

The Protection of the Criminal Law on Cultural Property — The Approach of International and Each Country's Domestic Legislation

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Abstract—Cultural property with historical, artistic or religious significance is rich in historical and cultural wealth. Thus the international criminal law and the criminal law of each country in the world should work together to crack down on criminal acts against cultural property protection. In terms of international penal law, a convention on crimes against cultural property protection should be formulated as soon as possible, and such crimes should be included in the scope of international criminal sanctions. As regards to criminal law of each country in the world, the law that has universal jurisdiction over such crime and laws that serve as the corresponding international criminal justice assistance should be included.

Keywords—cultural property protection; cultural property crime; international criminal law; domestic legislation of each country

I. INTRODUCTION

Cultural property with historical, artistic or religious significance is a rich historical and cultural wealth, reflecting the development of human society. These cultural properties constitute the cornerstone of human civilization and lay the foundation of national culture. They "enhanced the understanding of human civilization, enriched the cultural life of people of all countries and inspired mutual respect and understanding among countries"[1]. Unfortunately, not all cultural property can be passed down and developed. Some are destroyed by natural disasters, and more are artificially destroyed. War is the first, most direct and most violent cause for the destruction of cultural property. During wars, the victors always deliberately plunder, destroy cultural property, or retain or squander it as a valuable "trophy"; or use it as a means to wreck the conquered, holding the view that the elimination of cultural property is equivalent to destroying their cultural beliefs. Therefore, the protection of international criminal law on cultural property originates

from wars, is born during wars, what's more, developed through wars¹. [2]

It can be seen that the protection on these properties by law comes first from the monetary value of the property itself either from the international or each country's perspective, just as the law protects private property. Despite the protection of international criminal law on cultural property follows the norms of the Law of War, it still failed to break away from such path. Even during the first real international trial in human history (Nuremberg Trials) in the last century, most Nazis' acts of plundering and destroying cultural property were identified violations of public and private property. However, it failed to adequately realize the historical, literary, religious, archaeological, and scientific value of destroyed cultural property. This situation did not improve until the issuance of *Convention on the Protection of Cultural Property in the Event of Armed Conflict (Hague Conventions of 1954 for short)*, which started the protection on movable or immovable property of great significance to each nation in the event of armed conflict. In the late last century and at the beginning of this century, several international legal documents extended the scope of protection to natural landscape heritage and intangible cultural heritage, while extending the period of protection to non-armed conflict time. *The Statute of the Establishment of a High Court for the Prosecution of Crimes in the Democratic Republic of Cambodia in the Cambodian Courts (the Statute of High Chambers in the Courts of Cambodia for short)* even included the crime against cultural property protection under armed conflict as a separate offence to punish such serious international crimes. However, Article 7 of the statute has not been applied to the prosecution and trial of any suspect until now. Before and after the *Rome Statute of the International Criminal Court* in 1998 (*the Rome Statute for short*) becomes effective, some countries inherited and further developed the provisions of the *Statute of the International Tribunal for the Former Yugoslavia (Statute of*

¹ According to in international law, the protection of cultural property in the event of armed conflict is mainly achieved through humanitarian law.

the Former Yugoslavia for short) in their domestic criminal legislation. They have successively added provisions that equal conviction of cultural property damage to war crimes in specific situations, such as the United Kingdom, Germany, Canada, New Zealand, etc. These international and each country's legislation provisions have played a positive role in the protection of cultural property. However, there are still many unsatisfactory provisions on this issue either in international convention or criminal legislation in various countries. Sometimes it is obviously not enough to crack down on crimes against cultural property protection.

The crime of cultural interests was included in the *Draft International Criminal Code* in 1974 compiled by famous international criminal jurist Cherif Bassiouni. At the early negotiation stage of the *Rome Statute*, some representatives hold that the crime of destroying or stealing precious cultural property of the country should be included in the jurisdiction of the International Criminal Court [3]. However, it's obviously difficult to incorporate the crimes of cultural interests into the jurisdiction of the International Criminal Court.

First of all, it is not easy to define crime of cultural interests, as well as the content of cultural interests. In addition to cultural property with historical, literary, archaeological, religious, and scientific values, if natural landscapes and intangible cultural heritage are included, it is difficult to get an accurate list of objects covered by this crime. As the protected intangible cultural heritage is constantly increasing and cannot be accurately determined in each country. However, if natural landscapes and intangible cultural heritage are not included, the crime of cultural interests is incomplete. Second, the content of criminal related to cultural interests is complicated. Aside from damage and stealing, there are more illegal trafficking and illegal trade during peacetime. Therefore, even if the criminal object of cultural interests is included in the jurisdiction of the International Criminal Court in a listed but not completely limited manner, the International Criminal Court cannot cope with the trial of such crime. Given these criminal acts against cultural property protection — illegal damage, illegal theft, illegal trafficking, illegal transactions — occur almost every day in the world. Thirdly, apart from the four categories of international crimes listed in the *Rome Statute*, there are also many serious threats to the security and development of human society, such as piracy, illegal trafficking and trading of drugs and psychotropic substances, and terrorism. If the crime of cultural interest can be governed by the International Criminal Court, then more international crimes can also be governed by the International Criminal Court. In this way, the International Criminal Court cannot deal with so many international crimes at all even there is no conflict between the jurisdiction of the International Criminal Court and the sovereignty of the state. Therefore, it is not feasible for the International Criminal Court to govern the crime of cultural interest.

However, the fact that the International Criminal Court cannot administer crimes related to cultural property does not mean that such crimes are not international crimes or that such crimes cannot be punished in the international

community. Accordingly, such crimes can be considered from the perspective of international and each country's criminal legislation.

II. DISCUSSION ON THE APPROACH OF THE INTERNATIONAL CRIMINAL LEGISLATION

The Hague Convention of 1954, which has a pioneering significance in the protection of cultural property in the event of armed conflict, is the first universal multilateral international treaty in the international community to focus on the protection of cultural property during wartime. It provides a comprehensive code for the protection of cultural property under armed conflict. However, the provisions of Article 28 on sanctions of the *Hague Convention* endorses state parties' right to punish specific crimes of cultural property, allowing state parties to compulsory punish individuals who intentionally damage, destroy or plunder cultural property in the event of armed conflict, as well as criminal or disciplinary sanctions[4]. A few countries have specific provisions in their general criminal legislation on how to sanction violations of cultural property protection in armed conflicts. However, most states parties do not have universal jurisdiction over such criminal act in their domestic criminal legislation, which will inevitably lead to a reduction in the deterrence of the Convention and limit its role. *The 1998 Rome Statute* clearly defined such act as a component of war crimes, but the act of destroying cultural property in peacetime cannot be punished unless the attack on civilians reaches a "wide or systematic" level², which is mainly for attacks on religion and its buildings, making it difficult to be applied for other types of cultural property.

In addition, the relevant judicial practices conducted by international community are all imperfect. The Nuremberg Trials based on *Charter of the International Military Tribunal for Nuremberg* imposed severe criminal sanctions on individuals who committed crimes of plundering or destroying cultural property. However, the scope of protection of cultural property in this trial is limited. The indictment and judgment only recognize the plundering and destruction of cultural and artistic treasures, including paintings, sculptures, furniture, precious books, historical buildings and famous cities, which has a considerable gap with the scope of cultural property recognized by international criminal law later. At the same time, the Nuremberg Trials conducted a combined judgment on war crimes and crimes against humanity, and the reasons for the judgment were also explained together. Such judgments are incapable of drawing conclusions as to which acts belong to war crimes consisting of cultural property and which constitute crimes that undermine humanity. Third, the trial and judgment of crimes related to cultural property are also inadequate. The judge of Göring did not clearly identify that Göring is responsible for "predation of public and private property", while the judgment of Ribbentrop (war crimes and crimes against humanity) only vaguely require him to be responsible for the economic policies implemented during the occupation period of the occupied country as regards to

² Those who cause persecution and pressure to the spirit of the masses can be convicted of crimes against humanity.

property damage. Only the judge of Rosenberg clearly stated the robbery, looting, and sabotage of the cultural property he had made, and that he had committed war crimes for these acts. Such results easily lead future generations to the misunderstanding that Rosenberg was the only one to destruct cultural property.

The International War Crime Tribunal for former Yugoslavia established in 1993 practiced and further developed the protection of international law on cultural property in non-international armed conflicts.[6] The court tried Pavre Strugar, Jokic, Brastian and others accused of attacking temples or historical and cultural cities, and finally sentenced such acts to war crimes and crimes against humanity, adding one more example of incorporating the destruction of cultural property into crimes against humanity. But it still did not address the issue of convicting the destruction of cultural property in peacetime. *The 2001 Statute of High Chambers in the Courts of Cambodia* broke the international legislation on this issue and directly defined the destruction of cultural property in the event of armed conflict as crime. It is clearly stated in Article 7 of the Statute, "Based on the *Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954*, the Extraordinary Court has the power to carry out judgment to all persons mostly responsible for cultural property damage in the armed conflicts that took place between April 17, 1975 and January 6, 1979. Thus, it is no exaggeration to say that the provision in *Statute of High Chambers in the Courts of Cambodia* serves as the most avant-garde legislation on cultural property crimes to date in international community. It is a pity that the avant-garde legislation has not resulted to the successful trial of cultural property crimes. This single offence was included in several completed cases, and no defendant in those cases was convicted only because of this crime. What is more, no defendant's conviction in those cases is related to the destruction of cultural property.

Prior to the elaboration of the *Rome Statute*, the *Draft Code of Crimes against the Peace and Security of Mankind* (amended by the International Law Commission of United Nations in 1996) [7] set out five categories of international crimes, including the crime of aggression, genocide, crimes against humanity, crime of endangering the security of United Nations and related Personnel and war crime. The crime of interfering in a country's internal affairs, crime of colonial rule and other foreign domination, crimes of apartheid, crime of recruiting and training mercenaries, crimes of international terrorism, and crimes of illegal trafficking in narcotic drugs included in 1991 draft were absent here.^[8] Of course, this has much to do with the establishment of the International Criminal Court and the formulation the *Statute of the International Criminal Court*. Therefore, the final statute only concluded four types of crimes. However, the compilation of legislation for international crimes should not stop here. The types of crimes stipulated in the *Rome Statute* do not conflict with the legislation of international crimes. It is in human interest and operationally feasible to incorporate the crimes related to cultural interests (including vandalism, illegal theft, illegal distribution, illegal trading and so on) to international

criminal legislation. Incorporating such crimes into international criminal legislation does not necessarily require an international criminal body to exercise jurisdiction over such crimes. It serves as a component of international attitude, showing the international community's zero-tolerance towards crimes related to cultural interests. It also clearly reflects their intention to assign the jurisdictional rights of such crimes to the state, so that the state jurisdiction of such crimes becomes a norm of international law, just as the universal understanding of countries around the world for crime of piracy and torture.

The legislation on international crimes by international community integrates existing international crimes and regulates the elements of crimes, so that considerable international crimes would not linger on academic discussion to avoid difficulties in practice. In terms of crimes of cultural interests, one possible approach is to combine convention with existing legal effects and non-binding documents in the international community, which can cover the objects and behavioral elements of cultural interest crimes to the greatest extent, stop the situation of "one war, one international statutes" or "new declaration after the former was severely damaged".³ This can also integrate the existing international regulations on illegal import and export and illegal transfer of cultural property. In this way, a comprehensive international criminal legislation is established, and the universal jurisdiction of state can be included in legislation, so that any country can impose criminal sanctions into any similar crime regardless of the nationality of the offender, the place of crime, the victimized country, etc. This will provide a better position to combat criminal acts against cultural property protection.

III. APPROACH FOR CRIMINAL LEGISLATION IN EACH COUNTRY

What each country needs to do is to improve their law against cultural property crimes on the basis of international comprehensive criminal legislation. Such improvement can be realized from the following three aspects:

The first is to formulate sanctions for related criminal acts in combination with crimes under the jurisdiction of the International Criminal Court. For example, the individual violating cultural property under certain conditions also commit war crimes and crimes against humanity and are required to shoulder criminal responsibility. Looking through criminal legislation on cultural property crimes in various countries, only some European countries, Canada in the Americas, few African countries, and New Zealand and Australia in the South Pacific established domestic legislation that is connected with the *Rome Statute in content*, such as *The International Criminal Court Act* in the United Kingdom, *The German Code of Crimes Against*

³ After the Second World War, there emerged the *Charter of the European International Military Tribunal* to punish German war criminals. After the Yugoslavia War, there emerged *Statute of the International Tribunal for the Former Yugoslavia*. After the destruction of the Bamyan Buddha, there emerged the *Declaration on the Deliberate Destruction of Cultural Heritage*. After the ISIL destroyed the cultural relics in Iraq and Syria, there emerged the *Bonn Declaration on World Heritage* (2015).

International Law in Germany, *The International Criminal Court Act of New Zealand*, *Australia International Criminal Court Act and its Consequential Amendments* in Australia, *Crimes Against Humanity and War Crimes Act* in Canada, *The International Criminal Court Act* of the Republic of South Africa, as well as the "crimes against humanity" specially stipulated in the *Czech Penal Code* and *Australian Federal Criminal Code*. Apart from these countries, most countries in the world have no China's legislation on the offences stipulated in the *Rome Statute*. This is obviously not helpful to the punishment of cultural property damage included in war crimes and crimes against humanity, causing the jurisdiction of the International Criminal Court serves as a supplement to national jurisdiction. The implementation of state jurisdiction is still the most important approach to crack down on crime against cultural property.

The second is to formulate domestic legislation supported by international criminal judicial assistance in each country. Actually, most International Criminal Court Act of the countries mentioned above include articles allow legal assistance from the International Criminal Court, while some countries have relevant provisions in the International Criminal Judicial Assistance Act established separately. Examples include the *Criminal Judicial Assistance Act* of New Zealand, *Criminal Judicial Assistance Act* of Canada, *Criminal Judicial Assistance Act* of Singapore and *Act for Criminal Judicial Assistance and Related Matters* of Mauritius. Thus, national legislation involves the mutual judicial assistance in criminal cases between the State and the International Criminal Court, including investigation and evidence collection, execution of arrests and confiscation. Such provisions serve as strong guarantee for the International Criminal Court to combat violation of cultural property constituted in war crimes and crimes against humanity.

The third is to clearly define the crimes of cultural interests in each country's criminal legislation, and establish complete universal jurisdiction over such crimes in the general provisions of their criminal law. Detailed definition acquires clear description about the object of the crime, the behavior of the crime, the subjective state of the crime, the subjective characteristics of the crime and so on, and the constituent elements of the crime should be enough to serve as a basis for judgment under specific circumstances. The regulation of these contents can be placed in the Criminal Law or even other Executive Law according to the norms in criminal legislation of each country. The specific content does not need to be consistent in which law or laws. It is important to have complete legal protection for cultural property with human historical, literary, religious, archaeological, and scientific value and severe criminal sanctions for violations. In addition, the country's criminal legislation should involve detailed provisions on the types of crimes under universal jurisdiction and the implementation of universal jurisdiction, so that the universal jurisdiction of international crimes such as crimes of cultural interests can be truly implemented in the country. Given that crimes related to cultural interests have spread into the field of

international crimes, it is reasonable and appropriate to exert universal jurisdiction over such crimes.

IV. CONCLUSION

Undoubtedly, the violation of cultural property with historical, literary, religious, archaeological, scientific and other values is an international criminal act. Such acts violate international criminal law norms (including the provisions on theft, illegal import and export, illegal transactions in 1970 *Paris Convention*). They seriously endanger human peace and security and should be subject to criminal sanctions. However, the current international criminal law and the criminal legislation of various countries are still lacking in combating these criminal acts against cultural properties, either for incomplete criminal acts, loose sanctions, or poor cooperation, leading to more and more crimes against cultural property. Such crimes involve damage in the event of armed conflict and illegal trafficking and trade in peacetime. In order to protect the cultural property that reflects the history of human society, the international community must make concerted efforts to develop a sound and reasonable criminal legislation against cultural property crimes both in international and each country's legislation. Only in this way can we effectively protect our cultural property from damage caused by war, deliberate destruction and excessive development, so that it will always remain splendid in the process of human civilization.

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