



PREVENTION OF ILLEGAL TRAFFICKING AND TRANSFER OF CULTURAL PROPERTIES IN THE LIGHT OF UNITED NATIONS CONVENTIONS

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Abstract

Protection of cultural properties of which existence decreases every day is one of the most important issues causing global concern. Many important conventions have been drawn up as a result of the efforts led by United Nations in order to prevent the threats against these properties accepted as the common heritage of the mankind. The purpose of this study is to examine the criminal law provisions included in the leading ones of these internationally important conventions, to raise awareness and to contribute, even slightly, to the future works concerning this issue in our domestic law.

Keywords: Cultural Property, Historical Artifact, Antique, Illegal Trafficking Of Cultural Property, International Cooperation.

BİRLEŐMİŐ MİLLETLER KONVANSİYONLARI IŐIĞINDA KÜLTÜR VARLIKLARININ YASADIŐI TİCARETİNİN VE NAKİLLERİNİN ÖNLENMESİ

Öz

Varlıkları her geçen gün hızla azalan kültür varlıklarının korunması küresel ölçekte endişeye neden olan önemli sorunlardan biridir. İnsanlığın ortak mirası olarak kabul edilen bu varlıklara yönelik tehlikelerin önlenmesi için Birleşmiş Milletler öncülüğünde yapılan çalışmalar sonucunda birçok önemli konvansiyon hazırlanmıştır. Çalışmamızın amacı, uluslararası alanda önem arz eden bu konvansiyonlardan öne çıkanların içeriğinde yer verilen ceza hukukuna ilişkin hükümlerin incelenmesi, farkındalık oluşturulması ve gelecekte bu alanda iç hukukumuzda yapılacak çalışmalara az da olsa katkı sağlayabilmektir.

Anahtar Kelimeler: Kültür Varlığı, Tarihi Eser, Antika, Yasadışı Kültür Varlığı Ticareti, Uluslararası İşbirliği.

1. Introduction

International society has been endeavouring for about hundred years to increase its efforts on the protection of cultural heritage of the world. These efforts to protect the cultural property, which is one of the concrete elements of the cultural heritage, are carried out not because of the economic values of these properties, but for their sentimental value in the cultural and world heritage. Because these properties are meaningful objects on which the traditions and history of the nations are reflected and which are to be protected legally (Forrest, 2010: 5).

Plundering, exporting and illegal trafficking of the cultural properties is today accepted as an important problem which has reached to global and international level (Bowman, 2008: 228). Such that, the biggest factor on the basis of this problem which is considered as an obstacle against revealing the secrets of history of humanity (Hilaire, 2013: 8) lies on the high demands of wealthy countries for plundered and stolen cultural properties. This demand enables that the cultural properties in poor countries find purchasers in wealthy countries on really high prices and therefore, the illegal trafficking of cultural properties cannot be prevented. This sophisticated and prosperous business has caused necessarily the existence of two different group of countries in the illegal trafficking of cultural properties, as in the other transnational crimes (Dietzler, 2013: 330). These countries are named on the doctrine as source and market or supplying and demanding countries (Dietzler, 2013: 330; Mackenzie/Tess, 2014: 722).

The market centres for cultural properties which are obtained especially in illegal ways from different points around the world where significant amounts are paid for these properties are established ironically in the most wealthy and modern cities of the world such as New York, London and Paris. As a result of the demanding activities from these centres, specifically a local conclusion is reached that the cultural heritage of the nations where these artifacts have been obtained is ruined. However, from a wider perspective, it is revealed explicitly that the cultural heritage of whole humanity is destroyed. In addition, as long as the available demand for these properties continues, an effective fight to hinder the plundering, illegal trafficking or transfers, unfortunately, does not seem to be possible (Forrest, 2010: 6). In the beginning of this study, the term of cultural property and related concepts are addressed. Following the explanations concerning the problems encountered in relation with the illegal trafficking and transfers of cultural property, the outstanding conventions drawn up by the United Nations are emphasised for the solution of these problems and the study is concluded with our domestic legislation and suggestions on the conclusion.

II. Illegal Trafficking and Transfer of Cultural Properties and Problems in Relation with These Acts

A. In General

It is helpful for comprehending the issue to address firstly the terms of "cultural property (historical artifact), antiques and trafficking of cultural property" briefly. Trafficking in cultural property (historical artifact) of which origin goes back to hundreds of years means, in the most general sense, to export a cultural property belonging to a country illegally from the territories of

that country and smuggle it to other countries (Alder/Polk, 2005: 98). As is understood, trafficking in cultural property is a type of smuggling where the materials in direct relation with the cultural heritage of a nation and values of humanity are in question.

Antiquities is the term used for the materials dating back more than hundred years. Cultural property is a more complicated term to define. Today, many artworks and archaeological findings are preserved in the museums in developed countries associated with this terminology. Since cultural properties are objects reflecting the historical and cultural identity, they are specified in the doctrine as a part of the "rights of the humanity" and in this aspect, it is stated that they are to be protected legally (Blake, 2000a: 61; Merryman, 1990: 513; Conklin, 1994: 24).

Article 3 of the Law No. 2863 on the Conservation of Cultural and Natural Property refers the cultural properties as "movable and immovable property on the ground, under the ground or under the water pertaining to science, culture, religion and fine arts of before and after recorded history or that is of unique scientific and cultural value for social life before and after recorded history".

Western countries have transferred, since 16th century, the cultural properties which they obtained from the territories they ruled for imperialist purposes to their own civilisation centres (Alder/Polk, 2005: 100). The fact that the cultural properties were exported, in illegal ways, from the places where they were unearthed to the developed countries where they were demanded has caused the emergence of a special international smuggling market where high amounts of money are invested. The countries which provide source to the trafficking in historical artifacts are generally politically problematic and economically underdeveloped countries (Mackenzie, 2011: 69). Besides, recently nearly in all of the source countries where these plundered cultural properties are available, the act of exporting these materials from their locations to another places without permission has been defined as an offence. The national legislations govern these acts generally as a type of theft or smuggling in normative sens (Alder/Polk, 2005: 101)¹.

The reasons and form of committing of the acts of exporting the works belonging to cultural heritage from their source countries to other locations are diverse. This diversity varies from the criminal sanctions stipulated by the source countries for this offence, to the

¹ According to our domestic law, Article 68 of Law No. 2863 on the Conservation of Cultural and Natural Property entitled "Contradiction with the prohibition to take abroad" states that "Anyone who take abroad the cultural and natural properties contradictory to this Law shall be punished with a imprisonment sentence for a period of five to twelve years and judicial fine up to five thousand days." (Detailed information will be given on the further parts of the study.)

efficiency and frequency of the controls carried out by the law enforcement authorities, to the probability of detection of the offence and to whether the related works have been plundered or stolen or other similar condition (Alderman, 2012: 608). Even though these acts are accepted as offences in many countries, the amounts of the punishments provided for this offence is relatively low compared to the other types of offences. However, some countries such as China stipulates death penalty for this offence (Alderman, 2012: 609).

B. Form of Committing the Offence of Illegal Trafficking of Cultural Property and the Offender

As in any other international smuggling market, the first step of this offence involves obtaining the materials (cultural properties) which constitute the substantial subject of the offence. The offender is the person carrying out this illegal trafficking in a systematic way. These persons reside generally either in the source or demanding countries. Moreover, it is crucial and almost necessary for these offenders to become familiarised with the market and to know its requirements. Likewise, in addition to possessing the capacity to know the characteristics, quality and value of the related objects, the offenders should be in contact with the other smugglers who know the illegal procedure on how to bring the objects from the source country to demanding country and act in and outside the country in this area (Bowman, 2008: 223).

Export of the related works from the territories requires two important elements. First is the network which is wide enough to transfer the related objects from one country to another. Second element is guaranteeing that the related works will be delivered successfully to the arrival point. The most applied practice on this issue is the bribe given to the police officers or customs officials on the borders or other interests provided to them (Alder/Polk, 2005: 101).

Illegal trafficking in cultural property is a type of offence with a wide legal range as in the drug trafficking. Just as the drug trafficking involves variable drugs such as cocaine, heroine and marijuana and the distribution routes and accomplices who act in an organised way, the trafficking in historical artifacts also require alternative works from different cultures and locations, followed smuggling routes and a well organised crime ring (Alder/Polk, 2005: 101).

C. Relation of Illegal Trafficking in Cultural Property with Some Other Transnational Offences

The illegal activities, smuggling and corruption aspects of illegal trafficking in cultural property which are common in other illegal trafficking offences, such as drug trafficking or trafficking in human, are addressed above. However, this offence has a very substantial distinction compared to other offences with illegal market. This substantial distinction is that

the trafficking of the related objects which is initiated on illegal ways becomes legitimate after a few steps (Mackenzie, 2011: 69). For example, the objects seized from the plunderers who have been sentenced to death penalty in China may be sold publicly and legally by the Chinese authorities to rather elite institutions based in London, Paris and New York. As understood, final sale and shipping of historical artifacts in this method do not involve any secret and illegal aspect as in the production, transfer and sale of the drugs. The prices of the historical artifacts offered in this method may, in some cases, reach to extraordinary levels. Absolutely, as a natural consequence of this case, the purchaser group of these objects consists of the elite in regard to social and economic aspects in their own societies. Likewise, possessing these objects not only reflects the symbol of pleasure and wealth, but also remains to be a different indication for being the privileged in the society (Mackenzie, 2011: 137). Surely, the fact that a country becomes a party to the international instruments concerning the protection of cultural properties makes the supply and demand of historical artifacts in that country significantly inconvenient. Therefore, rich countries such as Belgium and the Netherlands where historical artifacts find high demand withdraw from signing these international instruments drawn up for the protection of cultural heritage (Manacorda, 2011: 17).

The traders who deal in such a profitable business have got involved personally in the solution of this problem which they encountered or will encounter and they have tried to find solutions how to legitimatise the sale of cultural properties obtained in illegal ways (Mackenzie, 2011: 138). The transition makes the trafficking in cultural property legal which has been illegal in the beginning and it is carried out through export of cultural property from the source countries with legal and duly drawn up documents and import to the demanding countries with legal documents. The transition from this illegal to the legal status is ensured using the transfer ports or regions. Almost all of these transfer stations are located in free zones. The ports in these zones are not subjected to any limitations, contrary to the other ports, except a few general rules which could be easily fulfilled. Therefore, the objects of which export and import documents are duly drawn up in the free zones are transferred to the demanding countries and offered to the market in these countries as legal objects (Alder/Polk, 2005: 102). One of the most striking examples of such stolen or plundered objects is the objects smuggled from Iraq following the Gulf War. These plundered objects were first taken to Jordan and then sent to Switzerland (Brodie, 2011: 118). These objects which became legitimate through the free zones in Switzerland had two crucial effect generally accepted in international area. First of these is the strong tendency in the international area to prevent the easy recover of the objects from "the bona fide purchaser" who has bought these objects with

a secure title through well known commercial channels or acknowledged mediators (Lehman, 1997: 527). Second is the fact that the transfer of these objects which have been granted secure title by the centres such as Switzerland to other demanding centres becomes free. Because the objects granted secure title are accepted smoothly to the other demanding countries and they are, therefore, sold herein easily (Alder/Polk, 2005: 102; Lehman, 1997: 527).

The purchasers with archaeological knowledge especially act conscious and demanding for obtaining, beforehand the sale, information concerning the ownership chain and history of the objects with cultural heritage nature. These persons carry out detailed inspections in relation with the current situation of the object to be sold, who its previous owners were, where it has been found, who has carried out the excavation and transfer, whether any source has been published concerning this object and how it has been brought to the commercial market (Alder/Polk, 2005: 103).

III. International Efforts to Prevent the Illegal Trafficking in Cultural Property

A. In General

It is a known fact that the efforts for international cooperation to prevent smuggling of plundered objects of cultural heritage and the illegal trafficking of these objects are mostly exerted by the source countries (Blake, 1997: 223). Even though the history of these efforts dates back more than a century, their normative regulation is not that old (Greenfield, 1996: 14). These regulations are mostly observed in two forms as weak and strong. The weak regulations involve only some limitations for the material to be exported. However, any clear definition for the export of cultural properties has not been provided. In the strong form, the cultural materials are defined and the transfer of these materials to any other location is subjected to criminal prosecution as different form of theft (Kaye, 24).

The primary problem in most of the demanding countries including the United States of America and the United Kingdom is the unwillingness of these countries to govern limitations, for the acts of the persons who carry out business in their territories and conduct individual sale and purchase transactions. Nevertheless, the principal reason why the judicial inspections performed in these countries against the illegal trafficking in cultural property is concluded in success results from the different country origins of the related objects possessed by the offenders (Gerstenblith, 2002: 5).

The experiences in this area gained in the last five decades showed that it is almost impossible to prevent this illegal trafficking unless an international cooperation is ensured

between the source and demanding countries (Murphy, 155). The decrease in the number of the historical artifacts and, in parallel, the increase of the demand to these objects from the rich countries has resulted in the excessive high prices; and this incites the persons in poor countries to the offence.

B. Defining the Fundamental Framework for Conversation of Cultural and Art Properties According to International Criminal Law

The provisions laid down in the instruments governed by UNESCO and UNIDROIT respectively in 1970 and 1995 concerning the export, import or movement of cultural property in wide regions are evaluated under this title in respect with the conversation of the cultural and art properties.

1. Criminal Perspective of UNESCO Convention of 1970 on the Legal Framework of Movement of Cultural Properties

An important step in the international area against the illegal export, import and transfer of the cultural property is "*Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*" which was drafted by UNESCO and signed on 14 November 1970 in Paris and entered into force on 24 April 1972². This Convention is at the same time is a fundamental international source instrument and establishes the minimum legal regulations required to be implemented by the signatory States for the prevention of the illegal movement of the cultural properties. Accordingly, each State Party is obliged to protect the cultural properties in the scope of its sovereignty against the threats of theft, unauthorised excavations, unlawful export and import. The Convention is structured on a dual perception. First of these is based on the emphasise that special attention should be paid to the cultural property as the fundamental elements of the civilisation and national culture. The other perception focuses on the prevention of the dangers imposed by the illegal activities intended for the cultural properties. The Convention underlines what an obstacle is posed by the illegal export, import or ownership transfer of the cultural properties for the international communication which is a part of the UNESCO's mission. This second perception represents the existence reason of the element concerning protection. In this line, reaffirming the provisions laid down in article 2 paragraph 1, the Convention highlights what a cultural heritage impoverishment is caused, for the source

²*Convention on the Means Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention> (Date of Access: 23.11.2017).

countries, by the illegal export, import or ownership transfer of the cultural properties (Manacorda, 2011: 28).

Besides, Article 2 specifies a more specific purpose of the Convention that the States Parties should increase international co-operation for protecting each country's cultural property against all the dangers particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations³.

Considering worldwide, an immense cultural heritage variety is observed. Article 1 of the Convention indicates that the protection of this variety requires the regulation of norms for the protection of the properties accepted and declared by the countries as being of importance, for regional or secular reasons, in archaeology, prehistory, history, literature, art or science⁴.

Article 3 of the Convention governs that "The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit."⁵ When Article 6 sub-paragraph (b) of the Convention which prohibits the exportation of cultural property from their territory unless accompanied by the export certificate is interpreted along with Article 3, it is understood that the objects exported contrary to the exportation rules of a State Party shall be deemed as illegal under the law of the imported country.

Likewise, Article 4 of the Convention governs the provisions for the protection of the cultural property declared by the State Party as a part of the individual or collective genius⁶.

³ Article 2

1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes; CIE the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting therefrom. 2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

⁴Article 1

For the purposes of this Convention, the term "cultural property" means 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 and which belongs to the following categories: Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; elements of artistic or historical monuments or archaeological sites which have been dismembered; antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; objects of ethnological interest; property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand) ; original works of statuary art and sculpture in any material; original engravings, prints and lithographs; original artistic assemblages and montages in any material; (ii) (iii) (iv) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; postage, revenue and similar stamps, singly or in collections; archives, including sound, photographic and cinematographic archives;

⁵Article 3

The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit.

⁶ Article 4

The Convention takes into account the broad framework of the concept of cultural property and defines the framework of the regulations to be carried out by the State Parties in relation with the export, import and transfer of ownership of such. The first group of regulations involves the establishment of one or more national institutions which would prepare for the technical infrastructure of the norms to specify or update, in line with the *ethical principles* defined by the Convention, the list of the properties which require protection. This last regulation stipulated by article 5 sub-paragraph (c) of the Convention recalls indirectly the rules stipulated under the text of the Convention as in the other non-binding legal instruments on this issue. In other words, it leaves to the discretion of the State Parties how to govern the acts for protection the cultural properties⁷.

The essence of the Convention concerns the problem of export and import of the cultural properties which have significantly changeable structure. The most strict provisions are related with the activities of export. It is obligatory for taking a cultural object from the territory of a country to receive the permission of the competent authorities of that country. Especially it is requested to prevent the export from one of the Signatory States of the Convention unless a certificate on the source of the historical artifact is available⁸.

The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State: (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory; (b) cultural property found within the national territory; (c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property; (d) cultural property which has been the subject of a freely agreed exchange; (e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

⁷ Article 5

To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions:

(a) Contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property; (b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage; (c) promoting the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops...) required to ensure the preservation and presentation of cultural property; (d) organizing the supervision of archaeological excavations, ensuring the preservation "in situ" of certain cultural property, and protecting certain areas reserved for future archaeological research; (e) establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules; taking educational measures to stimulate and develop respect for the cultural heritage of all States, and spreading knowledge of the provisions of this Convention; (g) seeing that appropriate publicity is given to the disappearance of any items of cultural property.

⁸ Article 6

...
b) to prohibit the export of cultural property from their territory ass accompanied by the above mentioned export certificate ;

The terms or obligations concerning the import of the cultural properties are relatively lighter. These terms are formulated in two forms as related to "illegal export" and "stolen objects smuggled abroad".

On the first case, it is required that each Signatory State is take the necessary measures, consistent with national legislation, *'to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported in the States concerned'*.

The second case is the obligation to draw up provisions concerning *'prevention the import of the stolen objects'*. However, in this case, it is required to draw up national regulations governing that the objects stolen from the museums, religious or secular monuments or similar locations or institutions in the States concerned are not to be acquired and accepted. Moreover, it is indicated that the related objects are needed to be returned or recovered. Another emphasised matter is the necessity to pay a just restitution to the person who possesses the stolen but returned object with a valid certificate of ownership (Manacorda, 2011: 32).

Besides, the Convention abolishes the obligation to provide criminal sanctions against the personnel of the official or private institutions who acquire the cultural property without specifying its origin. Likewise, the preparation of certification which would cover the import process of the cultural properties and function as control means is not considered appropriate as it is an extremely complicated mechanism.

As known, the most important provisions of the Convention in respect with the import are included under Article 7⁹. This last examined mechanism governed under the Article represents the essence of general purpose of the Convention. This provision stipulates the necessity to establish a mechanism to ensure the return of the illegally acquired objects to the victim State which was rare and also difficult to implement.

⁹ Article 7

The States Parties to this Convention undertake: To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States; (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution; (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.

In addition, where the person possessing this cultural property has a certificate of private ownership duly drawn up, in conformity with the bona fide principles, in his location country, irrespective of being a party to the Convention, or the person has bona fide ownership declaration supported by the legal regulations of his location country, some difficulties may be experienced in the practice with respect to the return of this property (Manacorda, 2011: 33).

In general sense, Article 3 of the Convention addressing the prohibitions more clearly states that *"The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit."* However, this situation is not interpreted as a new obligation for the States to implement criminal sanctions against such activities.

Apparently, this case has two reasons such as the difficulties experienced in relation with proving and international reluctance to take action against the offences committed pertaining the cultural heritage of a foreign country:

The first one governed under Article 8 does not impose *'any penalties or administrative sanctions'* for the activities referred under Article 6 (b) and Article 7 (b). Therefore, sometimes the form of sentencing consists only administrative sanctions. Article 6 (b) of the Convention includes the subject of *"export of cultural properties without a certificate"* in the scope. However, both Article 7 (b) and Article 8 requires, without any exceptions, the scope of obligation to impose penalty to be limited with the first paragraph regarding the import of the stolen object. This case cannot include the acts which might be referred to the State, as in the ones concerning return and compensation, into the scope.

Another related provision with respect to the sanctions is governed under article 10 paragraph (a). This provision states that *"The States Parties to this Convention undertake to oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject"*.

The obligations of the State Parties originating from Article 13 of the Convention to establish a legal procedure, in conformity with their own domestic laws, which prohibits the illegal export and import of the cultural properties, prevents the transfer of suspicious cultural properties and ensures the earliest restitution of such to the owner, as well as to determine the practices in relation with the judicial procedure for the statutory protection of the individuals during this restitution process are not still clear. On the last part of the mentioned article, State Parties acknowledge that the cultural property of a State Party is inalienable and they are

obliged to recognise the continuous and indefeasible right of each State Party to such cultural properties.

Actually, UNESCO Convention of 1970 is the result of the conflict of interests in the reconciliation, even the slightest, between “the source” countries such as Turkey, India and South America which argued that the international responsibilities for the cultural properties were to be increased and “the market” countries such as the USA and West European countries which feared for damaging the international historical artifact trade. However, the confusing and insufficient provisions under the Convention are a conclusion of still continuing this conflict of interests. Despite all, it is an instrument of which importance cannot be denied as it is comprehensive regulation on this issue and it forms a basis for the bilateral and multilateral agreements thereafter.

2. UNIDROIT Convention of 1995 on Stolen or Illegally Exported Cultural Objects

UNIDROIT Convention of 1995 on Stolen or Illegally Exported Cultural Objects was drafted by the International Institute for the Unification of Private Law (UNIDROIT) based in Rome for facilitating and contemplating the implementation of the UNESCO Convention of 1970 and opened for signature on 24 June 1995 and entered into force on 1 July 1998. The Convention is intended for recognising and implementing the private laws of the States in respect with the recovery of the stolen or illegally exported cultural properties.

UNIDROIT established in 1926 for the unification of the private laws brought an international order for protection of the cultural properties. A consideration on two fundamental matters which were fulfilled by the integrity and drawing up the limits of the instrument and were the source of inspiration was included in the Preamble Part of the Convention. Firstly of these matters mentions about “*the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation*”. However, the themes in the following parts leading up to the introduction to a mechanism fighting with the illegal trafficking are provided. On one hand, it is underlined that important steps should be taken for common normative regulations, even on the minimum level, concerning return and restoration, on the other hand, it is emphasised that the Convention alone may not be able to solve the problems caused by the illegal movement, but it might trigger a process for international cultural cooperation.

Besides, the Convention applies to the claims of an international character for the return of the stolen or illegally exported cultural property (Article 1). For the purposes of this

Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention (Article 2). This list is the same with the one included in Article 1 of the Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

The Convention governs the procedure for restitution in two different forms for two separate categories: Chapter II governs the restitution of stolen cultural objects and Chapter III governs the return of the illegally exported cultural objects. The Convention states that the possessor of the stolen cultural object may return it. According to the Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place. Briefly, it could be stated that the UNIDROIT Convention focuses on the improvement of the instruments of private law more than punishing elements (Manacorda, 2011: 34).

3. United Nations Model Agreement of 1980

One of the instruments in criminal law with international character is the Model Treaty for the Prevention of Crimes which Infringe on the Cultural Heritage of Peoples in the Form of Movable Property which was adopted during *the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders* held in 1990 in Havana¹⁰. However, contrary to the other model treaties concluded in Havana, any UN General Assembly Resolutions was not adopted with this instrument. So this Treaty is not only a model treaty, but also it does not provide any binding legal value. It is only in the nature of a simple template which might be useful for the relations between the States wishing to cooperate in the fight against the offences of movable cultural properties.

In the Preamble, it is stated that the States, wishing to combat criminal activities which involve movable cultural property through the introduction of measures for impeding illicit transnational trafficking in movable cultural property whether or not it has been stolen, accept the imposition of appropriate and effective administrative and penal sanctions and the provision of a means for restitution. As seen, even though the means for restitution is indicated frequently under the fundamental Convention on this issue (UNESCO Convention

¹⁰ *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, http://www.unodc.org/documents/congress/Previous_Congresses/8th_Congress_1990/028_ACONF144.28.Rev1_Report_Eighth_United_Nations_Congress_on_the_Prevention_of_Crime_and_the_Treatment_of_Offenders.pdf (Date of Access: 27.11.2017).

and UNIDROIT Convention), it may be expressed that this treaty attaches more importance to the idea of sanction for illegal export and import and thus it provides a real novelty as is (Manacorda, 2011: 36).

In this respect, State Parties undertake three different obligations. Firstly, the States accepts the obligation “to take necessary measures to prohibit the import and export of movable cultural property which has been stolen in the other State Party or which has been illicitly exported from the other State Party” (Article 2 sub-paragraph a). This provision brings along the obligation to implement various sanctions for the offence of illegal export and import of movable cultural properties including minimum criminal sanctions.

Secondly, criminal sanction is provided against the acts in contradiction with article 3 of the Treaty which stipulates the obligation “to take the necessary measures for preventing the purchase of the exported cultural property and dealing with this within its own territories” (Article 3). At this point, *the Model Treaty* requires for the implementation of the criminal sanctions that the act has been committed “*by persons or institutions that knowingly acquire or deal in stolen or illicitly imported movable cultural property*”. It is observed that the scope of implementation is limited with the requirement that the purchaser is informed about the illegal origin of the property.

The provision under Article 3 is regulated for the prevention of the illegal trafficking in cultural properties which is an organised and transnational offence with regard to the form of committing and imposes criminal sanctions on “*Persons or institutions that enter into international conspiracies to obtain, export or import movable cultural property by illicit means*”. This provision enables to impose sanctions both on real and legal persons.

Some provisions under this model treaty is such as to provide a starting point for the introduction of new instruments for the fight against smuggling. As a basis for the instrument, it should be noted that Economic and Social Council encourages, in its *Resolution numbered 2003/29 on Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the Form of Movable Property*, “Member States to consider, where appropriate and in accordance with national law, when concluding relevant agreements with other States, the Model Treaty”¹¹.

C. Reform Suggestions Provided on the Basis of International Criminal Law for the Fight against Offences Committed in relation with Cultural Properties

Besides importance has been attached internationally recently to drawing up instruments which would strengthen the criminal provisions for offences committed against

¹¹ E/2003/INF/2/Add.4, 22 July 2003, <http://www.refworld.org/pdfid/46c45596d.pdf>.

cultural properties, several different perspectives have been expressed both in scientific and political and diplomatic level:

As the first trend, it is argued that international norms might be used for the protection of cultural heritage including the fight against the organised crimes as well as the works to be carried out in the future. In this regard, an overt support has been provided in international level for the implementation of *the United Nations Convention against Transnational Organised Crime (UNTOC)* which was adopted by the United Nations Resolution No. 55/25 during the General Assembly on 15 November 2000. The most crucial subject of this Convention is the fact that not only stronger instruments for the international cooperation are constituted, but also it is applicable against the organised crime acts with international nature (from participation to a crime network to money laundering). For this purpose, although negotiations were conducted in order to draft a new protocol, in addition to the current protocols, pertaining only to the smuggling of the art and archaeological properties, the negotiation forums could not accomplish a result since it was hard to prompt the international society except the countries which were the victims of the smuggling.

Alternatively, according to an opinion concerning the implementation of UNTOC, State Parties may ensure that serious sanctions are imposed for the illegal acts of which material subject is cultural property taking advantage from “Serious Crimes” category under Article 2 of the Convention. Likewise, the doctrine underlines that it would also be useful to extend the scope of the acts of participation to the organised crimes in relation with the smuggling of artworks, cultural and archaeological object (Manacorda, 2011: 39).

Moreover, several steps have been taken to put the provisions of UNTOC into practice for *the protection of the cultural heritage*. The first considerable step in this line is the *Resolution of 21 July 2004 on “Protection against trafficking in cultural property”* adopted by UN.¹² This Resolution stresses that the entry into force of the United Nations Convention against Transnational Organised Crime is expected to create a new impetus in international cooperation to counter and curb transnational organised crime; and this will in turn lead to innovative and broader approaches to dealing with the various manifestations of such crime, including trafficking in movable cultural property.

In the same manner, during *the Eleventh United Nations Congress on Crime Prevention and Criminal Justice* organised in Bangkok, on 18-25 April 2005, it was noted the increased involvement of organised criminal groups in stolen or smuggled cultural property.

¹² *Resolution ECOSOC 2004/34 of 21 July 2004, Protection against trafficking in cultural property.*

Also it was reaffirmed the fundamental importance of implementation of existing instruments and the further development of national measures and international cooperation in criminal matters, and the State Parties were called upon to take the necessary measures for ensuring such effect. Moreover, United Nations Economic and Social Council (ECOSOC) notes on its Resolution 2008/23 of “the increased involvement of organised criminal groups in the theft of and trafficking in cultural property” and it is emphasised strongly once more to benefit from the UNTOC. Also during the United Nations Congress on Crime organised at Salvador de Bahia in March 2010¹³ some other discussions were held concerning this issue and it was decided to invite the Commission on Crime Prevention and Criminal Justice. Additionally, taking note of some other related international instruments including UNTOC, it was adopted to draft the fundamental principles and guidelines needed for the prevention of the smuggling of cultural properties.

Recently, two important institutions have been established as an alternative for the fight on this issue in the framework of the efforts of United Nations: “*establishing a unified model offence type on smuggling*” and “*seizing the subject property*”. In this line, it could be regarded that, the matters similar to this strategy were argued by the experts group meeting held in 2009 at United Nations Office on Drugs and Crime. The mentioned suggestions are included in the Report submitted by the General Secretary during the Nineteenth Session of *Commission on Crime Prevention and Criminal Justice* held on 17–21 May 2010 in Vienna¹⁴.

Firstly, the State Parties were requested to “draft a legislation which takes the specific characteristics of the properties subjected to the offence and are appropriate for *criminalise the smuggling of cultural property*”. More clearly, State Parties are required to consider *the acts pertaining to the smuggling of cultural property using a comprehensive definition* for the stolen or exported cultural property.

Secondly, State Parties are to specify the act of *export, import and transfer of the cultural property* as offence referring to Article 3 of the Hague Convention of 1970. Besides, the States should consider smuggling of cultural property (including theft and exploitation of the archaeological sites) as a serious crime, especially in the case of involvement of organised crime rings, in accordance with the national legislations and Article 2 of UNTOC. Moreover, as noted on the Resolution 2008/23 of ECOSOC, the State Parties are requested to permit the seizure of the cultural property, in conformity with the fundamental principles of their legal

¹³ *United Nations Congress on Crime at Salvador de Bahia in March 2010.*

¹⁴ *19th Session Commission on Crime Prevention and Criminal Justice*, https://www.unodc.org/unodc/en/commissions/CCPCJ/session/23_Session_2014/CCPCJ_23-Index.html.

system and their national law, where the possessors of the cultural property or the objects fail to prove the legal origin of the ownership or to provide a reasonable and convincing explanation on the original origin of these properties, and it is expressed that UNTOC would constitute a useful basis for this purpose. This report, in brief, includes recommendations for strengthening significantly the parts of the international instruments in relation with criminal law ensuring that the sanctions are reinforced in the future for implementation on the illegal acts committed against the cultural properties.

IV. Some Statutory Regulations in Turkish Law on This Issue

A. Offence of Contradiction with the Prohibition to Trade Cultural Property

Article 2 paragraph 2 of the Law No. 2863 on the Conservation of the Cultural and Natural Property imposes sanction for the act of contradicting to the prohibition to trade cultural property. According to the provision, persons who tender, sell, offer, buy, accept the cultural and natural properties which have not been reported shall be sentenced to imprisonment for a period of two to five years and judicial fine up to five thousand days.

The legal subject of the offence is to prevent the trade, without being reported, of the cultural properties which are the common heritage and richness of the humankind. The offender of the offence is the real persons who tender, sell, offer, buy, accept the cultural properties which have not been reported.

The victim of the offence is the society which has the interest in the protection of the cultural properties.

The material element of the offence is the act of offering, selling buying or accepting the cultural properties which have not been reported. The negligent or operational acts for performing the mentioned issues may also constitute the material elements of the offence. For this purpose, the mentioned offence could be committed with separate act. The mentioned offence may be established as “damaging offence”. Therefore, the acts, except “the attempt”, which cause just the danger of damage, not the actual damage, does not constitute the material elements of the offence.

Any reason is not provided under the article for removing the unlawfulness element of the offence.

The moral element of the offence is intention. The expression of “...who contradict ... intentionally...” included under Article 67 paragraph 1 of the Law No. 2863 requires the existence of the intention for the constitution of the offence under the paragraph 2 of the same Article. In this sense, the general intention is sufficient and special intention is not required.

As known, the element of intention involves knowing and wishing. Knowing is to know about the meaning and results of the act. In this regard, it is required that the offender knows that the object subjected to the act is “a cultural property which is necessary to be reported” or this knowledge is accepted statutorily. As the acts constituting the offence are possible to interrupted, the attempt to this offence is possible.

B. Offence of Contradiction with the Prohibition to Take the Cultural Property Abroad

Article 68 of Law No. 2863 on the Conservation of the Cultural and Natural Property provides sanction for the act of taking the cultural property abroad in contradiction with the provisions under this Law. According to the mentioned article, the persons who take abroad the cultural and natural properties in contradiction with this Law shall be sentenced to imprisonment for a period of five to twelve years and judicial fine up to five thousand days.

The legal subject of the offence is to prevent the cultural properties which are the common heritage and richness of the humankind from being taken abroad. The offender of the offence is the real persons who take the cultural property abroad.

The victim of the offence is the society which has the interest in the protection of the cultural properties.

The material element of the offence is the act of illegally taking the cultural properties abroad. The mentioned offence could be committed with separate act. So it is possible to commit this offence through negligent or operational acts resulting in illegally taking the cultural properties abroad. This offence is constituted as “damaging offence”. Therefore, the acts, except “the attempt”, which cause just the danger of damage, not the actual damage, do not constitute the material elements of the offence.

Even though the text of the article mentions about taking the cultural properties abroad in contrary to this Law, the act of taking the cultural properties abroad in compliance with the law shall be deemed as the ground for compliance with law within the scope of Article 24 of Turkish Criminal Code.

The moral element of the offence is intention. The expression of “...who take abroad the cultural and natural properties contradictory to this Law...” included in the text of the Article requires the fact that the offender knows that it is contrary to Law to take the cultural properties abroad and he wishes to take them abroad. In this sense, the general intention is sufficient and special intention is not required. Besides, as the acts constituting the offence are possible to interrupted, the attempt to this offence is possible.

Conclusion

Cultural properties are of great importance since they reflect the various aspects and colours of the human history as well as they are one of the rare factors revealing the differences between the civilisations. For this purpose, preventing the destroy and illegal trafficking of these properties has been remaining as one of the issues discussed in international level. In this regard, it seems possible that taking a number of measures below could contribute to the settlement of this problem.

Firstly, illegal excavations providing the supply of the cultural properties to the related market should be prevented. The principal measure to be implemented for this purpose is decreasing the demand and prohibiting the illegal trafficking in cultural properties as much as possible. Preventing the illegal export in the countries demanding cultural properties as well as rendering decisions by the courts in the demanding countries in favour of the source countries may result that purchasers become more cautious and so the demand, thus the plundering, might be decreased. Likewise, for the prevention of illegal excavations and plundering, the areas where the cultural properties are available in the source countries should be taken under control through including law enforcement measures. Moreover, the educational works for raising awareness among the local people should be concentrated and the objects found by chance should be purchased by the State for a reasonable price and therefore it should be ensured that they are taken under protection. Unless the demand is taken under control, the plundering would continue. The source countries should take the attention of the International public opinion on this issue and should be cautious and insistent on the follow-up process.

Secondly, as stated under the Conventions addressed in this study, the acceptance that illegal trafficking in cultural properties is among the transnational organised crimes is extended in the international level and thus, special importance should be attached to the increase of the cooperation of the law enforcement and judiciary on the fight against this offence between the countries. Moreover, through a clear and certain definition of the objects to be protected and elements of the offence concerning the offences committed against the cultural properties, the differences between the offence definitions of the countries should be decreased and these offences should be unified.

Thirdly, it would be useful to include provisions, which could contribute to the settlement of the inconsistencies in the different normative regulations and practices on export and import between the countries, in the future conventions or the annexes of these conventions for the protection of cultural properties and illegal trafficking of these properties.

Also, the minimum requirements should be specified in general terms by removing the differences between the perspectives of the countries on the criminal sanctions for the offences committed against the cultural properties.

Lastly, the scope of the criminal liability should be extended from the real persons to legal persons. In this manner, it would be ensured that some public or private law persons (museums or auction houses) who are effective, directly or indirectly, in the market of cultural properties act more responsible and cautious.

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