, promoting the BRAVE.UA brand, etc. Undoubtedly, such activities are extremely important and critical for the future, but we also need to understand that it is worth acting now so that we have something to restore in the future. To this end, Ukraine, as a state, should study and implement in practice the provisions of international law on the protection of cultural heritage during armed conflict and take into account the experience of other states in this field. Particular attention should be paid to the issue of implementation of compensation mechanisms for damage to cultural heritage objects.

Today, Ukrainian national law does not contain provisions that would allow for a qualitative assessment of damage to cultural property during the armed conflict that would meet international standards. This is especially true for objects of Ukraine's movable cultural heritage. However, the existing norms of international law, mechanisms and instruments used by the international community in the past could contribute to the development of an appropriate mechanism for the restitution of cultural property in Ukraine. This mechanism includes the possibility of return or initiation of compensation through legal proceedings, as a result of bilateral and multilateral consultations, negotiations and enshrining this mechanism in relevant treaties, etc. The proposed document contains a study of the existing instruments and mechanisms for the protection of cultural property and its restitution used by the international community in the past, as well as proposals for the future mechanism in Ukraine.

¹ <https://mfa.gov.ua/en/about-ukraine/cooperation-international-organizations/unesco/ukraine-unesco>



1 Protection of cultural property in the event of armed conflict

1.1. Defining cultural property as an object of protection and restitution in accordance with legislation of Ukraine and international humanitarian law

National legislation and international law use different definitions of cultural property. This is due to the subject matter, the purpose of regulation, the peculiarities of the legal regime, and the correlation of sources. The purpose of national legislation in general is to ensure the regulation and protection of cultural property. The purpose of international humanitarian law and its implementing rules is to protect cultural property during armed conflict, while the purpose of restitution rules is to return cultural property or compensate for damage resulting from the loss of cultural property both in connection with armed conflict and in other circumstances. Given the existence of different legal regimes and different sources, it is important to clarify differences and gaps, especially with regard to restitution issues. This should take into account: (1) the place of international treaties in the national legal system, for Ukraine – through the prism of Article 9 of the Constitution of Ukraine; (2) the relationship between special and general rules and regimes; (3) the existence of special regulation of restitution in international and national law; (3) the application (prospects for application) of special mechanisms of restitution and compensation in relation to the cultural heritage of Ukraine; (4) the peculiarity of restitution of cultural property and implementation of compensation mechanisms depending on the circumstances (colonial period, World War II, aggression of the Russian federation against Ukraine).

Legislation of Ukraine.

An object of cultural heritage is a place of interest, a building (a work of art), a complex (ensemble), their parts, movable objects associated with them, as well as territories or water bodies (underwater cultural and archaeological heritage objects), and other natural objects, natural-anthropogenic or man-made objects, regardless of their preservation state, which have survived to the present day and preserved archaeological, aesthetic, ethnological, historical, architectural, artistic, scientific or artistic value and have retained their authenticity (Art. 1 of the Law of Ukraine “On Protection of Cultural Heritage”).

According to Article 1 of the Law of Ukraine “On the Export, Import and Return of Cultural Property”,² cultural property is an object of material and spiritual culture that has

² The Law of Ukraine “On the Export, Import and Return of Cultural Property”, of 21.09.1999 No. 1068-XIV: as amended on 1 January, 2023, URL: <https://zakon.rada.gov.ua/laws/show/1068-14#Text>



artistic, historical, ethnographic and scientific significance and is subject to preservation, reproduction and protection in accordance with the legislation of Ukraine, namely: original artistic works of painting, graphics and sculpture, artistic compositions and assemblages of any materials, works of decorative and applied and traditional folk art; objects related to historical events, development of society and the state, history of science and culture, as well as those related to the life and activities of prominent figures of the state, political parties, public and religious organisations, science, culture and art; objects of museum value found during archaeological excavations; components and fragments of architectural, historical, artistic and monumental monuments; old books and other publications of historical, artistic, scientific and literary value, individually or in a collection; manuscripts and incunabula, old prints, archival documents, including film, photo and audio documents, individually or in a collection; unique and rare musical instruments; various types of weapons of artistic, historical, ethnographic and scientific value; rare postage stamps, other philatelic materials, individually or in collections; rare coins, orders, medals, seals and other collectibles; zoological collections of scientific, cultural, educational, academic or aesthetic value; rare collections and specimens of flora and fauna, mineralogy, anatomy and paleontology.

Article 1 of the Law of Ukraine “On Museums and Museum Affairs” states that cultural property is objects of material and spiritual culture that have artistic, historical, ethnographic and scientific significance and are subject to preservation, reproduction, and protection, the list of which is defined by the Law of Ukraine “On the Export, Import and Return of Cultural Property”. Museum objects of the Museum Fund of Ukraine are cultural property permanently stored on the territory of Ukraine and abroad or subject to return to Ukraine under international agreements (Article 15 of the Law of Ukraine “On Museums and Museum Affairs”).

Documents of the National Archival Fond are cultural property in accordance with part 2 of Article 4 of the Law of Ukraine “On the National Archival Fond and Archival Institutions”.

Paragraph 30 of the Order of the Ministry of Defence of Ukraine “On Approval of the Instruction on the Procedure for Implementation of International Humanitarian Law in the Armed Forces of Ukraine” defines cultural property as objects of great importance for the cultural heritage of peoples and playing an important role in the spiritual life of people (architectural and historical monuments, works of art, religious or secular monuments, archaeological sites, museums, libraries, archives, theatres, etc.)

International law.

The definition of cultural heritage is contained in Article 1 of the 1970 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, which states *“monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings : groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science ; sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.”*



IHL uses a broad concept of “cultural property”. This concept encompasses and combines both “cultural heritage (movable, immovable)” and purely “cultural property” as defined in Ukrainian legislation.

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 distinguishes three groups of cultural property, irrespective of their 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** centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as centres containing monuments’ (Article 1 of the Convention).

Also in force is the provision of Article 56 of the Regulations concerning the Laws and Customs of War on Land, which is an annex to the Convention (IV) respecting the Laws and Customs of War on Land of 1907, according to which “*all seizure of, destruction or wilful damage done to institutions of this character [property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences], historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.*”

Article 53 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977, prohibits:

- a** to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- b** to use such objects in support of the military effort;
- c** to make such objects the object of reprisals

Paragraph A of Rule 40 of Customary International Humanitarian Law prohibits all seizure of, or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science.

Article 1 of the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property defines cultural property as property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science. A similar definition of cultural property is contained in Article 2 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.



1.2. Protection and restitution of cultural property in international humanitarian law

The issue of protecting cultural heritage has been addressed in world politics since the times of the Ancient World.

For the first time, the norms on the protection of cultural property during armed conflicts were enshrined during the US Civil War (1861-1865) in the so-called Lieber Code.³ The norms set out in the Code identify cultural property as private property that should not be used for military purposes. Accordingly, the issue of using a compensation mechanism for damage to cultural heritage objects within the framework of this Code is considered as a matter of compensation for private property and was addressed by the relevant documents and acts that existed at the time.

Later, the issue of protection of cultural property was mentioned in the Hague Conventions of 1899 and 1907, which required parties to the conflict to refrain from looting and prohibited the seizure, destruction, or intentional damage to cultural property. In fact, the issue of compensation was not directly enshrined in the texts, but by providing for the prohibition and prosecution of violations, including those involving cultural property, the Hague Conventions of 1899 and 1907 became the basis for establishing the relevant mechanisms of compensation for cultural property and the further development of relevant mechanisms.

For example, the Treaty of Versailles, in its Article 245, provided for the implementation of the two Hague Conventions, requiring Germany to return to France all works of art and other cultural objects stolen during the war.⁴ Although there have been no legal proceedings for destruction and damage to cultural property, acts of appropriation and looting since the First World War, such actions have already been condemned as violations of international law. This condemnation, coupled with post-conflict general restitution procedures, was a significant step towards a clearer vision of international protection of cultural property.

In 1935, the Roerich Pact,⁵ or Treaty for the Protection of Artistic and Scientific Institutions and Historic Monuments,⁶ was promulgated in Paris, which was aimed at protecting and preserving cultural property, including in armed conflict. It was the first document to prioritise the protection of cultural property over the principle of military necessity. However, this document did not enshrine the issue of compensation in the event of destruction, damage, or ruination of cultural property.

During World War II, there was widespread destruction and looting of cultural property, which further emphasised the need to regulate the protection of cultural heritage, including the issue of return and compensation mechanisms. A similar demand arose during the conflicts in Yugoslavia, Syria, Mali, and other regions, when through international treaties, the international community attempted to minimize the damage caused by armed conflict.

³ Instructions for the government of armies of the United States, in the field – General Order №100, 1863: <https://archive.org/details/governarmies00unitrich/page/n5/mode/2up>

⁴ Treaty of Versailles, the Allied and Associated Powers and Germany, Part VIII. Reparation, 1919: https://en.wikisource.org/wiki/Treaty_of_Versailles/Part_8

⁵ The Roerich Pact was not fully supported by the states of the time (despite the support of the League of Nations), only 21 states signed the treaty, of which 10 ratified it (mainly North and South America).

⁶ Treaty for the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), 1935: https://zakon.rada.gov.ua/laws/show/995_191#Text



If we talk about international institutions or organisations whose purpose was to protect and preserve cultural property, we should mention the League of Nations, which existed until 1945. It had an advisory body in its structure, the Committee on Intellectual Cooperation, or the International Committee on Intellectual Cooperation. The main task of the Committee was to promote intercultural dialogue, education, science, culture, and language. Within the scope of its goals and objectives, the Committee was involved in the development of the International Convention for the Protection of Literary and Artistic Works (1928), as well as the establishment of the European Institute for Cultural Cooperation in 1925, which aimed to strengthen cooperation between European countries in the field of culture, language, and education. The Committee also worked to develop international standards in education and science and facilitated the exchange of intellectual resources and ideas. However, after the outbreak of World War II, the Committee's activities were suspended, and it was officially dissolved in 1946. Many of the tasks previously carried out by the International Committee were later delegated to the relevant specialised agencies of the United Nations, including UNESCO.

Numerous devastating local or regional conflicts and the terrible consequences of the two World Wars have provided a significant impetus for rethinking the issue of the protection of cultural heritage at the national and international levels, in particular through the codification of legal norms for the protection of cultural heritage at the international level, and the establishment of new international and regional organisations designed to enrich and protect the cultural heritage of humanity.

To date, there are a number of international treaties that form a conditional system of international legal protection of cultural property during armed conflict. As of today, this system is formed as follows:

- The Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and its two Protocols of 1954 and 1999 respectively.
- Additional Protocol I of 1977 to the Geneva Conventions of 1949 (Articles 52,⁷ 53,⁸ 85(4)(d)).⁹
- Additional Protocol II of 1977 to the Geneva Conventions of 1949 (Article 16¹⁰).
- The Rome Statute of the International Criminal Court (Articles 8(2)(a)(iv), 8(2)(b)(ix), 8(2)(b)(xiii), 8(2)(b)(xvi), 8(2)(e)(iv), 8(2)(e)(v), 8(2)(e)(xiii), and Article 7(1)(h) in certain cases).¹¹
- Customary IHL Rules (rules 38-41).¹²

7 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 52: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F08A9BC78AE360B3C12563CD0051DCCD4>

8 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 53: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=D76C3391F1A412C5C12563CD0051DCEB>

9 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 85(4)(d): <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=73D05A98B6CEB566C12563CD0051E1A0>

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 16: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=23F37F921C55419EC12563CD0051E8DD>

11 Rome Statute of the International Criminal Court, 1998: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

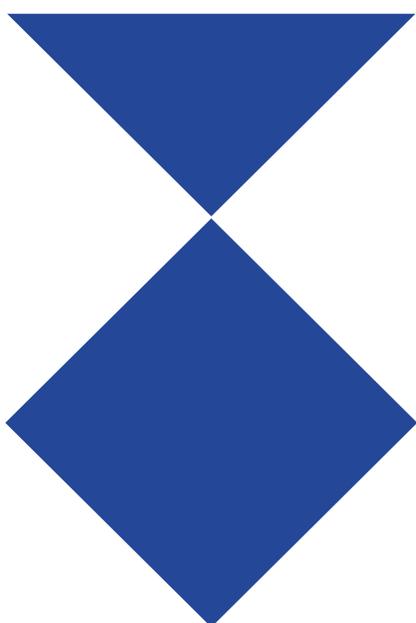
12 Customary IHL Database: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul



- The Hague Regulations concerning the Laws and Customs of War on Land of 1907 to the Convention (IV) respecting the Laws and Customs of War on Land (Art. 27¹³)

The system also includes selected conventions of UNESCO and other international organisations that deal with cultural property (UNIDROIT, ICRROM, etc.).

The 1954 Convention is the main international treaty protecting cultural property during armed conflict. Most of the provisions set out in the Convention are part of customary international law, which in turn allows certain provisions of the treaty to be applied to states that are not parties to the Convention.¹⁴ Even in the case of non-accession to the 1954 Convention or any of its Protocols, the state is not exempt from the obligation to protect cultural heritage during armed conflict in accordance with customary international humanitarian law. In case of violation of such an obligation, the state must be held accountable (for more details on the mechanisms of accountability and compensation mechanisms, see Section 1.4).



The 1954 Convention establishes certain instruments and regimes for the protection of cultural property. In particular, Article 6 of the Convention establishes a special distinctive emblem for cultural property. The emblem looks like a blue and white shield and indicates the existence of international legal protection for a cultural property and/or the area around that property. The designation of a cultural heritage object is not mandatory for states, but in regions with high political and security tensions, it is recommended to install such symbols. However, even without special designations, cultural property still has its own (international) legal protection as part of cultural heritage. There is also a prohibition on the misuse of the emblem.¹⁵

A cultural property may also receive a higher protection regime when it is included in certain national lists of important monuments or in international lists. Higher status implies a higher degree of protection and establishes stricter rules and obligations to care for and protect such property. According to the 1954 Convention and its Protocol, there are two categories of higher protection: special protection and enhanced protection.

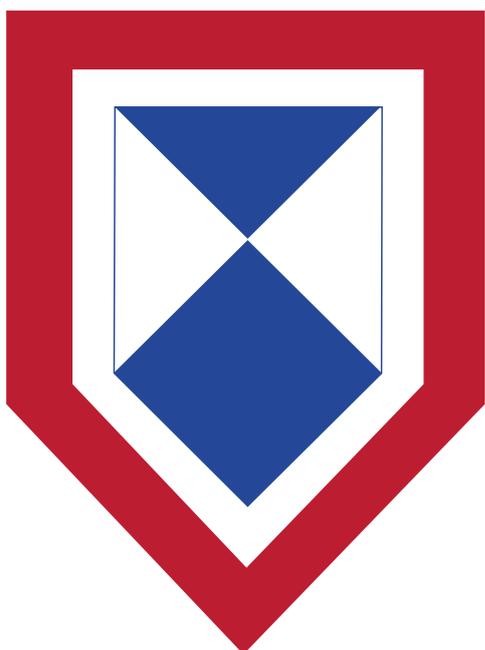
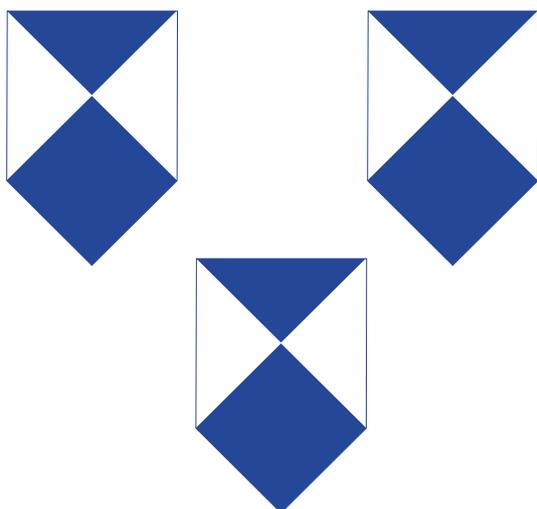
Special protection is provided for centres containing monuments, immovable cultural property of great importance and refuges intended to shelter movable cultural property in the event of armed conflict.¹⁶ The UNESCO Committee for the Protection of Cultural Property in the Event of Armed Conflict decides whether to (not) grant the request of a State Party.

¹³ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907: <http://surl.li/rbml>

¹⁴ Roger O'Keefe, Camille Péron, Tofiq Musayev, and Gianluca Ferrari, Protection of Cultural Property: Military Manual (International Institute of Humanitarian Law and UNESCO 2016) (hereafter: UNESCO Military Manual), 4.

¹⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention The Hague, 14 May 1954, Article 8: <http://surl.li/ruyyk>

¹⁶ UNESCO Military Manual (2016), p. 68



The emblem for cultural property under special protection consists of three blue shields and is a mandatory requirement for marking such property.¹⁷

As the system of special protection had only limited success, the Second Protocol to the 1954 Convention introduced a new system of protection for cultural property.

The concept of enhanced protection of cultural property is set out in the Second Protocol of 1999 to the 1954 Convention. Enhanced protection is applied to heritage of the highest importance for humanity, at the request or recommendation of a High Contracting Party, or upon designation by other parties or expert organisations.¹⁸ The UNESCO Committee for the Protection of Cultural Property in the Event of Armed Conflict decides on the listing of the nominated property.¹⁹

The emblem used to designate heritage under enhanced protection (created in 2015) is the original emblem of a blue shield with a white and thick red line around it. States are not obliged to mark cultural property under enhanced protection.

If a cultural property has been granted both special and enhanced protection at the same time, only the provisions on enhanced protection shall apply.²⁰

¹⁷ supra 15, Article 10

¹⁸ Articles 10 and 11 of the 1999 Second Protocol to the 1954 Convention: <https://ihl-databases.icrc.org/en/ihl-treaties/hague-prot-1999/article-10?activeTab=undefined>; <https://ihl-databases.icrc.org/en/ihl-treaties/hague-prot-1999/article-11?activeTab=undefined>.

¹⁹ Article 27 of the 1999 Second Protocol to the 1954 Convention: <https://ihl-databases.icrc.org/en/ihl-treaties/hague-prot-1999/article-27?activeTab=undefined>.

²⁰ Article 4 of the 1999 Second Protocol to the 1954 Convention: <https://ihl-databases.icrc.org/en/ihl-treaties/hague-prot-1999/article-4?activeTab=undefined>.



1.3. Regulation of return/restitution of cultural property under the legislation of Ukraine

With respect to return/restitution of cultural property, there is a special Law of Ukraine of 21 September 1999 No. 1068-XIV “On the Export, Import and Return of Cultural Property”.²¹ The Law defines the **return** of cultural property as a set of actions related to the **import** into the territory of Ukraine or **export** from the territory of Ukraine to the territory of other states of cultural property in accordance with **claims and appeals** of Ukraine, other states, their authorised bodies, decisions of courts of Ukraine or foreign states.

It is quite clear that the return of cultural property is a complex and multifaceted process that is difficult to define succinctly and concisely. At the same time, the current definition needs to be interpreted, in particular, based on the fact that it separates actions in accordance with “claims” and “court decisions”. Since the Ukrainian legal system cannot take actions to transfer property solely on the basis of a “claim” and such actions will require a “court decision”. It is quite possible that the legislator had in mind the analogy of a “claim”, which is inherent in European legal systems.

The Law also contains only a few general provisions on application during “wars and armed conflicts”. In particular, paragraphs 8-10 of Article 3 are applicable to the international armed conflict between the Russian Federation and Ukraine, which apply namely to:

- **illegally exported** cultural property of Ukraine that is outside its territory;
- cultural property **evacuated** from the territory of Ukraine during wars and armed conflicts and not returned;
- cultural property **temporarily exported** from the territory of Ukraine and **not returned** to Ukraine.

As we can see, the Law singles out evacuation as a separate characteristic of Ukraine’s cultural property. At the same time, it is obvious that the Law refers to any export of Ukraine’s cultural property during armed conflicts as a general provision. This means that all cultural property of Ukraine that is outside its borders in connection with an armed conflict is subject to return and is illegally exported. The same applies to the list of cultural property to be returned to Ukraine in accordance with Article 4 of the Law.

Thus, the Law of Ukraine “On the Export, Import and Return of Cultural Property” does not distinguish cultural property illegally exported from the territory of Ukraine during armed conflicts as a separate category.

In other words, the general provisions of the Law should be applied to the cultural property of Ukraine exported during the Russian aggression against Ukraine. At the same time, no attention is paid to the circumstances of such export (war), as well as possible collateral damage, losses, comprehensive direction and purpose, etc. It is worth noting that overall, the term “restitution” is absent in Ukrainian legislation. One of the arguments for using the generalised term “return” is that it can be considered in a broader context, which also includes acts of goodwill.²²

²¹ The Law of Ukraine “On the Export, Import and Return of Cultural Property”, as amended on 31.12.2023: <https://zakon.rada.gov.ua/laws/show/1068-14#Text>

²² Return and restitution of cultural property in the political and cultural life of Ukraine (XX — early XXI centuries): monograph / Serhii Kot. — Kyiv: Institute of History of Ukraine of the National Academy of Sciences of Ukraine, 2020. <http://surl.li/ruzdw>



Given the volume of Ukrainian cultural property exported by the aggressor state, the systematic nature of such actions, on the one hand, and the lack of a systematic, verified database or register of Ukrainian cultural property, on the other, it is necessary to create effective mechanisms for its return. This justifies the creation of a special regulatory framework for the mechanism of restitution of cultural property during the Russian aggression against Ukraine.

It is worth noting that Ukraine has had experience in creating a National Commission for the Return of Cultural Property to Ukraine.²³ Also, since Ukraine's independence, there have been several legislative initiatives on the restitution of cultural property, but to date there is no single bill on restitution.²⁴

The current Ukrainian legislation is not in line with the global trends in the return of cultural property, and there is no comprehensive state policy on the issue.²⁵ It is important to have a comprehensive policy and regulation, which would include: (1) a comprehensive state policy on these issues, taking into account the consequences of the Russian aggression against Ukraine; (2) creation of general and special bodies for the return/restitution of cultural property; (3) regulation of the return of cultural property from the territory of Ukraine to other states; (4) regulation of the exchange of information on cultural property and the circulation of cultural property.

As a result, Ukraine lacks a state register of lost cultural property and even a unified electronic database of museum collections. However, without them, the return and even prevention of new losses of cultural property becomes an extremely difficult task.

At the same time, digital photocopies of the inventory books of the main fund of museums, historical and cultural reserves (regardless of ownership), which store museum objects that are state property and belong to the state part of the Museum Fund of Ukraine, can be effectively used. The National Museum of History of Ukraine is the custodian of electronic media of the above mentioned information.²⁶

Thus, the issue of developing effective mechanisms for the return of cultural property should be dealt with by the state, i.e., **it is necessary to focus on improving Ukrainian legislation and creating a separate institution** that could implement state policy on the restoration and preservation of national heritage, the return of cultural property to Ukraine, and coordinate the activities of central executive authorities, departments, institutions and other interested organisations on these issues. The development of a separate state strategy will also be a prerequisite for establishing effective mechanisms. In doing so, we should take into account the experience of other countries.

It is also worth emphasising that Ukraine should show interest in returning not only state-owned cultural property, but also private property that was removed from the territory of Ukraine during Russia's armed aggression.

23 Resolution "On Approval of the Regulation on the National Commission for the Return of Cultural Property to Ukraine", expired on 05.10.1996: <https://zakon.rada.gov.ua/laws/show/464-93-r>

24 The Restitution Project. Svitlana Fomenko: "Russia's systematic robbery of Ukraine began long before World War II" / LB.ua, 5 February 2019: https://lb.ua/culture/2019/02/05/418837_proekt_restitutsiya_svitlana.html

25 The Restitution project: what European museums return and to whom they return, and what experience Ukraine adopts / LB.ua, 23 January 2019: https://lb.ua/culture/2019/01/23/417776_proekt_restitutsiya.html

26 Order of the Ministry of Culture of Ukraine No. 943 "On some issues of accounting for the state part of the Museum Fund of Ukraine" of 05.11.2014: <https://zakon.rada.gov.ua/laws/show/z1445-14#Text>



1.4. General description of forms of compensation mechanisms for cultural property

The issue of compensation mechanisms is one of the most debated in the international community, including in relation to the situation with cultural property in Ukraine. Despite all the existing international treaties, instruments, and discussions, there is no mechanism for compensation for damage to cultural heritage objects as such. There are certain possibilities for compensation through the generalization of cultural property to private property or civilian objects in general, but no more. In addition, the fact that the texts of international treaties or national regulatory and legal acts do not always clearly distinguish and logically interpret the term “compensation mechanism” and other derivatives such as “reparation”, “restitution”, “substitution”, “compensation”, “satisfaction”, etc. adds an extra challenge. After all, what actions were taken against the cultural heritage object (destruction, appropriation, theft, transfer, etc.) will determine what type of “compensation mechanism” will be used and what norms will be used to regulate the issue, i.e. public or private law.

In general, the term “**compensation mechanism**” should be understood as “something that is returned to someone for the damage done; to give someone something else to replace what has been lost, stolen, destroyed, etc.; to cover expenses, losses with something else.”²⁷ This definition, despite all possible shortcomings, provides a framework for the interpretation of the following terms (mentioned in the paragraph above). The forms of compensation mechanisms set out in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law²⁸ are restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

The term “**restitution**”.

From a purely legal point of view, the concept of *restitution* implies the return of an object to its rightful owner in accordance with what is provided by law, or the restoration of material assets in kind, the same or similar assets, or things of the same value.²⁹ If they cannot be returned in kind, their value in money is compensated. Restitution must also be proportionate to the gravity of the violations and the damage caused. As a rule, the quantity of property, amount, or other things subject to restitution are determined under the terms of a peace agreement between the parties to the conflict upon its completion. One of the types of restitution is substitution, which generally means “the return (or replacement) of property that has been damaged or destroyed with similar and equivalent things (items), but in cases where restitution is not possible.”

The mechanism of restitution is regulated by the 1995 UNIDROIT Convention,³⁰ which enshrines the obligation of States Parties to observe the same regime for the restitution of stolen or illicitly exported cultural objects, and allows for the consideration of

27 Verbatim translation of the definition given in SlovnkyUA: <https://slovnky.ua/index.php?swrd=%D0%B2%D1%96%D0%B4%D1%88%D0%BA%D0%BE%D0%B4%D0%BE%D0%B2%D1%83%D0%B2%D0%B0%D1%82%D0%B8>

28 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law / General Assembly resolution 60/147, 15 December 2005: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>

29 Article 35 of the Draft Articles on State Responsibility

30 As of February 2024, Ukraine has not acceded to the Convention. The Russian Federation is a signatory state, but has not ratified the provisions of the treaty.



restitution claims directly through national courts. In addition, the UNIDROIT Convention also extends its provisions to all stolen cultural objects, not just those inventoried and declared, and stipulates that all cultural property must be returned.

However, restitution is inappropriate when the owner does not want to own a particular object of (in)tangible cultural heritage. For example, some communities, such as the Rai Coast people in Papua New Guinea, refuse to claim their own cultural heritage objects because they believe that it is not the objects but the circulation of these objects that embody their culture. Accordingly, for the residents of the Rai Coast, restitution would mean a break in relations and an impoverishment of cultural heritage, rather than the opposite.³¹

The term “**reparations**”

Reparations are full or partial compensation mechanism (under a peace treaty or other international acts) by the state that started the war for the damage caused to the state that was attacked. When determining the form of compensation mechanism, the first priority is restitution itself, which in turn is part of reparations. Reparations as a mechanism of compensation are mentioned in the First Protocol of 1954 to the 1954 Convention, which expressly prohibits the expropriation of cultural property by invasion of armed forces in response to a country’s violation of its international obligations.³² In other words, this provision prohibits the transformation of cultural property into spoils of war and there is an obligation to return these properties to their owners after the conflict.

The term “**rehabilitation**”

This type of compensation mechanism cannot be applied directly to cultural heritage objects, but should be applied to cultural heritage professionals, employees of cultural institutions, museums, theaters, archives, galleries, etc. and direct bearers of intangible cultural heritage. In particular, rehabilitation allows for the provision of necessary medical and psychological assistance, as well as legal and other social services, if necessary and agreed upon.

The term “**compensation**”

Compensation is essentially a material compensation mechanism for any economically assessable damage, appropriate and proportionate to the severity of the violation and the circumstances of each case (e.g., physical or moral harm, lost opportunities, earnings, social benefits, education, etc.) Compensation can be either in the form of cash payments or in the form of pro bono services to support the community or area that has suffered economic losses. In the latter case, for example, it can be the restoration of cultural institutions, organization of events to support artists, awareness-raising activities, etc.

In the case of cultural heritage, the issue of compensation may concern employees of cultural institutions, such as museums, galleries, archives, theaters, etc., who have lost their jobs due to the destruction or looting of cultural property.

31 Brown MF. Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property. *International Journal of Cultural Property*. 2005: <https://www.cambridge.org/core/journals/international-journal-of-cultural-property/article/abs/heritage-trouble-recent-work-on-the-protection-of-intangible-cultural-property/5E95AF9EA1EA9BA5851B6E-6A131CCD3F>

32 Article 3 of the First Protocol to the 1954 Convention



The term “**satisfaction**”

Satisfaction is a symbolic compensation mechanism and is usually the last thing to be addressed, but in terms of meaning and content, it is perhaps the most important in reconciliation policy issues. Satisfaction can be expressed in various forms, including through the realization of the right to the truth about the circumstances of the violation, search for the missing and dead, identification and reburial of bodies at the request of families and communities, commemoration of victims of the violation, establishment of memorial dates, official statement, public hearings or apology for the violation, judicial and administrative sanctions against those responsible for the violation.

The term “**non-repetition guarantees**”

Non-repetition guarantees, as the name implies, mean certain actions or measures that prevent anyone from committing a violation of the same or similar content in the future.

For example, the non-repetition guarantee includes adherence to international standards and good practices in proceedings against victims and perpetrators, strengthening the judiciary, providing adequate protection and assistance to victims, survivors or witnesses of crimes, introducing lessons on international law, in particular IHL and IHRL, in school or higher education courses, promoting mechanisms for the prevention and monitoring of social conflicts and their resolution, reviewing and reforming laws that facilitate or allow gross violations of international law, etc.

In the case of cultural heritage, this type of compensation mechanism can take the form of improving mechanisms for protecting cultural heritage objects, harmonizing national and international law, developing effective mechanisms and tools for finding and returning cultural property, training specialized personnel, creating a special unit for cultural heritage within law enforcement or security agencies, etc.



2

International experience in applying mechanisms of return/restitution of cultural property

2.1. Intergovernmental negotiations on the return/restitution of cultural property

Intergovernmental negotiations are the most commonly used means of resolving disputes over the return/restitution of cultural property.³³ The fact that a party to a dispute may choose to negotiate does not mean that legal norms will be ignored or overlooked.

The legal basis for intergovernmental negotiations on the return/restitution of cultural property is the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention), the UNIDROIT 1995 Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention), and European Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State.

After World War II, states actively used negotiations as a means of resolving disputes over the return and restitution of cultural property, for which purpose bilateral agreements were adopted and bilateral commissions were established. On 15 February 1993, an intergovernmental agreement was signed between Ukraine and Germany on cultural cooperation. The document dealt, in particular, with the return of lost or illegally exported cultural property to owners or their heirs. On 13 July 1993, a bilateral protocol was signed on the problems of cultural property lost or illegally transferred during World War II and in the following years.³⁴ The document provided for the establishment of the Intergovernmental Ukrainian-German Commission on the Return of Cultural Property. Also, intergovernmental bilateral commissions were established: the Ukrainian-Russian, Ukrainian-German, Ukrainian-Polish, and Ukrainian-Hungarian commissions on restitution.³⁵

³³ Chechi Alessandro. Plurality and Coordination of Dispute Settlement Methods in the Field of Cultural Heritage. In *Enforcing International Cultural Heritage Law*, edited by Francesco Francioni and James Gordley. Oxford University Press. 2013. P. 188.

³⁴ Soloshenko V.V. The problem of returning cultural property. European and world practice of achieving consensus and national unity: an algorithm for Ukraine. Analytical report / Kudriachenko A.I., Metelova T.O., Soloshenko V.V., pp. 57-82.

³⁵ Ukrainets N.P. The problem of returning cultural property to Ukraine. *Modern Ukrainian politics. Politicians and political scientists about it.* K., 2010. Issue 19. P. 286



In December 1998, the International Washington Conference on Holocaust-Era Assets was held, organized by the U.S. State Department. It was attended by representatives of more than 40 countries and Jewish organizations, who developed 11 provisions of the International Agreement. The provisions of the Agreement concerned the need to identify works of art looted and confiscated during the Nazi rule and to search for their pre-war owners or heirs. It was also stipulated that museums in the signatory states should check their collections for their origin and determine whether they contain cultural objects that were illegally alienated during the rule of the National Socialists.³⁶

In March 2001, the Russian Federation and Belgium reached an agreement on the return to Belgium of military archives stolen by the Nazis during World War II and then taken by Soviet troops to Moscow. The Russian authorities agreed to return the archives to Belgium on the condition that the costs of their maintenance be compensated.³⁷

Another example is the return of a bronze bell from the United States to Japan to strengthen cooperation between the two countries. The bell, which belonged to a 15th-century Buddhist temple on Okinawa, was seized by U.S. Marines in 1945 and displayed as a war trophy at the Virginia Military Institute. The bell was returned in 1991 and was presented by the press as “*a gesture by the United States to help the region restore its culture.*”³⁸

Cultural sanctions are a powerful tool for states wishing to recover cultural property, and there are many cases where governments have used them to put pressure on another state, a party to a dispute.³⁹ Cultural sanctions can be used by states seeking the return of cultural property as leverage either before negotiations (to force the other party to negotiate) or during negotiations (to force the other party to make concessions and reach an agreement). In these cases, such sanctions work as negotiating tools that enhance the bargaining power of the state that requests their use. Thus, they can also change the balance of power during negotiations.

In 2009, the Louvre returned to Egypt 5 fragments of frescoes that had been illegally taken from the tomb in the Valley of the Kings. The return took place only after Egypt suspended its cooperation with the museum in holding exhibitions, cancelled a lecture in Egypt by a former Louvre curator, and suspended excavations in the Saqqara necropolis sponsored by the Louvre.⁴⁰

There are also cases in which international organizations have intervened to assist governments in recovering stolen artifacts. For example, in 1995, UNESCO asked the Metropolitan Museum of Art to return a Buddha sculpture on behalf of Afghanistan. Also, UNESCO assisted Cambodia in its attempt to return a set of sculptures from Koh Ker that were in auction houses (Sotheby's) and museums (Metropolitan Museum).

36 Soloshenko V.V. Research on the origin of lost cultural property (experience of the Federal Republic of Germany). Scientific works of the Faculty of History of Zaporizhzhia National University. Zaporizhzhia: ZNU, 2015, Issue 44, volume 2, pp. 119-123.

37 Practice relating to Rule 41. Export and Return of Cultural Property in Occupied Territory // <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule41#f520ef58-1db0-4c82-857e-33dac905b59c>

38 Honan W. A 1465 Bell, War Booty, to Go Back to Okinawa. New York Times, 6 April 1991. <https://www.nytimes.com/1991/04/06/arts/a-1465-bell-war-booty-to-go-back-to-okinawa.html>

39 Shehade, M., Fouseki, K. The Politics of Culture and the Culture of Politics: Examining the Role of Politics and Diplomacy in Cultural Property Disputes. International Journal of Cultural Property. 2016. 23(4), P. 363. doi:10.1017/S0940739116000308

40 Shyllon Folarin. Looting and Illicit Traffic in Antiquities in Africa. In Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property, edited by S. Manacorda and D. Chappell. New York. Springer. 2011. P. 135-142.



UNESCO promotes the use of negotiations for the return/restitution of cultural property as a means of peaceful settlement of disputes through the activities of the Intergovernmental Committee. The UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its States of Origin or its Restitution in case of Illicit Appropriation⁴¹ facilitates bilateral negotiations on the restitution or return of cultural property to its states of origin and ensures multilateral and bilateral cooperation on this issue.⁴² To this end, the Committee may also submit proposals to interested Member States for mediation or conciliation. The Committee also promotes multilateral and bilateral cooperation for the restitution and return of cultural property to the states of origin. The Committee provides mediation services between States in conflict over the return or restitution of cultural property when the provisions of the 1970 UNESCO Convention are not applicable. Prior to submitting a complaint to the Committee, the complaining State must initiate bilateral negotiations with the State in which the cultural property in question is located. Only if these negotiations fail or are interrupted can the case be referred to the Committee. At its 33rd session, the UNESCO General Conference adopted the Strategy to Facilitate the Restitution of Stolen or Illicitly Exported Cultural Property.⁴³ This strategy clearly defines the mediation and conciliation functions of the Committee. In September 2010, at its 16th session, the Committee considered and adopted the Rules of Procedure for Mediation and Conciliation.⁴⁴ The Rules of Procedure provide for confidential communication on relevant political, diplomatic, legal and financial matters between mediators and conciliators and each of the parties. In 1981, the Committee developed a “Standard Form for Requests for Return or Restitution”⁴⁵ to be completed by both parties.

In 2006, at the initiative of the Republic of Tanzania, a request was submitted to the Committee for the return of the Makonde ritual mask, which was stolen in 1984 from the National Museum in Dar es Salaam and is now stored in the Barbier-Muller Museum in the Swiss Confederation. Tanzania filled out a standardized form for requests for return or restitution and provided the necessary documentary evidence. The request for restitution was transmitted by UNESCO to Switzerland on 31 May 2006, with all the relevant documents. In 2010, the Makonde mask was returned by the Barbier-Muller Museum in Geneva, Switzerland, to the United Republic of Tanzania.⁴⁶

Examples of returns and restitution achieved as a result of litigation and bilateral negotiations include: (1) in April 2008, 156 cultural relics illegally exported to Denmark were returned to China after China filed a request for their return with a local court in Denmark; (2) in April 2008, Syria returned to Iraq about 700 ancient artefacts, including gold coins and jewellery, which had been stolen after the US intervention in Iraq; (3) in March 2009, the Netherlands agreed to return to Ghana the head of King Badu Bonsu II, who was allegedly executed by Dutch troops in the 1830s. Authorities of the two countries are negotiating to conclude the best possible arrangements for the return of the head to the community of origin for burial with full honours.⁴⁷

41 Founded in 1978 by Resolution 4/7.6/5 of the 20th session of the General Conference B-XB3383 - UNESCO.

42 Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (2005) // <https://unesdoc.unesco.org/ark:/48223/pf0000145960>

43 Strategy to facilitate the restitution of stolen or illicitly exported cultural property // <https://unesdoc.unesco.org/ark:/48223/pf0000140517>

44 Rules of Procedure for Mediation and Conciliation in accordance with Article 4, paragraph 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation // https://unesdoc.unesco.org/ark:/48223/pf0000192534_eng

45 Standard Form concerning Requests for Return or Restitution // https://www.unesco.org/sites/default/files/medias/fichiers/2022/04/form_returnEN_FR_02%5B1%5D.pdf

46 Restitution of art: Some examples // <https://www.unesco.org/en/articles/restitution-art-some-examples>

47 Intergovernmental Committee for promoting the return of cultural property to its countries of origin or its restitution in case of illicit appropriation. CLT-2009/CONF.212/COM.15/2. March 2009.



Greece⁴⁸ and the United Kingdom are engaged in long-term bilateral negotiations on the return of cultural property. Greece is demanding that the British Museum reconsider its position on the Parthenon marbles, which have been kept in the museum since the early 19th century.⁴⁹ *“The [UNESCO] Committee urges the United Kingdom to reconsider its position and enter into a discussion with Greece, recognising that this is an intergovernmental issue – contrary to the British claim that it is a matter for the British Museum – and, most importantly, that Greece has legitimate grounds to demand the return of the sculptures to their place of origin.”* On 5 October 2021, the UNESCO Intergovernmental Commission at its 22nd session voted unanimously for the first time to include the return of the Parthenon sculptures in its recommendation documents.⁵⁰

With the assistance of the UNESCO Intergovernmental Committee, the case of the Bogazköy Sphinx was resolved, which had been the subject of a dispute between Turkey and Germany since 1975 and was resolved in 2010 with the signing of a memorandum of understanding and the return of the sphinx to Turkey.⁵¹

The UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its States of Origin or its Restitution in case of Illicit Appropriation in its recommendations calls on the States concerned to continue and intensify their efforts to resolve disputes concerning the return of cultural property or its restitution in case of illicit appropriation by peaceful means through bilateral negotiations, supplemented by other means such as mediation and conciliation.⁵²

The issue of the return of cultural property in the work of the UN General Assembly.

In 1997, during the debate at the UN General Assembly, Kuwait repeated the allegation that Iraqi soldiers had looted and plundered Kuwaiti cultural property during the armed conflict in the Persian Gulf. Kuwait appealed to UN member states to demand the return of Kuwaiti cultural property.⁵³ In turn, Iraq, during the debate at the UN General Assembly, stated that all cultural property taken by Iraq from Kuwait had either been returned or would be returned in the future.⁵⁴ The UN Security Council in its Resolution 1284 of 17 December 1999 on the situation between Iraq and Kuwait noted that Iraq had not yet fully fulfilled its obligation to return all Kuwaiti property seized by it as soon as possible and requested the UN Secretary-General to *“report every six months on the return of all Kuwaiti property seized by Iraq, including archives”*.⁵⁵ In 2000, the UN Secretary-General’s Report on the Return of Kuwaiti Property from Iraq stated that although

48 Greece has initiated negotiations with the United Kingdom on the return of the Parthenon marbles since 1983. Thanks to the efforts of the UNESCO Committee, this case has received wide publicity among the international community.

49 Machado Haertel, Leticia. The past, present: The Parthenon Sculptures dispute as an example of the ICPRCP’s role on claims barred by the non-retroactivity of the 1970 UNESCO Convention. *International Journal of Cultural Property*. 2021. 28, Nº 4. P. 479-504. <https://doi.org/10.1017/S0940739121000424>.

50 Gareth Harris. The British Museum should review its position on the Parthenon Marbles, the Unesco body says. *The Art Newspaper* // <https://www.theartnewspaper.com/2021/10/04/british-museum-should-review-its-position-on-the-parthenon-marbles-unesco-body-says>

51 Prött Lyndel. The Sphinx within the Wall: A Tale of Two Germanies and Three Sphinxes. *Art Antiquity and the Law*. 2010. 15, Nº 2. P. 147-155.

52 Intergovernmental Committee for promoting the return of cultural property to its countries of origin or its restitution in case of illicit appropriation. CLT-2009/CONF.212/COM.15/2. March 2009.

53 Kuwait, Statement before the UN General Assembly, UN Doc. A/52/PV.55, 25 November 1997, P. 15

54 Iraq, Statement before the UN General Assembly, UN Doc. A/52/PV.55, 25 November 1997, P. 20.

55 UN Security Council, Res. 1284, 17 December 1999.



Iraq had returned a significant amount of property after the end of the Gulf War, there remained “many items that Iraq is obliged to return to Kuwait... priority should be given to the return by Iraq of Kuwaiti archives... and museum exhibits”.⁵⁶

In 2003⁵⁷ and 2006,⁵⁸ the UN General Assembly adopted resolutions on the return or restitution of cultural property to the states of its origin.

There are many examples of diplomats, ambassadors and other government officials intervening in disputes over cultural property. In many cases, such interventions have helped to resolve the problem and break the deadlock in negotiations, such as in the case between Peru and Yale University over the return of the Machu Picchu collection. When an agreement was not reached in 2007, Peru withdrew from the negotiations and filed a lawsuit in the United States against Yale University. Peruvian President Alan Garcia wrote a letter to US President Barack Obama “asking for help in returning the artefacts”.⁵⁹ The deadlock was broken thanks to the intervention of Christopher Dodd, a Democratic US senator from Connecticut who was a member of the Senate Foreign Relations Committee and chairman of the Subcommittee on Latin America. He met many times with Peruvian President Alan Garcia and other government officials, as well as with representatives of Yale University, to facilitate a settlement of the dispute. The Senator worked with both sides for many years, and in 2010 the lawsuit was withdrawn and the parties reached an agreement that also included extensive cooperation between the parties.⁶⁰

The use of negotiations as a means of peaceful settlement of international disputes concerning the return/restitution of cultural property is possible after the cessation of hostilities.

Negotiations as a means of peaceful settlement of international disputes and a means of returning or restitution of cultural property, including those that occur after armed conflicts, are used by states directly or through intermediaries, within the framework of international governmental and non-governmental organisations.

Many factors influence the success of negotiations on the return of cultural property, primarily political (political will) and legal (legal basis for claims).

2.2. International experience of military and law enforcement institutions in the return/restitution of cultural property

2.2.1. Military and paramilitary formations and institutions

NATO. NATO has actually started to consider the protection of cultural property as a separate issue within its military operations since 2012. Before 2012, cultural heritage within NATO was perceived more as a sub-element of the operational level of environmental protection and civil-military cooperation. In accordance with the recom-

56 UN Secretary-General, Second report pursuant to paragraph 14 of resolution 1284 (1999), UN Doc. S/2000/575, 14 June 2000.

57 UN General Assembly, Res. 58/17, 3 December 2003.

58 UN General Assembly, Res. 61/52, 4 December 2006.

59 Christoffersen J. Senator: Artefacts Held by Yale Belong to Peru. The San Diego Union-Tribune, 9 June 2010. <https://www.sandiegouniontribune.com/sdut-senator-artifacts-held-by-yale-belong-to-peru-2010jun09-story.html>

60 *ibid*



recommendations of the 2012 research,⁶¹ a separate directorate within NATO was created to formulate the organisation's policy on the protection of cultural property, develop and implement relevant tools and mechanisms.

NATO recognises the need to protect cultural property as an essential factor in the military dimension and one of the most important indicators of security, cohesion and identity of a society. In particular, the preamble to the North Atlantic Treaty states that NATO Allies are determined to defend the freedom, common heritage and civilisation of their people.⁶²

NATO's obligations to protect cultural property stem from both Alliance values and international law. For example, NATO's 2016 Policy on the Protection of Civilians states that the concept of "protection of civilians in Alliance operations and missions" should be understood to include the protection of not only persons but also objects and services, including cultural property. At the same time, NATO representatives explain that harm (even unintentional) to civilians and objects during operations calls into question the legitimacy of the operation itself, and can lead to further escalation of the situation and thus to negative consequences for the Alliance,⁶³ peace, security and stability.

The **NATO Directive on Implementing Cultural Property Protection in NATO Operations and Missions**⁶⁴ makes a similar point. The purpose of this document is to provide guidance and recommendations on the protection of cultural property in the preparation, planning and conduct of NATO operations and missions, training, education and evaluation.

The main documents on which this Directive is based include the 2016 NATO Policy on the Protection of Civilians and a number of international treaties, including:

- The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and its two Protocols of 1954 and 1999,
- The Geneva Conventions of 1949 and Additional Protocols,
- relevant resolutions of the United Nations Security Council (UNSC), as well as
- The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and related treaties, such as the 2001 Convention on the Protection of the Underwater Cultural Heritage and its Protocol, etc.

The Directive draws the attention of NATO member states to the obligation to comply with universally recognised provisions on cultural property (prohibition of destruction, ruination not justified by military purposes, prohibition of vandalism, theft, looting, etc., duty to protect, evacuate if necessary, etc.) and also insists on the inclusion of cultural heritage protection in the military manuals of NATO member states and non-NATO Troop Contributing Nations, military training programmes, preparation and implementation of

61 Cultural Property Protection in the Operations Planning Process / NATO Joint Analysis and Lessons Learned Centre, 20 December 2012: https://www.jallc.nato.int/application/files/6816/0261/3580/factsheet_cpp.pdf

62 The North Atlantic Treaty, Washington D.C. - 4 April 1949: https://www.nato.int/cps/en/natolive/official_texts_17120.htm

63 Cultural Property Protection / Office of the Secretary General - Human Security Unit, NATO, April 2019: https://static1.squarespace.com/static/5a8ece4b12abd9a4deae2dad/t/5cbf84baee6eb054eb5e596e/1556055233761/NA+TO+Factsheet_CPP.pdf

64 Implementing Cultural Property Protection in NATO Operations and Missions-1 / NATO, 1 April 2019: https://www.scribd.com/document/682774455/Bi-SCD-086-005-Implementing-Cultural-Property-Protection-in-NATO-Operations-and-Missions-1?doc_id=682774455&download=true&order=622059045



military operations at all stages. Separately, the Directive states the need to involve civilians in all processes of implementing the policy of protection of cultural property, including in the preparation of military operations and missions at the early stages.

Civilians are defined by the Directive as individual experts, scientific and research institutions, international organisations (UNESCO, Blue Shield International, ICOMOS, ICRC, UNODC, etc.), non-governmental organisations (ICOM, regional and local organisations) and governmental organisations (EU, Europol, ICCROM, etc.) with a focus on the protection of cultural property.

For example, during the campaign in Afghanistan (2014), the NATO leadership and the Afghan authorities signed an agreement on the status of NATO forces and personnel,⁶⁵ which provided for a mutually agreed procedure for concluding contracts between NATO and the Islamic Republic of Afghanistan. The agreement included two clauses on the protection of cultural property:

- NATO Forces operations and activities on Agreed Facilities and Areas shall be conducted with full respect for Afghan laws and regulations for the protection of sites or artifacts of historic and cultural heritage. NATO Forces Authorities shall notify and consult immediately with appropriate Afghan authorities through the Afghanistan-NATO Implementation Commission when sites or artifacts of historic and cultural heritage are discovered on an agreed facility or area (Article 5, paragraph 7);
- NATO Forces Authorities, working with relevant Afghan authorities, shall take appropriate measures to ensure that no items or material of cultural or historic significance to Afghanistan are being exported (Article 14, paragraph 3).

On the basis of this agreement, the French Institute in Afghanistan organised courses on cultural heritage for the International Security Assistance Force (NATO-led), also with the support of the US Central Command. The International Security Assistance Force has also been actively involved in the construction of temporary shelters for archaeological and cultural property⁶⁶ in Afghanistan.

In this way, NATO as an organisation can contribute to the protection of cultural property through cooperation, including through its identification in the areas of military operations, evacuation of property from conflict zones, establishing the truth about the facts of destruction, ruination and misappropriation of property, etc.

Separate units and positions at the domestic level of states. It is worth noting that some states, in accordance with the 1954 Convention and the aforementioned NATO Directive, have created separate units and structures at the domestic level to protect cultural property.

Italy, for example, has created a special unit of carabinieri for the protection of cultural heritage (TPC: Carabinieri Tutela Patrimonio Culturale),⁶⁷ the first specialised police unit created with the sole purpose of combating trafficking in cultural property. Its

65 Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan, 30 September 2014: https://www.nato.int/cps/en/natohq/official_texts_116072.htm?selectedLocale=en

66 Mes Aynak / ARCH International, 11 December 2018: <https://www.arch-library.org/projects/mes-aynak/>

67 Comando Carabinieri per la Tutela del Patrimonio Culturale: <https://www.carabinieri.it/chi-siamo/oggi/organizzazione/mobile-e-speciale/comando-carabinieri-per-la-tutela-del-patrimonio-culturale>



most important tool is the Banca Dati Leonardo,⁶⁸ a database of illicitly exported cultural artefacts, which is believed to be the largest database of stolen artworks in the world. In 2015, Italy created the Task Force Unite4Heritage (TF U4H),⁶⁹ a rapid deployment unit made up of TPC staff and experts from the Italian Ministry of Culture that can be sent anywhere in the world to help local authorities protect endangered cultural property.⁷⁰

For example, during the conflict in Kosovo (Serbia), at the request of the Serbian Orthodox Church, NATO established a special mission to protect religious and sacred sites. To carry out this task, NATO engaged Italian carabinieri. They monitored churches and mosques to prevent further looting and damage, as well as to prevent damage to architectural elements and frescoes. Their tasks also included recording the condition of the monuments and their storage conditions, as well as entering this data into the aforementioned carabinieri database.⁷¹

The actual TPC experience gained in various missions has already become part of Italy's military doctrine.

THE UNITED KINGDOM, following the recommendations developed by NATO and given the fact that the state ratified the 1954 Convention in 2017, in 2018 also created a special Cultural Property Protection Unit (CPPU)⁷² within its armed forces. The Cultural Property Protection Unit is a separate team of 15 army reservists-volunteers with relevant experience in the field of cultural property protection. The staff of the Unit is required to have a university degree in culture, military and/or law enforcement.⁷³ The Unit already cooperates with a number of countries, including the Italian Carabinieri and the French military, to share experience and knowledge, and also interacts with NATO.⁷⁴

THE NETHERLANDS. Within the Ministry of Defence of the Netherlands, there is a separate Cultural and Historical Reference and Information Unit (sectie Cultuurhistorische Achtergronden en Informatie, CAI),⁷⁵ which operates on the basis of the 1st Civil-Military Interaction Command (1 Civiel en Militair Interactie Commando, 1CMICO)⁷⁶ and consists of a small group of civil servants (from 2 to 10 permanent members). In general, this Unit is engaged in outreach activities (provides advice on cultural heritage issues, conducts analytical and research work, promotes interaction and cooperation between the military and civilians, including with various educational and scientific institutions, and trains military personnel in the protection of cultural property).

68 Comando Carabinieri per la Tutela del Patrimonio Culturale: <https://tpcweb.carabinieri.it/SitoPubblico/home>

69 Comando Carabinieri Tutela Patrimonio Culturale, Compiti: <https://www.carabinieri.it/chi-siamo/oggi/organizzazione/mobile-e-speciale/comando-carabinieri-per-la-tutela-del-patrimonio-culturale/compiti>

70 Task Force Caschi Blu della Cultura: <https://www.carabinieri.it/chi-siamo/oggi/organizzazione/mobile-e-speciale/comando-carabinieri-per-la-tutela-del-patrimonio-culturale/task-force-caschi-blu-della-cultura>

71 Protecting Cultural Heritage as a Common Good of Humanity: A Challenge for Criminal Justice / ISPAC, 2014: https://www.unodc.org/documents/congress/background-information/Transnational_Organized_Crime/ISPAC_Protecting_Cultural_Heritage_2014.pdf, c. 101-108

72 UKBS supports UK's first CPP Special to Arm course / Blue Shield International, 18 October 2019: <https://theblueshield.org/ukbs-supports-uks-first-cpp-special-to-arm-course/>

73 British Army starts recruiting for revived Monuments Men unit to protect art and archaeology in war / The Telegraph, 11 October 2018: <https://www.telegraph.co.uk/news/2018/10/11/british-army-starts-recruiting-revived-monuments-men-unit-protect/>

74 Military Cultural Property Protection / Tim Purbrick, 2020: https://www.linkedin.com/posts/tim-purbrick-37052410_military-cultural-property-protection-cpp-activity-6591247359517171712-mlym?trk=public_profile_like_view

75 Section Cultural Affairs and Information: <https://www.linkedin.com/company/sectiecai/?originalSubdomain=nl>

76 1 Civiel en Militair Interactiecommando: <https://www.defensie.nl/organisatie/landmacht/eenheden/oocl/cmi-commando>



The Netherlands also has another institution – the Cultural Heritage Unit of the Operational Headquarters of the Royal Netherlands Army, established in 1993. This Unit develops strategic and programmatic documents on the protection of cultural property for the armed forces of the Netherlands, advises the Commander-in-Chief and military leadership on the cultural and historical background of conflicts, and represents the Netherlands within NATO, UNESCO, ICOMOS, ICOM, etc.

THE UNITED STATES OF AMERICA. No separate unit as such has been created within the US security and law enforcement agencies, but this does not mean that the US does not implement the policy of protecting cultural property as envisaged by NATO protocols and, in particular, the provisions of the 1954 Convention (the US ratified it in 2009).

At the FBI level, a rapid intervention team was set up to focus on crimes against artistic heritage committed in 2004 after the robbery of the National Museum of Art in Baghdad, Iraq. To date, it is known that the work of this team has recovered more than 14,850 objects worth more than \$165 million.

Separately, there are various institutions in the United States that, by their very nature, are either advisory or educational in relation to the US military. In particular, CHAMP (Cultural Heritage by Archaeology & Military Panel) and MilCHAG (Military Cultural Heritage Advisory Group) are US-based organisations that aim to establish close cooperation between the military and cultural heritage professionals. In addition to providing education and training, MilCHAG also provides cultural property protection support to military operations across the full spectrum of operations.

The Monuments Men⁷⁷ is a Cultural Heritage Task Force that is part of the Army's Civil Affairs and Psychological Operations Command at Fort Bragg in North Carolina. The unit is made up of Army Reserve officers who are also experts in cultural property, such as curators, scholars, archaeologists and conservators.⁷⁸ At Fort Drum, home of the 10th Mountain Division, the Cultural Resources Division has incorporated the policy on the protection of cultural property during armed conflict into educational programmes and incorporated various policy objectives into field exercises.

These groups and organisations regularly provide training and outreach activities for the military; and the US Defense Intelligence Agency uses their work and NATO's cultural heritage policy in decision support activities, including for the Global Coalition Against ISIS.

2.2.2. International law enforcement institutions

INTERPOL. In accordance with its mandate to assist member states in the investigation of crime, INTERPOL has developed specific measures to strengthen the institutional capacity of national law enforcement agencies in the protection of cultural property, especially its search and return.

The vision of INTERPOL and its global role in supporting member states in the fight against crimes against cultural property have been repeatedly emphasised by the UN Se-

77 Return of the Monuments Men: U.S. Army launches new initiative to protect cultural heritage in war zones / Returning Heritage, 11 November 2019: <https://www.returningheritage.com/return-of-the-monuments-men-u-s-army-launches-initiative-to-protect-cultural-heritage-in-war-zones>

78 The Army Is Looking for a Few Good Art Experts / The New York Times, 21 October 2019: <https://www.nytimes.com/2019/10/21/arts/design/new-monuments-men.html>



curity Council (Resolutions 2199/2015 and 2347/2017), the UN General Assembly (Resolution 73/130/2018), and the Conference of the Parties to the UN Convention against Transnational Organised Crime (Resolution COP/2020/L.10). For example, in 2021, with the assistance of INTERPOL, the government of Mongolia decided to establish a special police unit to combat trafficking in cultural property under the National Police Agency.⁷⁹

INTERPOL plays an important role in facilitating the return of cultural property to its rightful owners by providing a wide range of services and resources to its member states. These include:

1. Maintaining a centralised database of stolen cultural artefacts. INTERPOL's Stolen Works of Art Database (SWAD)⁸⁰ is one of the world's most comprehensive databases of stolen cultural property. It contains information on more than 75,000 stolen works of art, including paintings, sculptures, archaeological artefacts and other objects of cultural significance. The database is accessible to national law enforcement agencies of any country in the world, as well as museums, auction houses, universities, art dealers, and individual experts and journalists.

The database is filled with information provided by the states themselves, national offices of INTERPOL, as well as individual requests from international partner organisations such as UNESCO, ICOM, and ICCROM. Only fully identified objects are entered into the database.

The database is a fairly effective mechanism for tracking and returning cultural property. For example, in 2020, with the assistance of INTERPOL and national law enforcement agencies, two large-scale international police and customs operations were conducted to combat trafficking in stolen art and archaeological artefacts, which led to the arrest of 101 people and the recovery of more than 19,000 items, including a pre-Columbian gold mask, a carved Roman lion and thousands of ancient coins.⁸¹

2. Issuing of Red Notices for stolen cultural property.⁸² INTERPOL Red Notices are essentially international notices requesting the arrest or location of persons wanted by the police for serious crimes. In particular, INTERPOL can issue red notices for persons suspected of trafficking in stolen cultural property, which can help bring them to justice and facilitate the recovery of stolen objects.

3. Providing training and enhancing the institutional capacity of national law enforcement agencies and establishing cooperation between national law enforcement agencies of different countries. INTERPOL offers a wide range of training programmes and resources to help law enforcement agencies around the world effectively combat cultural property crime. These programmes cover topics such as identifying and documenting stolen cultural objects, conducting investigations, and cooperating with international partners. INTERPOL also conducts an awareness-raising campaign aimed at the general public to increase the chances of preventing new crimes against cultural property.

79 Mongolia Advances to Prevent Crimes and Offenses against Cultural Property / UNESCO, 14 April 2023: <http://surl.li/rtcmh>

80 Stolen Works of Art Database / Interpol: <https://www.interpol.int/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database>

81 Police seize 19,000 stolen artefacts in international art trafficking crackdown / The Guardian, 7 May 2020: <https://www.theguardian.com/world/2020/may/07/stolen-artefacts-international-art-trafficking-crackdown>

82 How we fight cultural heritage crime / Interpol: <https://www.interpol.int/Crimes/Cultural-heritage-crime/How-we-fight-cultural-heritage-crime>



Additionally, INTERPOL can also facilitate effective cooperation between national law enforcement agencies around the world, as it is in fact a kind of central body (platform) for such agencies to exchange information and coordinate investigations related to cultural property crimes. This cooperation is important for tracing stolen objects and bringing criminals to justice.

For example, in 2023, the US police blocked the sale at auction of a stolen collection of 100 ancient coins that had been stolen from a museum in Japan back in 2019. US law enforcement agencies were able to identify and block the sale of the coins through cooperation with the Japanese police and the INTERPOL's Stolen Works of Art Database and arrested at least 3 people on charges of theft and misappropriation.⁸³

4. Cooperation with international organisations.

INTERPOL also cooperates with other international organisations such as UNESCO, the World Custom Organisation, ICOM, ICCROM, etc. to combat crimes related to cultural property. This cooperation helps to strengthen global efforts to protect cultural heritage.

For example, INTERPOL, together with UNESCO, has developed a guide for law enforcement agencies to prevent and effectively investigate cases of trafficking in cultural property.⁸⁴ And in 2025, a virtual museum of cultural property stolen from museums, collections, and archaeological sites around the world, based on the INTERPOL database and with the assistance of UNESCO, is due to open.⁸⁵

Thus, the use of INTERPOL mechanisms is an important means of returning cultural property misappropriated or stolen in the territories of Ukraine temporarily occupied by the Russian Federation.

2.3. Application of international justice tools for the protection and return/restitution of cultural property

The existing list of international treaties on the return/restitution of cultural property is limited due to the lack of a coordinated will of states on these issues and the dominance of national interests and decisions made at the national level. At the same time, they usually use the rules of national law, sometimes referring to international law, and make decisions in favour of the original owner, mainly the state to which court the claim was filed. For example, the case law of the United States or the United Kingdom is particularly rich in such cases, which may contain not only civil but also criminal aspects.

At the same time, there are special mechanisms at the level of individual states that allow law enforcement and security agencies to directly apply to the court for the immediate seizure of cultural property of alleged illegal origin and its return to the owners, the states from which it was exported/stolen.

83 https://www.interpol.int/content/download/8553/file/UNESCO%20Toolkit%20to%20fight%20the%20illicit%20trafficking%20of%20cultural%20property_web....pdf

84 <https://unesdoc.unesco.org/ark:/48223/pf0000384224>

85 <https://www.theguardian.com/world/2023/oct/06/unesco-planning-virtual-museum-of-stolen-cultural-arts-facts>



For example, the Italian carabinieri mentioned in the previous section have the right to apply to the competent court for judicial confiscation of valuables identified during control as those that have been imported without the necessary certificates. After determining the region of origin of the artefacts with the help of experts and competent institutions, the carabinieri inform the probable state of origin of the find, ask it to confirm the fact of theft or illegal export of the objects and, if so, to apply through diplomatic channels for their return. Based on the request of the carabinieri, the judicial authority gives permission to return the objects to the owner.

However, the situation with the Italian carabinieri is an exception rather than a general rule. The issue of protecting cultural property is of great interest to society. To a certain extent, the issue of cultural and historical heritage is perhaps the most important one today. However, despite this demand, litigation, especially at the international level, related to cultural property is rare. There is an assumption that this situation stems from the fact that the public interest in question mostly lies with the state that owns the cultural property, i.e. the one that demands justice and restitution.

Nevertheless, litigation on cultural property has taken place. Among the landmark cases are the following:

1 Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), 86 15 June 1962, International Court of Justice.

Content of the case: in 1961, Cambodia applied to the ICJ over Thailand's occupation of a part of its territory around the ruins of Preah Vihear, a sacred site for Cambodians, asking for recognition of Cambodia's territorial sovereignty over the temple and demanding that Thailand withdraw its armed forces, which had been stationed there since 1954. The Court has delivered two judgments in the case, in 1962 and 2013 respectively.⁸⁷ In both judgments, the Court found that Thailand had indeed illegally occupied the area around the temple and ruled that Thailand was obliged to withdraw its armed forces stationed there and return to Cambodia all valuables that had been taken from the temple during the entire period of occupation since 1954.⁸⁸

According to the court's decision, in 1963 Cambodia officially became the owner of the temple. At that time, the political leadership and individual pilgrims of about 1,000 people came to the shrine, including the then-Prince Sihanouk, who made a gesture of reconciliation. He announced that all Thais would be free to continue visiting the temple (even without visas), and that Thailand was free to keep any valuables it may have taken from the site⁸⁹ It should be noted that the 1962 decision established that Cambodia owns only the building (and ruins) of the temple, and the path to the temple is under Thai territorial jurisdiction. However, since 2015, access to the temple is actually only possible from the Cambodian side and is limited.

86 Temple of Preah Vihear (Cambodia v. Thailand) / ICJ: <https://www.icj-cij.org/case/45>

87 Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Judgment, I.C.J. Reports 2013: <https://www.icj-cij.org/sites/default/files/case-related/151/151-20131111-JUD-01-00-EN.pdf>

88 Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962: <https://www.icj-cij.org/sites/default/files/case-related/45/045-19620615-JUD-01-00-EN.pdf>

89 Peaceful Overture Held in Cambodia At Disputed Shrine; Reconciliation Invited / The New York Times, 8 January 1963: <https://www.nytimes.com/1963/01/08/archives/peaceful-overture-held-in-cambodia-at-disputed-shrine.html>



In parallel to the 1962 and 2013 decisions, the process of including the temple ruins in the UNESCO World Heritage List was underway. In July 2007, the World Heritage Committee announced its intention to do so based on a request from Cambodia. Thailand objected to the Committee's decision, explaining its position by the disputed territory around the temple, and UNESCO temporarily postponed work on the temple in response to the protest. Nevertheless, both Thailand and Cambodia agreed that the temple is of great value to the history and culture of the region and the world and should be inscribed on the list at the joint request of Cambodia and Thailand. However, during the preparation of the nomination dossier, new circumstances arose that critically affected the positions of both states regarding the temple, in particular the 1962 ICJ decision (the temple was nevertheless inscribed in 2008⁹⁰). Thus, in 2011, Thailand launched a military operation in the territories where the temple was located, including armed clashes between Thai and Cambodian troops, which led to injuries and deaths on both sides.⁹¹ During the conflict, there was an artillery bombardment of the area, which, according to Cambodian observations, partially damaged the temple,⁹² which was also confirmed by the UNESCO mission that was sent there.⁹³ In general, the situation remained unresolved.

Nevertheless, at a meeting of the UNESCO World Heritage Committee in 2011, it was finally decided to designate the Preah Vihear temple as a Cambodian monument. Thailand lodged a silent protest against this decision. In turn, Cambodia additionally appealed to the International Court of Justice to withdraw Thai armed forces from the temple.⁹⁴ On 11 November 2013, the International Court of Justice ruled that the land adjacent to the temple from the east and west (the southern part was previously recognised as Cambodian, the northern part as Thai) belongs to Cambodia, and that all Thai security forces still in the area must leave.

2 Eritrea v. Ethiopia,⁹⁵ 12 December 2000, arbitration assisted by the Permanent Court of Arbitration at The Hague.

Content of the case: from 1961 to 1991, Eritrea fought a long war of independence against Ethiopia, where a civil war was going on in parallel. The conflict eventually ended in 1991, when Ethiopian rebels won, established an interim government in Addis Ababa, and made peace with the people of Eritrea (which, in 1993, officially declared its independence and joined the UN). At the same time, new problems arose – Eritrea deported, according to various sources, about 30,000 Ethiopian families from its territory, which started a new conflict with Ethiopia, including the issue of defining state borders. The conflict lasted for two years, from 1998 to 2000, and ended with the signing of the Algiers Peace Agreement on 12 December 2000.⁹⁶

90 Temple of Preah Vihear / UNESCO: <https://whc.unesco.org/en/list/1224>

91 Thailand, Cambodia Border Fighting Breaks Out Amid Tensions / East Asia, 3 February 2011: <https://www.voanews.com/a/thailand-cambodia-clash-at-border-115266974/134501.html>

92 Heritage at Risk / ICOMOS: http://www.international.icomos.org/risk/world_report/2008-2010/H@R_2008-2010_final.pdf

93 UNESCO to send mission to Preah Vihear / UNESCO, 8 February 2011: <https://whc.unesco.org/en/news/708/>

94 Request for Interpretation of the Judgement of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand) / ICJ Judgement, 11 November 2013: <https://web.archive.org/web/20131111173337/http://www.icj-cij.org/docket/files/151/17704.pdf>

95 Eritrea-Ethiopia Claims Commission / Permanent Court of Arbitration: <https://pca-cpa.org/en/cases/71/>

96 Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, 12 December 2000: <https://pcacases.com/web/sendAttach/786>



The Algiers Agreement provided for the establishment of a special arbitration tribunal for the two parties to the conflict, facilitated by the Permanent Court of Arbitration in The Hague, where both governments and individuals and legal entities could file a claim concerning a violation of international law. One of the lawsuits in particular concerned Eritrea's request to return the 2,500-year-old Stela of Matara (a stone obelisk), which is an object of historical and cultural significance to both states, to Eritrea. According to eyewitnesses, the area where the stela was located during the conflict was controlled by the Ethiopian armed forces, and according to some accounts, it was they who blew up and destroyed the stele.⁹⁷

Eritrea also submitted to the arbitration the testimony of two experts, one of whom claimed that military-type explosives had caused the destruction of the stele. Ethiopia, on the other hand, disputed this expertise, citing the intensity of the fighting in the region and the proximity of the stela to the military barracks that were attacked by Eritrean forces. In other words, Ethiopia accused the latter of non-compliance with the provisions of customary IHL (since neither state was a party to the 1954 Hague Convention at the time).

The Claims Commission found that the evidence submitted by Eritrea was sufficient to conclude that Ethiopia was responsible for the unlawful damage caused to the Matara ceiling in May 2000. With regard to compensation, the Claims Commission determined as follows:⁹⁸

1. Eritrea's claim for satisfaction for damage to the Stela of Matara **was dismissed**.
2. Eritrea's claim for financial compensation for damage to the Stela of Matara **was satisfied**.

The Claims Commission determined the compensation for such actions of Ethiopia, taking into account the cost of restoration, in the amount of USD 50,000 (although Eritrea had requested USD 8 million).

3 Prosecutor v. Ahmad Al-Faqi Al-Mahdi (ICC-01/12-01/15 of 27 September 2016),⁹⁹ International Criminal Court.

Content of the case: Al Mahdi was found guilty of the intentional ruination and destruction of 10 buildings of historical and religious significance in Timbuktu, Mali, between 30 June and 11 July 2012, when non-state armed groups gained control of Timbuktu, which the convict supported. 9 of the 10 buildings had UNESCO World Heritage status, which underlines their value as cultural heritage. In particular, the court recognised the destruction of:¹⁰⁰

1. the mausoleum Sidi Mahamoud Ben Omar Mohamed Aquit,
2. the mausoleum Sheikh Mohamed Mahmoud Al Arawani,

97 Eritrea-Ethiopia Claims Commission - Partial Award: Central Front - Eritrea's Claims 2, 4, 6, 7, 8 & 22, 28 April 2004: https://legal.un.org/riaa/cases/vol_XXVI/115-153.pdf

98 Final Award Eritrea's Damages Claims between The State of Eritrea and The Federal Democratic Republic of Ethiopia, 17 August 2009: <https://pcacases.com/web/sendAttach/766>

99 Situation in the Republic of Mali, The Prosecutor v. Ahmad Al Faqi Al Mahdi / ICC, January 2022: <https://www.icc-cpi.int/sites/default/files/CaselnformationSheets/Al-MahdiEng.pdf>

100 Ibid.



3. the mausoleum Sheikh Sidi Mokhtar Ben Sidi Muhammad Ben Sheikh Alkabir,
4. the mausoleum Alpha Moya,
5. the mausoleum Sheikh Sidi Ahmed Ben Amar Arragadi,
6. the mausoleum Sheikh Muhammad El Mikki,
7. the mausoleum Sheikh Abdoul Kassim Attouaty,
8. the mausoleum Ahmed Fulane,
9. the mausoleum Bahaber Babadié, and
10. Sidi Yahia mosque (the door).

With regard to the specific circumstances of the crime, the population of Timbuktu had relevant religious practices that they carried out in mausoleums and mosques, which were a common heritage for the community. The convict prepared a sermon about the need to destroy the mausoleums and determined the sequence of destruction. The court noted that the very status of a UNESCO World Heritage Site testified to the seriousness of the attack, which affected not only the direct victims of the crimes – believers and residents of Timbuktu – but also the entire local and international community.

Al-Mahdi's actions were classified as a war crime under Article 8(2)(e)(iv) of the Rome Statute, namely intentionally directing attacks against buildings dedicated to religion, education, art purposes, historic monuments, provided they are not military objectives in a non-international armed conflict. The prosecutor argued that the defendant was not charged with the more general crime of destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict under Article 8(2)(e)(xii) of the Rome Statute. This is similar to the ICTY case of Pavel Strugar regarding the status of the *lex specialis* of the crime against cultural property in relation to the general crime against civilian objects. The Court emphasised that in a non-international armed conflict, this is the only crime aimed specifically at cultural property, not civilian objects.

In total, in its Reparations Order¹⁰¹ of 17 August 2017, the Court determined that Al-Mahdi was liable for €2.7 million in individual and collective reparation costs to the Timbuktu community for the deliberate attacks on religious and historic buildings in the city. However, a significant portion of the reparation payments was taken over by one of the entities within the jurisdiction of the Court, the Trust Fund for Victims.

Nevertheless, the Reparations Order is quite interesting, in particular because the Court recognised three categories of victims in this situation, the believers and residents of Timbuktu, the population of the entire territory of Mali, and the international community. It is also noteworthy that UNESCO itself did not file a single claim for reparations, stating instead that the main victims were local communities, despite the fact that the destroyed monuments were on the UNESCO World Heritage List.¹⁰² Nevertheless, all the victims asked the Court for reparations in the form of restoration, maintenance and protection of the monuments.

101 Situation in the Republic of Mali in the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi, Case Information Sheet: <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/Al-MahdiEng.pdf>. Public Reparations Order, 17 August 2017: <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1803eb94b.pdf>.

102 Situation in the Republic of Mali in the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi UNESCO amicus curiae observations, 2 December 2016: <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1803eb314.pdf>



During the proceedings, UNESCO, together with the partners, rebuilt the destroyed Timbuktu mausoleums at their own expense (over €2.59 million),¹⁰³ without demanding anything in return. This point was also discussed when the Reparations Order was handed down. However, the Court then found that the restoration work carried out by a third party between the destruction and the Reparations Order did not change the extent of the original damage and did not mitigate Al Mahdi's fault,¹⁰⁴ and that the fact that UNESCO did not intend to seek any compensation was also irrelevant.¹⁰⁵ In general, the Court determined the following forms of compensation mechanisms in this case:

1. *With regard to cultural heritage objects destroyed during the conflict,*¹⁰⁶ the Court considers that the appropriate form of reparations is measures aimed at restoring protected sites with effective measures which will guarantee the non-repetition of attacks directed against them.
2. *With regard the satisfaction measures,*¹⁰⁷ the Court considers that Mr Al-Mahdi had already admitted his guilt at the time of the trial and had provided sufficient apologies for the harm caused, despite the statements of some experts who considered that there were victims in the case who considered Mr Al-Mahdi's apology insufficient. Whether to accept his apology depends on the victim's personal circumstances and requirements.

In addition, the Court also instructed the Registry, as a symbolic measure to ensure that all victims have access to Mr Al Mahdi's apology, to produce an excerpt of the video recording of Mr Al Mahdi's apology and to post it on the Court's website, together with a transcript translated into the main languages spoken in Timbuktu.

3. *With regard to the economic losses resulting from the destruction of the Timbuktu mausoleums,*¹⁰⁸ the Court recognised that Al Mahdi's crime affected not only individuals who lived on the earnings from the maintenance of the mausoleums, but also the entire Timbuktu community and the population of Mali. However, the Court also concluded that in this case, the most appropriate compensation mechanism would be individual reparations for economic loss only for those whose livelihoods were entirely dependent on the monuments, as their losses were much more acute and devastating than those of others. As the compensation for the entire community will be covered by other instruments and funds.
4. *With regard to moral harm,*¹⁰⁹ the Court found that reparations for moral harm should be awarded: a) individual - for mental pain and anguish of those whose ancestral graves were damaged during the attack, and b) collective - for the mental pain and anguish and disruption of the culture of the Timbuktu community as a whole. As a compensation mechanism, the Court found it most appropriate to provide individual compensations, and in case of collective – through rehabilitation to overcome emotional stress. The Court also allowed for the possibility of satisfaction measures such as symbolic commemorative events, forgiveness ceremonies, etc.

103 *supra* 101, p. 116

104 *Ibid.*, p. 67

105 *Ibid.*, p. 67

106 *Ibid.*, p. 60-67

107 *Ibid.*, p. 68-71

108 *Ibid.*, p. 72-83

109 *Ibid.*, p. 84-92



In total, the Court ordered Al Mahdi to pay €97,000 for the destruction of Timbuktu monuments, €2.12 million for economic damage to the population of Mali and the Timbuktu community in particular, and an additional €483,000 for moral harm caused by the destruction.¹¹⁰

110 *Ibid.*, pp. 118, 128, 133



3

Ukraine's experience with the return/restitution of cultural property

First of all, it is worth noting that the process of searching for and returning Ukraine's cultural property is ongoing. At the same time, its effectiveness should be assessed only in the light of all circumstances, including Ukraine's domestic and foreign policy.

In what follows, we will consider cases that have taken place in recent years in order to analyse various mechanisms for the return of cultural property.

3.1. Application of bilateral procedures for the return of cultural property to Ukraine

During the XII meeting of the Joint Ukrainian-German Commission on the Return and Restitution of Cultural Property Lost and Illegally Transferred during and as a Result of World War II, which took place in Kyiv on 27-28 November 2019, the German side returned the painting "Study with a House" by Serhiy Ivanovych Vasylkivsky, a prominent Ukrainian painter of the second half of the nineteenth and early twentieth centuries. The painting, which was taken from the Kharkiv Art Museum during World War II, was discovered in late 2016. That is, it was only after more than two years that this return became possible. However, it was preceded by constructive cooperation between Ukraine and Germany within the framework of the Joint Commission. In fact, the painting had been outside Ukraine (was taken out) for **more than 70 years**.

At the ceremony, Ambassador-at-Large of the Federal Foreign Office of Germany Michael Jansen handed over the painting to the co-chair of the Joint Ukrainian-German Commission, First Deputy Minister of Culture of Ukraine Svitlana Fomenko.

This is an important "sign of goodwill" from Germany, as physical returns are very rare and are always preceded by a long negotiation process.¹¹¹

111 supra 24



In this case, there are three main stages:

1. Search for cultural property of Ukraine

It is understandable that this is Ukraine's interest and duty. For this purpose, there must be relevant information and authorised public authorities. In the case of the painting "Study with a House," unfortunately, it was found by accident. The painting was sold at an auction in Berlin. The auction organisers mistook it for a painting by an unknown artist and sold it, even though they were obliged to check all the data. In the autumn of 2016, the buyer of the painting turned to German law enforcement agencies to establish its authenticity.¹¹² Using the inventory numbers, they managed to establish its origin.

2. Negotiation procedures

To this end, not only diplomatic relations should be established, but also appropriate advisory bodies should be created to facilitate cooperation between states on the return of their cultural property. Obviously, relevant experts should be involved in their activities. The work of the Joint Ukrainian-German Commission on the Return and Restitution of Cultural Property Lost and Illegally Transferred during and as a Result of World War II is a good example. We must understand that in the future it may be quite appropriate to establish a similar commission with Russia or its successor state(s).

3. Return.

The state on whose territory Ukraine's cultural property is located may require Ukraine to perform certain procedures required by its national legislation, such as signing agreements or going to court on its territory, etc. At the same time, the example of the return of the painting "Study with a House" demonstrates that the duration of the procedure can take a long time (the procedure took more than 2 years). However, as reported by the Ministry of Culture of Ukraine, among all the exhibits **lost during World War II, this was the first one to be returned to its homeland.**¹¹³

The fact that during World War II, the Kharkiv Art Museum alone lost almost 94% of its collection deserves special attention. Today, the museum has documents for 50,000 lost exhibits.¹¹⁴

The next case took place in 2022-2023, and it is interesting because of the short timeframe for the return of cultural property.

On 2 September 2022, U.S. Customs and Border Protection officers seized cultural property that had been illegally smuggled into the United States at the international postal department of John F. Kennedy International Airport.

Among the stolen valuables were, in particular: akinak swords of the Scythian culture of the VI-V centuries BC (distribution area – forest-steppe, steppe part of Ukraine and Crimea), a flint ground axe of the III millennium BC, which, according to the Institute of Archaeology of Ukraine, belongs to the culture of spherical amphorae (distribution area – Northwestern Ukraine), Polovtsian sabers of the ancient Rus state of the XI-XII

112 Germany returned to Ukraine Vasylkivsky's painting taken away during World War II/ UKRINFORM, 20.12.2018: <https://www.ukrinform.ua/rubric-culture/2604873-nimeccina-povernula-ukraini-kartinu-vasilkivskogo-vivezenu-pid-cas-drugoi-svitovoi.html>

113 A painting lost during World War II returned to Kharkiv / Olga Kyrylenko, Hromadske, 20.12.2018 : <https://hromadske.ua/posts/do-harkova-povernuli-kartinu-vtrachenu-pid-chas-drugoyi-svitovoyi-vijni>

114 supra 112



centuries and many other artifacts.¹¹⁵ The swords came from Russia, and the stone axe from Ukraine.¹¹⁶ The items were identified by U.S. Customs and Border Protection as cultural property of Ukraine.

And already on 10 March 2023, the Embassy of Ukraine in the United States held an official handover ceremony for the return of Ukrainian cultural heritage items.

In September 2023, during a working visit to the United States, President of Ukraine Volodymyr Zelenskyy took part in the ceremony of returning these cultural property items illegally transferred from the temporarily occupied territories of Ukraine:¹¹⁷ in his presence, U.S. Secretary of Homeland Security Alejandro Mayorkas and Ambassador of Ukraine to the United States Oksana Markarova signed the relevant certificate of transfer¹¹⁸ of cultural property.

The issue of transportation was also resolved in a fairly short time, and on 20 October 2023, representatives of the Ministry of Culture and Information Policy of Ukraine handed over the returned archaeological property from the territories temporarily occupied by Russia to the Kyiv-Pechersk Lavra National Reserve for temporary storage.¹¹⁹

In other words, in this case, no additional bodies were created, and the illegal importation of cultural property **was prevented** at the time of crossing the border.

At the same time, the short timeframe for the return of cultural property that was attempted to be smuggled into the United States can be explained by the cooperation of Ukrainian diplomats and the political will of the United States. Administrative procedures were applied **exclusively to the extent necessary to identify and return** Ukraine's cultural property.

This case is one of **the first examples of the return of cultural property to Ukraine that was looted during the large-scale Russian invasion** after 24 February 2022. At the same time, it should be understood that the United States will not be the only country into whose territory someone will try to smuggle Ukrainian cultural property. Therefore, it is important to collect relevant information on the administrative requirements of various states and establish bilateral relations in order not only to identify such cultural property but also to minimize the time and cost of its return. Since, given the scale of the looting of Ukrainian cultural property by the occupiers, such cases should become more and more frequent in the future.

115 The United States returned Scythian swords and a Polovtsian saber to Ukraine, which the Russians had taken from the occupied territories / Yaroslav Gerasymenko, Hromadske, 11.03.2023: <https://hromadske.ua/posts/ssha-pov-ernuli-ukrayini-skifski-mechi-ta-polovecki-shabli-yaki-rosiyani-vivezli-z-okupovanih-teritorij>

116 US returned Scythian swords and Polovtsian sabre looted by occupants to Ukraine / Olena Barsukova, Ukrainian Pravda, 12.03.2023: <https://life.pravda.com.ua/society/2023/03/12/253302/>

117 Ukraine will defend in international courts the return of cultural property stolen by Russia, – Rostyslav Karandeyev / Ministry of Culture and Information Policy: <https://mcip.gov.ua/news/ukrayina-vidstoyuvatyme-v-mizhn-arodnyh-sudah-povernennya-vkradenyh-rf-kulturnyh-czinnostej-rostyslav-karandeyev/>

118 The United States handed over to Ukraine artefacts stolen by Russians from the temporarily occupied territories / Suspilne Novyny, 22.09.2023: <https://suspilne.media/577871-ssa-peredali-ukraini-artefakti-vikradeni-rosianami-z-timcasovo-okupovanih-teritorij/>

119 Kyiv-Pechersk Lavra National Reserve receives for storage artefacts stolen from the occupied territories / Suspilne Novyny, 20.10.2023: <https://suspilne.media/598417-naczapovidnik-kievo-pecerska-lavra-otrimav-na-zberig-anna-artefakti-vikradeni-z-okupovanih-teritorij/>



3.2. “Acts of Goodwill” as a Mechanism for the Return of Ukraine’s Cultural Property

Let’s consider a case where cultural property is returned to Ukraine solely through the goodwill of the persons who acquired it over time.

In 2020, a unique painting by Mykhailo Panin, “Ivan the Terrible’s Secret Departure Before the Oprichnina,” taken from the Dnipropetrovs’k Art Museum during the Nazi occupation, was returned to Ukraine. It was donated to Ukraine by the American couple Tracy, who received the painting in the 80s along with a house they bought from a lonely elderly man.¹²⁰

In 2017, the Tracy couple put the painting up for sale at the Potomack Company auction, which established the painting’s origin.¹²¹ After contacting the Dnipropetrovs’k Art Museum, archival records revealed that the painting was “temporarily taken” from the museum on 17 July 1942.¹²² Panin’s work was withdrawn from the auction by the FBI.¹²³

In other words, there is a similar situation with Serhiy Ivanovych Vasylykivsky’s painting “Study with a House”. However, in this case the auction correctly identified the cultural property of Ukraine and reported it to the bona fide owner of the painting. After learning about the painting’s origin, the Tracy couple decided to do the right thing by returning the painting to its owner, Ukraine.¹²⁴ At the same time, procedurally, they waived their rights to it, and the American authorities stated that unless other court requests (demands) were received, the work of art would be transferred to the Ukrainian Embassy in Washington.¹²⁵ This is what happened in the future. In September 2018, an official ceremony was held with the participation of the Ambassador of Ukraine to the United States, the head of the FBI office, the US Attorney for the District of Columbia, the Deputy Assistant Secretary of State, and the daughter of the former owners of the painting, Jenny Tingle.¹²⁶

In general, we can say that this case is an illustration of the international recognition of Ukraine’s loss of cultural property during World War II.

This is an example of how Ukraine’s cultural property can be in private collections for years. This is about personal use and concealment of property. In the case of the illegal export of Ukrainian cultural property from the temporarily occupied territories, it is likely that Ukraine **will have to cooperate with numerous private auctions and online sales platforms**, as the scale of the exported museum objects alone is already impressive.

120 Art and War. How the Third Reich took tens of thousands of paintings from Ukraine - and now museums are fighting to return them / by NV, 08.09.2019: <https://nv.ua/ukr/radio/inverythatplace/tretiy-reyh-ukrajina-i-vkradeni-kartini-novini-ukrajini-50040463.html>

121 Ministry of Culture reports on return of Ivan the Terrible painting to Ukraine / Letters: <https://bykvu.com/ua/bukvy/minkult-otchitalsja-o-vozvrashhenii-v-ukrainu-kartiny-s-ivanom-groznym/>

122 supra 120

123 The United States will return to Ukraine a painting of Ivan the Terrible, stolen in 1941 / LB.ua, 02.01.2019: https://lb.ua/culture/2019/01/02/416297_ssha_vernut_ukraine_kartynu_ivanom.html

124 Return of stolen exhibits: Scythian swords are already being brought to Ukraine / Korrespondent.net, 16.03.2023: <https://ua.korrespondent.net/articles/4572138-povernennia-vkradenykh-eksponativ-skifski-mechi-vzhe-vezut-v-ukrainu>

125 A painting stolen during World War II is returned to Ukraine / Zaxid.net, 01.01.2020: https://zaxid.net/v_ukrayinu_povernuli_vikradenu_v_rocki_drugoyi_svitovoyi_viyini_kartynu_n1495557

126 Ministry of Culture boasts of returning stolen painting of Ivan the Terrible to Ukraine / LB.ua, 01.01.2020: https://lb.ua/culture/2020/01/01/446279_minkult_pohvastalsya_vozvrashcheniem.html



It is important that such “operators” of art markets and antiquities have sufficient information about illegally exported cultural property of Ukraine and have the opportunity to contact Ukraine to identify it.

3.3. Return of Ukraine’s cultural property based on court decisions

The case of the so-called “Scythian gold” is a well-known example of a court decision on the return of cultural property to Ukraine.

First of all, it should be noted that “Scythian Gold” is a common name in the media, which is not entirely correct, since not all the exhibits in the collection are related to the Scythians, and not all of them are gold: most of them are bronze, ceramic, and even wooden items.¹²⁷ The exhibition was called “Crimea – the Golden Island in the Black Sea”.

It is worth noting that initially the collection included an additional 19 exhibits from the Museum of Historical Treasures of Ukraine (located on the territory of the Kyiv-Pechersk Lavra), which meant that it comprised 584 exhibits (**over two thousand objects**) worth over one million euros.

From 3 July 2013 to 19 January 2014, the Rhineland Museum in Bonn (Germany) hosted an exhibition of 584 exhibits as part of international cultural cooperation.

In February 2014, the exhibits were transported to Amsterdam. **From 6 February to 28 May 2014**, they were to be exhibited at the Allard Pearson Archaeological Museum of the University of Amsterdam.

In this case, it is important to assess the actions of the Ukrainian authorities after the temporary occupation of the Autonomous Republic of Crimea and the city of Sevastopol by the Russian Federation, namely, **since 20 February 2014**.

It should be noted at the outset that the exhibition’s duration allowed for “preventive” steps to be taken. Thus, at the end **of March 2014**, the Ministry of Foreign Affairs addressed the Embassy of the Netherlands with an official note regarding the return of the exhibition to Ukraine, i.e. diplomatic procedures were applied.

No issues were raised regarding the return of 19 exhibits from the Museum of Historical Treasures of Ukraine. At the same time, in relation to 565 museum objects (2,111 items) from the Crimean Republican Institution “Bakhchisaray Historical and Cultural Reserve”; Crimean Republican Institution “Kerch Historical and Cultural Reserve”; Crimean Republican Institution “Central Museum of Tavrida”; National Reserve “Tauric Chersonese”, the so-called representatives of Crimean museums stated that it was necessary to return cultural property to them. Their argumentation was based on contractual relations regarding the exhibition of cultural property, and that the items should be returned to the place from which they were temporarily taken.

In the future, in accordance with the Regulation on the Ministry of Culture of Ukraine, approved by the Decree of the President of Ukraine of 06.04.2011 № 388; Article 15-2 of the Law of Ukraine “On Museums and Museum Affairs”; Resolution of the Cabinet of Ministers of Ukraine of 02.02. 2000, No. 209 “On Approval of the List of Museums that Store Museum Collections and Museum Objects that are State Property and Belong to

¹²⁷ “Scythian gold” should be returned to Ukraine. The decision of the appeal in Amsterdam/ BBC News Ukraine, 26.10.2021: <http://surl.li/rtldij>



the State Part of the Museum Fund of Ukraine”; paragraph 41-1 of the Regulation on the Museum Fund of Ukraine, approved by the Cabinet of Ministers of Ukraine of 20.07.2000, No. 11, the Order of the Ministry of Culture of **13.05.2014**, No. 292 “On the Transfer of Museum Objects to the National Museum of History of Ukraine” was issued.¹²⁸

The above illustrates that Ukraine, **at the time of the beginning of the temporary occupation of its territories, had sufficient legislative regulation** to ensure the return of cultural property in those circumstances.

The Order stressed that items from the museums of the Autonomous Republic of Crimea **are state property of Ukraine and belong to the state part of the Museum Fund of Ukraine**. That is, Ukraine as a sovereign state has the right to determine the custodian, which was done, namely, they were transferred for permanent storage to the National Museum of History of Ukraine. Individual museums are not and cannot be the owners of valuables from the state part of the Museum Fund of Ukraine.

Under the circumstances, it is natural that the Allard Pearson Archaeological Museum wanted to protect itself from lawsuits and resolve the issue of returning cultural property. In August 2014, the museum issued an official position, stating that it could not accept demands for the return of exhibits from either “representatives of Crimean museums” or Ukraine.

In the autumn of 2014, 19 exhibits from the Museum of Historical Treasures of Ukraine were returned, while the rest were moved to storage. Thus, diplomatic procedures of protocol correspondence between Ukraine and the Netherlands did not help.

In January 2015, on the claim of “representatives of four Crimean museums”, the District Court of Amsterdam began a trial to return the cultural property to the territory of the Autonomous Republic of Crimea. At the same time, Ukraine joined the case as a third party, demanding the return of the exhibition to Kyiv.¹²⁹ In other words, a **“national judicial procedure”** was applied.

It is worth noting that it took 9 years to complete.

On 14 December 2016, the District Court of Amsterdam ruled that the exhibits of Crimean museums should be returned to Ukraine. The decision was based on the provisions of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, according to which artistic property must be returned to the sovereign state that provided it for temporary display.

On 28 March 2017, the Court of Appeal of Amsterdam received an appeal against this court decision from “representatives of the Crimean museums”. On 28 October 2020, the Court of Appeal of Amsterdam granted Ukraine’s motion to disqualify the judge due to confirmation of his connection with lawyers of the Crimean museums, which may indicate his bias.¹³⁰

On 26 October 2021, the Court of Appeal of Amsterdam ruled in favour of Ukraine,¹³¹ but on 26 January 2022, a cassation appeal was received.

128 Order of the Ministry of Culture of Ukraine “On the Transfer of Museum Objects to the National Museum of History of Ukraine” of 13.05.2014: <https://zakon.rada.gov.ua/rada/show/v0292734-14#Text>

129 supra 127

130 Scythian gold returns to Ukraine / Ministry of Culture and Information Policy of Ukraine 26.10.2021: <https://www.kmu.gov.ua/news/skifske-zoloto-povertayetsya-v-ukrayinu>

131 Allard Pierson Museum moet Krimschatten afgeven aan de staat Oekraïne: <http://surl.li/rtдон>



On 9 June 2023, the decision of the Supreme Court of the Netherlands (The Hague) in the case on the return of cultural property to Ukraine in cassation proceedings was made public.

It took some time to resolve the issue of paying for the long-term storage of Ukraine's cultural property in the Netherlands. This issue was resolved by an agreement at the state level not to charge for the storage of museum exhibits.¹³²

On 27 November 2023, the cultural property was returned to Ukraine.¹³³

This case demonstrates that the **“judicial” procedure for the return of cultural property to Ukraine can take years and require significant efforts** by lawyers, government officials (including the Ministry of Foreign Affairs, Ministry of Culture and Information Policy, and the Ministry of Justice), and international cooperation. In fact, it took from January 2015 to June 2023 to go through all the courts, but this was preceded by stages of negotiations, meetings, and intergovernmental communication.

This case can be used to analyse both the application of all possible procedures and the arguments of the parties.

Thus, Ukraine referred to the ownership of cultural property by the state, to its own legislation, including the permission for temporary export granted by Ukraine, as well as to international law, in particular the UNESCO Conventions.

The position of the “representatives of the Crimean museums” was based primarily on the agreement on the organisation of the exhibition, which stipulated that the exhibits should be returned to these museums.¹³⁴ In general, we can say that there were attempts to present the situation as a bureaucratic misunderstanding between individual museums, rather than as a matter of the state cultural values of Ukraine. There were even statements about the well-established international practice of the superiority of the rights of specific museums over those of the state. Other arguments were more emotional, such as that archaeological treasures should be stored on the peninsula, in the area where they were excavated. The issue of neglect of the cultural heritage of the peoples of Crimea was also discussed. They also argued for double standards and complaints about the deprivation of Crimeans of the right to see their heritage.

This case also illustrates the importance of disseminating information, communicating with partners and keeping a wide range of stakeholders informed.

In general, based on the analysis of these cases, it can be noted that **Ukraine has applied to and cooperated with the following bodies and institutions**: The Joint Ukrainian-German Commission for the Return and Restitution of Cultural Property Lost and Illegally Transferred during and as a Result of World War II, the U.S. Customs and Border Protection, the U.S. Department of Homeland Security, the U.S. Federal Bureau of Investigation, the Potomack Company auction. As for the courts, it is worth noting the proceedings of the District Court of Amsterdam, the Court of Appeal of Amsterdam, and the Supreme Court of the Netherlands.

132 Museum in the Netherlands cancels debts for storage of “Scythian gold”, Ukrainian artefacts will soon be at home / Ministry of Culture and Information Policy, 22.11.2023 : <http://surl.li/nkqmf>

133 “Scythian gold” returned to Ukraine from the Netherlands after 10 years / Suspilne Novyny, 27.11.2023: <https://suspilne.media/culture/626191-skifske-zoloto-povernulosa-do-ukraini-z-niderlandiv-cerez-10-rokiv/>

134 supra 127



Recommendations

Cultural property plays a key role in preserving cultural heritage and identity, as well as in stimulating education, science, economic and social development in any country. Changing the system of protection and preservation of this property, as well as establishing effective restitution mechanisms, is not only a moral obligation, but also an important investment in the future. The consequences of Russia's aggression against Ukraine for Ukraine's cultural heritage have led to the need to improve the existing national mechanisms for the protection and preservation of cultural property.

1. Harmonise the norms of national law, including criminal law, in accordance with the provisions of international law on the protection and restitution of cultural property, which Ukraine has consented to be bound by, in particular, the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and its two Protocols of 1954 and 1999 respectively, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage of 2003, the Council of Europe Framework Convention on the Value of Cultural Heritage for Society of 2005.

In particular, by bringing the conceptual framework used in the national legal system of Ukraine in line with international law:

- a Clear justification and definition of the concepts of "cultural property", "cultural heritage", "cultural heritage object" both in the main regulatory legal acts (the Law of Ukraine "On Culture", the Law of Ukraine "On Protection of Cultural Heritage", etc.) and in certain articles of the Criminal Code of Ukraine (Article 298, Article 438);
 - b Clear justification and consolidation of the concepts of "compensation mechanism", "restitution", "compensation", "satisfaction".
2. Create a state strategy for the return of cultural property, taking into account foreign experience.
 3. Establish a separate body (agency) with the function of controlling the implementation of policy in the field of cultural heritage protection. The body should be directly subordinated to the Cabinet of Ministers of Ukraine and perform supervisory functions over the implementation of state policy in the field of cultural heritage, including its protection and preservation, in such a way as to separate the powers to formulate policy on the protection of cultural heritage (the function is assigned to the Ministry of Culture and Information Policy) and to control its implementation.
 4. Establish a specialised separate institution whose activities would be aimed at protecting Ukraine's cultural heritage and overcoming the effects of hostilities on cultural property, as well as calculating the necessary reparations, supporting the procedures for the search and return of cultural property, etc.
 5. Establish a separate special position or unit within the Ministry of Defence of Ukraine, in particular within the Armed Forces of Ukraine, and/or within the par-



armilitary units of the Ministry of Internal Affairs of Ukraine, whose purpose is to ensure respect for cultural property among military personnel and cooperation with civilian authorities responsible for its protection.

6. Strengthen the institutional capacity of law enforcement agencies of Ukraine to search for, identify and record violations of Ukraine's cultural heritage, in particular:
 - a create a separate position or unit within the structure of law enforcement agencies of Ukraine for the protection and preservation of cultural heritage objects of Ukraine;
 - b conduct regular training and education for law enforcement officers on the protection and preservation of cultural heritage objects.
 - c establish cooperation between law enforcement agencies and relevant Ukrainian scientific and cultural institutions for the protection and preservation of cultural heritage objects;
 - d maintain constant communication and exchange of experience with the relevant law enforcement agencies of other countries (Italy, Cyprus, Greece, the United Kingdom, the United States) and international institutions (Interpol, Europol) that have the authority to protect and preserve cultural heritage objects.
7. Strengthen the state's institutional capacity to control the storage and circulation of Ukraine's cultural property, in particular through the relevant institutions that permanently store cultural property (museums, galleries, archives, libraries, reserves, research institutes, etc.) by creating a digital register of movable cultural property of Ukraine.
8. Create a separate state register of cultural heritage objects that were damaged, destroyed or stolen during the armed conflict.
9. Establish a clear, transparent and consistent procedure for applying for the compensation mechanism for cultural property. The procedure should define the following parameters:
 - a define clear criteria for circumstances that will indicate the illicit transfer of movable cultural property;
 - b establish a transparent mechanism for filing applications for compensation/return of cultural property, identifying persons entitled to file such an application and a clear list of documents and evidence that indicate the illicit transfer of specific cultural property;
 - c establish a fair and impartial review process: determine who is responsible for reviewing the submitted applications and who is responsible for making the final decision on the implementation of a compensation mechanism. This should be the responsibility of the relevant supervisory authority in the field of cultural heritage, or a specially created temporary commission, which should include representatives of both law enforcement and research institutions;
 - d create a clear mechanism for return: the circumstances of organising the process of returning a cultural property, determining who is responsible for the costs of the return process.



Conclusions

1. Aggression of the Russian Federation against Ukraine has created significant threats to Ukraine's cultural heritage to ensure protection and pave the way for return and restitution.
2. The development of Ukraine's capacity to protect and restore cultural property involves the use of international legal instruments and mechanisms within UNESCO, Interpol, Europol, and bilateral cooperation between states.
3. In order to return/restitute cultural property, Ukraine may in the future use all available peaceful means of resolving international disputes, including negotiations, mediation, good offices of foreign states, international governmental and non-governmental organisations.
4. Currently, the general approach is to include provisions on the protection of cultural property during military operations in policies, guidelines, instructions, both at the NATO and national levels, with the creation of separate units and positions (Italy, the United Kingdom, the Netherlands, the United States of America).
5. It is important to strengthen cooperation with INTERPOL on the return of cultural property by filling the centralised database of stolen cultural artefacts in Ukraine with information and creating Red Notices on stolen cultural property. A separate area of cooperation between Ukraine and INTERPOL should be educational through training and improving the institutional capacity of national law enforcement agencies, which will create the preconditions for establishing cooperation between Ukrainian law enforcement agencies and law enforcement agencies of foreign countries.
6. In relation to the protection of cultural property, the issue of criminal prosecution for crimes against cultural property is also important, and in the context of armed conflict, it is war crimes, both at the national level (Article 438 of the Criminal Code of Ukraine) and at the international level (Articles 8(2)(e)(iv) and 8(2)(b)(xii) of the Rome Statute of the International Criminal Court), including criminal proceedings in foreign countries based on the principle of universal jurisdiction.

Ukraine uses the following mechanisms for the return/restitution of cultural property: bilateral procedures for the return of cultural property (first, a search for cultural property, then negotiation procedures and the return itself); through "acts of goodwill" of foreign states; on the basis of court decisions.

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