

УДК 351.862.22

А.М. Соловійова

*кандидат юридичних наук, доцент,
докторант Класичного приватного університету,*

А.Б. Соловійова

*студентка 4 курсу
Київського національного університету
імені Тараса Шевченка*

КРИМІНАЛЬНО-ПРАВОВА ОХОРОНА ОБ'ЄКТІВ АРХЕОЛОГІЧНОЇ І КУЛЬТУРНОЇ СПАДЩИНИ В УКРАЇНІ ТА ДЕЯКИХ ЗАРУБІЖНИХ КРАЇНАХ

Alina Soloviova

*Candidate of Juridical Sciences, assistant professor,
Doctoral student
of Classical Private University,*

Aliesia Soloviova

*4th year student
of Taras Shevchenko National University of Kyiv*

CRIMINAL-LEGAL PROTECTION OF ARCHAEOLOGICAL AND CULTURAL HERITAGE IN UKRAINE AND SOME FOREIGN COUNTRIES

Formulation of the problem. Cultural property refers to property that has some special relationship with a particular culture or nation state. Cultural property includes objects found at archeological sites, which provide insight into earlier civilizations, and artworks produced by members of a culture and that are thought to embody or represent that culture in a distinctive way. The contours of the definition are vague and shifting, but the controversies over the use of cultural property are real and raise important problems for domestic and international law [1].

The aim of the article is investigate questions criminal-legal protection of archaeological and cultural heritage in Ukraine and some foreign countries.

The main results of the study. The 1969 European Convention on the Protection of the Archaeological Heritage is mainly concerned with archaeological excavations and the extraction of information from these excavations. It entered into force in 1970. The main thrust is that the parties undertake to prevent illicit excavations, to take the necessary measures to ensure that excavations are authorized and entrusted only to qualified persons, as well as to control and protect the results obtained. The parties accept to take those steps necessary for scientific publication concerning excavation and discoveries, to facilitate the circulation of

archaeological objects for scientific, cultural, and educational purposes. The Convention was ratified by twenty-four European countries. Pressure for revision of the Convention came in the late 1970s from the Parliamentary Assembly which was concerned with underwater archaeology and the illegal trade in antiquities [2].

The Convention of 1992 explains the concept of archaeological heritage by its ability to serve as an instrument for the memory of mankind. Within the objectives of the Convention of 1992, all such remains and objects and any other traces of mankind from past epochs are considered to be the elements of archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study: (i) the preservation and study of which help to retrace the history of mankind and its relation with the natural environment; (ii) for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information; and (iii) which are located in any area within the jurisdiction of the member countries of the Convention. Consequently, the archaeological heritage includes structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water [3].

Beyond the 1907 Convention there was the Hague Convention in 1954 and then the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in Armed Conflict 1999 ("Second Protocol").

The Second Protocol was adopted in response to the gaps contained within the 1954 Convention. The main crux of the Hague Conventions is to prevent the destruction of cultural property and artifacts during war, including eliminating the use of cultural property as a weapon of war. Beyond the treatment of cultural property in war, the Second Protocol states that Prosecution is warranted when there is a violation of the conventions. Beyond these specific conventions, crimes relating to cultural property can also be found in the ICC Rome Statute ("Statute") [4].

The Unidroit Convention presents an international framework to contest private sector transactions in stolen art and cultural property. Among other things, it allows claimants in countries that are party to the Convention to sue in the courts of other signatory countries for the return of stolen or illegally exported cultural property. It is significant that the Unidroit Convention unequivocally requires all objects demonstrated stolen to be returned and limits the possibilities for compensation in the case of return to holders who have been diligent in searching the title [5].

'Heritage crime' as a term has begun to appear more and more in both academic and policy documents. In England, the non-governmental organization responsible for the management and promotion of the historic environment, English Heritage, has even taken on the issue of heritage crime as a key aspect within its strategy moving forward (English Heritage, 2013, p. 15).

More broadly, such globally pertinent issues as the international trafficking of cultural objects, especially those looted from archaeological sites and monuments, have long attracted the attention of academics, heritage managers, lawyers,

journalists and participants in the art market alike (see for example Coggins, 1969 for an early archaeological discussion of the issue; Ede, 1998, for a dealer's perspective, and Silver, 2009, for a journalistic investigation). The challenges connected to the curtailing of the theft and illegal export of cultural material, not only that of an archaeological origin, continue to be an important area of research for many and the conflation of heritage crime in general with illicit trade was suggested in a recent publication produced in partnership between Norwegian and Polish agencies (Ramskjaer et al., 2011). However, other crimes also have a significant impact on cultural heritage, as defined here [6].

The key to the definition lies in the term "archaeology" itself. According to the Council of British Archaeology: "Archaeology is the study of the material remains and environmental effects of human behavior: evidence which can range from buried cities to microscopic organisms and covers all periods from the origins of humans millions of years ago to the remains of 20th and 21st century industry and warfare. It provides us with the only source of information about many aspects of our development. Milestones such as the beginning of agriculture, the origin of towns, or the discovery of metals, can only be understood through the examination of physical evidence. Archaeology also provides essential information for periods of the past for which written records survive."⁹ From this definition we see that the activity of archaeology as such is related to the creation of new knowledge and interpretations about the history and therefore the scientific component is a must when calling any activity "archaeology" [7].

The unlawful removal of archaeological heritage normally does not include any scientific measuring, documentation and research. The only similarity of "black archaeology" to actual archaeological activities is excavation which is necessary to get the archaeological finds out of surface. However, in case of "black archaeology", excavation is usually unlawful – i.e. carried out without the legal permission and often using the prohibited means of search (e.g. metal detectors if their use is prohibited by law). Illicit archaeology and metal detecting are often addressed as if they meant the same thing. It is often the case that detector users are equated to looters. The term "looter" involves diverse people with different motivations and interests, including those who engage in a legal hobby and sometimes even have historical interest in their search locations, and those who see detecting mostly as a profitable activity. (Hollowell 2006, 71). I agree that on certain occasions this is really the case. Yet, as I have argued in the introduction, detector users are a broad community with various motives and their relation to archaeology is not necessarily illegal. Therefore, the definition of "black archaeology" cannot contain detecting as one of its mandatory components [8].

Ingrid Ulst suggests the adequate definition of «black archaeology» should reflect the whole chain of activities because its actual meaning is much wider than the treasure hunting normally addressed as the simple unlawful excavation of archaeological items. In order to open its meaning and differentiate between archaeology and «black archaeology», Ingrid Ulst suggests that «black archaeology» can be defined as follows: «Black archaeology» means all the single or group-based activities which are related to the illegal non-scientific excavation, removal and

selling of archaeological heritage originating from illicit or official excavations, including but not limited to the preliminary research and communication activities, search and excavation works, removal and cleansing of finds, any support activities, networking and contracting, and the offering for sale and selling of finds to the previously identified or non-identified buyers in the country of origin and abroad [9].

The problem specific to Bulgaria is illegal excavations. In that country, there are vast and rich archaeological sites of yet-unknown content. Regular archaeological work started only after the war. To give the idea of the great value of the potential finds I may mention the treasure found in Rogozen in 1984, consisting of 164 silver vessels belonging to the culture of the ancient Thracians.

According to a recent estimate, about 13.000 archaeological sites have been identified, such as fortified cities, settlements, burial sites, and each of these sites may consist of up to a 100 structures or individual mortuary mounds (tumuli) [10].

The Criminal Code of Kosovo is also very clear on damaging, demolition and unauthorized removal of protected monuments or objects out of the Republic of Kosovo. According to the Criminal Code whoever damages or destroys a protected cultural, historical, religious, scientific or natural monument or object shall be punished by a fine or by imprisonment of up to two (2) years. Furthermore, if the protected monument is an object that has a unique value or if the offense results in serious damage, the perpetrator shall be punished by a fine or by imprisonment of up to three (3) years. The Criminal Code also determines the sanctions for damages caused during restoration work or research done within the properties of cultural heritage. According to the Code, whoever, without authorization by the competent authority, conducts conservation, restoration or research work on a cultural monument, or, despite a prohibition or without the authorization, carries out archaeological excavations or research and thereby destroys or seriously damages a cultural monument or its characteristics shall be punished by a fine or by imprisonment of up to two (2) years. When these criminal acts are committed against a cultural monument of unique value or result in serious damage, the perpetrator shall be punished by a fine and imprisonment of six (6) months to three (3) years [11].

The cultural heritage of Ukraine is an integral part of the world's cultural heritage. The preservation and enhancement of cultural values is among priorities in the government's policy in the sphere of culture (see, for instance, The Conceptual Directions of Policies by Executive Bodies of Power in the Sphere of Culture, presented by the Cabinet of Ministers of Ukraine in June 1997 and approved by the Order of the Cabinet of Ministers of Ukraine No 675 as of 23 June, 1997). In accordance with the Law of Ukraine On the basics of National Security of Ukraine (Article 3), "spiritual, moral and ethic, cultural and historic values are the basis of national security". In 2008-2009, the following laws were adopted: Law on Joining the International Convention on the Protection of Intangible Cultural Heritage; Law on Approval of the List of Cultural Monuments which cannot be Subject to Privatisation; Law on Amendments to the Law of Ukraine on Museums; Law on Amendments to Some Laws of Ukraine in Connection with the Approval of the

Parliament; Law on Amendments to the Law on State Programme for Cultural Heritage Protection [12].

Today, in Criminal Code of Ukraine such liability is provided for in Article 298. In accordance with article 298 of the Criminal Code of Ukraine, the Illegal conduct of archeological investigations, excavation, other earth or underwater works on the project of archaeological heritage – punishable by a fine up to 100 tax-free minimum incomes, or restraint of liberty for a term up to two years, or imprisonment for the same term, with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years [13].

Summary. Thus, in our view, the breach of Ukrainian criminal legislation is the absence of special norm, which would be subject to criminal liability for theft of movable objects of cultural and archaeological heritage. Currently, responsibility for such an act occurs on the relevant part of article 185 of the Criminal Code or under article 186 of the Criminal Code of Ukraine, if the abduction was carried out openly or under article 187 of the Criminal Code of Ukraine, if the abduction of objects of archaeological heritage by the attack occurred in the presence of all the other signs. The punishment should be appropriate degree of public danger of the offense, therefore, in our opinion, the presence of a special rule with a higher punishment, compared with the general rules (articles 185, 186, 187), would perform the functions of general and special prevention.

REFERENCES:

1. *Posner Eric*. The international protection of cultural property: some skeptical observations / Eric A. Posner // Electronic resource: http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1315&context=public_law_and_legal_theory.
2. Archaeological heritage the council of Europe initiatives and the valletta convention // Electronic resource: https://www.coe.int/t/dg4/cultureheritage/heritage/resources/Publications/Archaeology_brochure_EN.pdf.
3. European Convention on the Protection of the Archaeological Heritage // Electronic resource: <http://conventions.coe.int/Treaty/en/Treaties/Html/143.htm>.
4. Cultural property protections in international criminal law // Electronic resource: <https://acontrarioicl.com/2013/08/09/proprietas-culturalis/>.
5. Protection of Cultural Heritage in Southeast Asia // Electronic resource: http://asef.org/images/docs/Hanoi_Proceedings_Digital_2010.pdf.
6. Thomas Suzie. What is 'heritage crime'? / Suzie Thomas, Louise Grove // Electronic resource: https://he.palgrave.com/resources/sample-chapters/9781137357502_sample.pdf.
7. The Council of British Archaeology // Electronic resource: <http://www.britarch.ac.uk/getinvolved/whatisarchaeology>.
8. *Ulst Ingrid*. The Role of Community Archaeology in Heritage Protection: Responsible Metal Detecting as a Tool for Enhancing the Protection of Archaeological Heritage/ Ingrid Ulst // Electronic resource: <http://register.muinas.ee/ftp/Teadustood2013/IngridUlst2012.pdf>.
9. *Ulst Ingrid*. The problems of "black archaeology" in Estonia / Ingrid Ulst // Electronic resource: <http://register.muinas.ee/ftp/Teadustood2013/IngridUlst2012.pdf>.

10. The protection of historic buildings and their artistic contents against crime and willful damage // Electronic resource: https://www.coe.int/t/dg4/cultureheritage/heritage/resources/Publications/Pat_PC_33_en.pdf.

11. Protection and promotion of the cultural heritage // Electronic resource: <http://kfos.org/wp-content/uploads/2015/03/trashigimia-kulturore.pdf>.

12. Kyiv Initiative Regional Programme Pilot Project 2: "Rehabilitation of Cultural Heritage in Historic Towns" (PP2) // Electronic resource: https://www.coe.int/t/dg4/cultureheritage/cooperation/Kyiv/PP2/KI_2010_049-PP2UkraineHAR.pdf.

13. The Criminal Code of Ukraine // Electronic resource: <http://zakon2.rada.gov.ua/laws/show/2341-14>.

Соловйова А.М., Соловйова А.Б. Кримінально-правова охорона об'єктів археологічної і культурної спадщини в Україні та деяких зарубіжних країнах

У статті аналізуються питання кримінально-правової охорони об'єктів археологічної і культурної спадщини в Україні та деяких зарубіжних країнах. Досліджується місце об'єктів археологічної і культурної спадщини в системі кримінально-правової охорони України і деяких зарубіжних країн.

Ключові слова: археологічна спадщина, культурна спадщина, злочин, зарубіжне законодавство, кримінальне право.

Соловьева А.Н., Соловьева А.Б. Уголовно-правовая охрана объектов археологического и культурного наследия в Украине и некоторых зарубежных странах

В статье анализируются вопросы уголовно-правовой охраны объектов археологического и культурного наследия в Украине и некоторых зарубежных странах. Исследуется место объектов археологического и культурного наследия в системе уголовно-правовой охраны Украины и некоторых зарубежных стран.

Ключевые слова: археологическое наследие, культурное наследие, преступление, зарубежное законодательство, уголовное право.

Soloviova Alina, Soloviova Aliesia. Criminal-legal protection of archaeological and cultural heritage in Ukraine and some foreign countries

The article analyzes the issues of criminal law protection of archaeological and cultural heritage in Ukraine and some foreign countries. In the article was explored the place of archaeological and cultural heritage in the system of criminal law protection of Ukraine and some foreign countries.

Keywords: Archaeological heritage; Cultural heritage; Crime; Foreign legislation; Criminal law.

Стаття надійшла до редакції 19.04.2016.