NORMS OF SOFT LAW IN INTERNATIONAL LEGAL REGULATION OF CULTURAL HERITAGE PROTECTION

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Abstract

The article broadly analyzes the role of norms of "soft" law in the international legal regulation of cultural heritage protection, on the basis of the existing diversity of opinions in the legal literature and key international documents. It is noted that in the regulation of relevant field, the norms of "soft" law attract attention with their effectiveness along with the norms of "hard" law. At the same time, the norms of "soft" law in the international legal regulation of cultural heritage protection play an important role not only in the creation of the norms of "hard" law in the future, but also in the formation of relevant domestic legislation. Finally, the article analyzes the main provisions of some of the recommendations adopted by UNESCO, an important international organization in the field of cultural heritage protection. The above is carried out in parallel with the analysis of the national legislation of the Republic of Azerbaijan. In conclusion, a number of theoretical and practical proposals are put forward on the role and development of the regulation in this direction of the norms of "soft" law on cultural heritage protection.

Keywords: *cultural heritage, soft law, hard law, international documents, national legislation, archeological excavations, historical monuments, movable cultural property.*

Along with international contractual and international customary norms, norms of a recommendatory character have an important role in the field of protection of cultural heritage. Article 38 of the Statute of the International Court of Justice notes that the International Court of Justice, when resolving disputes submitted to it, may be guided by an international treaty, international custom, general principles of law and judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law [6]. Although the norms of a recommendatory character are not mentioned here, it is already unambiguously accepted that the role of norms of a recommendatory character in improving domestic legislation and in regulating international relations is huge. This is also called "soft" law in the legal literature.

In order to implement the principles reflected in their statutes, international organizations develop relevant international standards, exercise control over their application, and also adopt recommendatory norms that allow achieving important results in the practice of States. This process is carried out within the framework of various international organizations. For example, the International Labor Organization adopts conventions and recommendations on various aspects of social and economic rights. To date, the International Labor Organization has adopted about 200 such conventions and the same number of recommendations [10, p.233].

There are various types of decisions adopted by international organizations, and decisions of a recommendatory character have a special place. Most of the decisions of international organizations do not have binding legal force, they are advisory in nature. Thus, as an example, it can be cited the power of the General Assembly to make recommendations, provided for in Articles 10 and 11 of the UN Charter [5]. As more general and imprecise rules gradually evolve through custom or even so-called "soft law" (i.e. non-legally binding standards and general rules), these rules become "hard" law.

While an international treaty and international custom establish binding obligations for States in the system of international legal regulation of the protection of cultural heritage, "soft" legal norms do not do the same. In other words, an international treaty and international custom usually have an imperative character and provide rules of conduct binding on States. The term "soft" ("soft law") includes legal documents that have no legal force. "Soft" law often includes relations that are not consistent with the norms of "hard" law. Although the term "soft law"

originally appeared mainly in the context of international law, in recent times it has entered almost exclusively into domestic law and, to some extent, already into certain branches of it.

The practice of international organizations in this context is also varied. Thus, the UN, the European Union, the International Labor Organization, UNESCO and others have a special place. The main common feature of the documents adopted by these organizations is that they do not establish specific obligations for States do not include sanctions and, finally, are not legally binding.

In the legal literature, it is noted that the norms of a recommendatory character are not the norms of international law, although they have a special place in the social norms that exist in the international arena. As regards changing the existing norms of international law, norms of a recommendatory character cannot change the norms of international law. They can only determine the need to change the existing norm; in fact, a change in the norm is possible only with the consent of the States. In this case, the existing norm is not advisory in nature, but changes when a new international custom is formed [15, p.123].

The norms of "soft" laws are mainly defined within the European Union. Thus, the European Union has "recommendations", "codes of conduct", "guidelines", etc. to implement its various legal policies, norms of an advisory character are used. These policies are implemented more successfully within the European Union. It is about faster and more precise implementation of these rules by Member States. In the European Union law, "soft" rules are often used to assist in the implementation or interpretation of European Union law, as well as to fill gaps in the legislation of the Member States. As in the case of the norms of "hard" law, since general rules and principles are reflected here, they become binding on the Member States. This distinguishes the European Union from other international organizations. The legal basis for the adoption by the European Union of soft law is set out in Article 288 of the Treaty on the Functioning of the European Union. Thus, the various legal acts of the European Union that the Union may adopt in order to exercise its powers (e.g. statutes, directives, ordinances, recommendations, opinions, etc.) are described in this Article. Directives are binding on at least one Member State depending on the result to be achieved, but the choice of forms and methods is determined by the internal authorities of the Member States. Among the acts within the framework of the European Union, it can be mentioned the Regulation No. 3911/92 of 1992 on the Export of Cultural Goods, Directive No. 93/7 of 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State of the European Union, etc.

The recommendations of the International Labor Organization should also be mentioned. The Recommendations within the International Labor Organization, which are usually characterized as the norms of "soft" law, serve to facilitate and further expand the application of rules not adopted in the form of conventions. As for the Council of Europe, its conventions are binding on the States that ratify them, while its recommendations are not binding. They usually reflect the position of the Parliamentary Assembly of the Council of Europe.

The norms of "soft" law or non-binding international instruments are generally recognized as international instruments that have great potential for future development into the norms "hard" law or legally binding international instruments. This process may usually develop in three directions. The first of these is the drafting of declarations, recommendations, etc. The fact is that this is the first step towards the contracting process, and in this case, one should refer to the principles already set out in the norms of "soft" law. The second case is that the norms of "soft" law are aimed at directly influencing the practice of States and, if successful in this matter, lead to the emergence of basic domestic norms in this field. Finally, the last case, relevant norms, leading to further convergence of the legislations of the States, also lead to the adoption of international instruments of a mandatory character in the future. The norms of "soft" law usually do not bind States with international obligations, which offers States to make a convenient choice for the activities in the relevant field. States adopt the relevant principles, form their own na-

tional legislation, which is characterized by the fact that the paths are different, but the results are the same. In other words, the norms of "soft" law can be transformed into the norms of "hard" law by adoption by States domestic legislation in accordance with the law or by joining to specific binding agreements. The latter is more common with standards governing contracts or other business activities. Contracts are a prime example of an agreement that is traditionally considered "hard" law by default. When State ratifies a treaty, if the State has national laws that conflict with the treaty, the State is required to change those laws to be consistent with the treaty. In the recommendations, a more differentiated path is chosen, that is, there is a process of gradual changes in legislation, if agreement is not reached immediately.

The position of UNESCO in this direction is especially noteworthy and is distinguished by a number of specific features. Recommendations of UNESCO are adopted by a simple majority vote at the General Conference of UNESCO, the ratification by States is not required, but approval by States (legislative and other bodies) is considered desirable. It is no coincidence that Article 8 of the UNESCO Constitution defines that Member States must regularly submit reports to UNESCO, including those containing information on the implementation of conventions and recommendations [18]. Apparently, UNESCO, by its charter, also clearly defined the importance and place of recommendations.

The adoption of the UNESCO Recommendation of December 5, 1956, which defines the international principles applicable to archaeological excavations, is justified by a number of factors. First of all, it was noted that, though the regulation of excavations is first and foremost for the domestic jurisdiction of each State, this principle should be brought into harmony with that of a liberally understood and freely accepted international co-operation. Moreover, it is considered that, while individual States are more directly concerned with the archaeological discoveries made on their territory, the international community as a whole is nevertheless the richer for such discoveries. This creates confidence that the surest guarantee for the preservation of monuments and works of the past rests in the respect and affection felt for them by the peoples themselves, and persuaded that such feelings may be greatly strengthened by adequate measures inspired by the wish of Member States to develop science and international relations. Paragraph 1 of the Recommendation notes that by archaeological excavations is meant any research aimed at the discovery of objects of archaeological character, whether such research involves digging of the ground or systematic exploration of its surface or is carried out on the bed or in the sub-soil of inland or territorial waters of a Member State. Part 4 of Paragraph 2 defines that each Member State should ensure the protection of its archaeological heritage, taking fully into account problems arising in connection with excavations, and in conformity with the provisions of the present Recommendation. To this end, the States are recommended to take the following actions: make archaeological explorations and excavations subject to prior authorization by the competent authority; oblige any person finding archaeological remains to declare them at the earliest possible date to the competent authority; impose penalties for the infringement of these regulations; make undeclared objects subject to confiscation; define the legal status of the archaeological sub-soil and, where State ownership of the said sub-soil is recognized, specifically mention the fact in its legislation; consider classifying as historical monuments the essential elements of its archaeological heritage [4].

Obviously, this Recommendation, along with the statement that archaeological issues are an internal affair of States, defines the foundations for international cooperation in the relevant field, and finally analyzes the relevant activities to regulate these relations.

Further, Paragraph 32 of the Recommendation contains two important provisions. The first is related to the existence of the obligation of each Member State that has occupied the territory of another State during an armed conflict to refrain from carrying out archaeological excavations in that territory. The second important provision is related to the fact that in the event of chance finds being made, particularly during military works, the occupying Power should take all

possible measures to protect these finds, which should be handed over, on the termination of hostilities, to the competent authorities of the territory previously occupied, together with all documentation relating thereto. One of the facts pointing to the barbaric attitude of Armenia towards the historical monuments of Azerbaijan as a war crime is the holding since 2003 of "archaeological excavations" in the Azykh cave of the Khojavend region, and since March 2005 in the vicinity of the city of Aghdam, as well as in certain territories of Azerbaijan occupied by Armenia in different periods [13, p.71]. This action is also considered a violation of international law: Article 11 of the 1970 UNESCO Convention on the Means of Prohibition and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property defines that the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit [9, pp.140-141].

Another recommendation adopted by UNESCO in this field is the Recommendation of 16 November 1972 Concerning the Protection at National Level, of the World Cultural and Natural Heritage. One of the important features of this Recommendation is that it is addressed to all non-Member States of the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage. Another characteristic feature of the Recommendation is the indication to the States of specific areas of activity, as well as the orientation towards the protection of cultural heritage from all dangers. So that, the States are recommended to pursue an active policy, and it is also envisaged to ensure the joint activities of all interested public and private services in this direction, the active involvement of the local population in this work, the use of all the achievements of science and technology. The Recommendation defines the main features of the organization of specialized Public services for the protection of cultural heritage and their main tasks in this field. At the same time, the Recommendation provides for the adoption of certain measures of responsibility in relation to the circumstances that led to the destruction of cultural heritage. One of the important characteristic features of the Recommendation is the development of culture and education, the proper coordination of the activities of State bodies [11].

In general, this document is based not only on the passive preservation of cultural property, but also on the need for their active use [12, p.155]. Furthermore, the Recommendation notes that the implementation of interaction in this direction is entrusted to State bodies as an important task.

This document also has a kind of guiding character for other recommendations adopted within UNESCO. Adopted as a result of the activities of a Committee of Experts for almost 5 years, the Recommendation also played an important role in the adoption by States of domestic legislation in the relevant field. The analysis of the legislation of the States in this field proves this fact. This is once again confirmed by the analysis of the important provisions of the national legislation of the Republic of Azerbaijan in this field, including the State programs, including the Concept of Culture. So that, paragraph 3 of the Concept notes that the cultural heritage of each people is a means of reflecting national and spiritual values in it and recognizing them throughout the world. Therefore, the restoration and preservation of immovable historical and cultural monuments, the improvement of the activities of historical and cultural properties and bringing them in accordance with modern requirements, the modernization of museum networks and library and information systems, the creation of electronic catalogs and electronic libraries, the support of intangible cultural heritage and folk art, the development local cultural centers, culturally significant parks, ethnic parks are priority areas of the State policy of the Republic of Azerbaijan in the field of culture. In addition, paragraph 1 of the Concept notes that the State policy of the Republic of Azerbaijan in the field of culture is characterized by the principles that guide the State in the direction of preserving and promoting cultural heritage, creating and developing cultural properties. A number of principles put forward exactly in the same direction as the Recommendation: equality - ensuring the realization on equal terms of their cultural and creative rights and opportunities for everyone; democracy - education of the population in the

spirit of free thinking, expansion of rights and freedoms in the organization and management of the cultural sphere on a State-public basis, ensuring freedom of aesthetic thinking, stimulating the creation of new cultural organizations; humanism - acceptance as a priority of secular values, free development of the individual, human rights and freedoms, health and safety, care and respect for the environment and people; integration - ensuring the implementation, enrichment and development of national culture in the world, not isolating itself from world culture, accepting the universal values of world culture; balance - establishing a balance between the cultural industry and the markets for cultural products and services, ensuring the development of the activities of cultural societies; quality - ensuring the compliance of products and services in the field of culture with the most advanced standards, norms, socio-economic requirements, the interests of the individual, society and the State; secularism - ensuring the creation, preservation and development of secular values; efficiency - the organization of creativity in the field of culture by modern methods that are constantly evolving, useful and focused on the final result; continuity - the transfer of cultural property, knowledge and experience in this field to subsequent generations; the factor of talent - a manifestation of special concern for the growth of creative achievements of people with innate talent [2].

At the same time, it is necessary to mention other norms of a recommendatory character adopted within the framework of UNESCO: the 1960 Recommendation Concerning the Most Effective Means of Rendering Museums Accessible to Everyone; the 1962 Recommendation Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites; the 1964 Recommendation Concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the 1968 Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works; the 1976 Recommendation Concerning the Safeguarding and Contemporary Role of Historic Areas; the 1976 Recommendation Concerning the International Exchange of Cultural Property; 1978 recommendation on the protection of movable cultural property, etc.

The 1976 Recommendation Concerning the Safeguarding and Contemporary Role of Historic Areas is one of the considerable documents in this field. It is noted that every historic area and its surroundings should be considered in their totality as a coherent whole whose balance and specific nature depend on the fusion of the parts of which it is composed and which include human activities as much as the buildings, the spatial organization and the surroundings. It is also justified to carry out restoration works on a scientific basis. At the same time, it is proposed to pursue a "cultural revitalization" policy in relation to historic areas. Further, it is noted that the ancient occupations of the population should be preserved in historic towns. At the same time, when developing new functions, they must meet the social, cultural and economic needs of people [12, p.156].

Furthermore, this Recommendation notes that historic areas should become the main centers of cultural life, the process of urbanization should not jeopardize this process. It is noted that these processes also serve to preserve the heritage of mankind by preserving historic areas. At the same time, it is mentioned that the laying of new road system should not cause damage to historic areas. Rather, the State should properly address this problem, the restriction of certain places for traffic should be implemented, and more attention should be paid to pedestrian crossings and roads [17]. In this direction, it is necessary to study world practice (for example, on the practice of the Rome, Prague).

The Recommendation also defines a number of recommendations on the formation of the provisions of domestic legislation in this field. In this context a detailed reflection of specific circumstances in State programs, concepts, etc. is noted. The Recommendation defines that the fulfillment of obligations to protect any element of cultural and natural heritage should be determined regardless of the transfer of ownership of the object. Further, provisions were also

reflected on the possibility of State confiscation of cultural property in private ownership, if necessary, taking into account the requirements of the relevant legislation [17].

The 1968 Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works focuses Member States on the feasibility of preserving the historical links of a monument, including its current conditions. Along with the fact that these monuments can be moved, it is also important that special attention has to be paid to the preservation of circumstances that repeat their former characteristics. In addition, in the course of measures to save cultural property, detailed scientific and other researches have to be carried out. In this direction, the need to develop several options is noted; the choice of the best way has to be chosen as the basis while preserving historical features. To this end, States are also encouraged to allocate the necessary funds in this direction. In addition, as the best option, it is recommended to establish private funds in this direction and coordinate their activities. The development of tourism and measures to combat its destructive impact are also noted [16].

In general, one of the main characteristic features of the UNESCO recommendations, in our opinion, is that the measures to be implemented should be aimed at solving important global problems, such as environmental protection, combatting international crime, ensuring international security, etc., and it should be highly appreciated that this is fully consistent with the modern concept of development.

It is worth emphasizing one important point. Despite the fact that the international documents on environmental protection adopted by the end of the XX Century were recommendatory character, important steps have been taken to form standards in this field and the right to life in a healthy or favorable environment has been defined as a fundamental right. In addition, in Paragraph 1 of Article 1 of the Declaration on the Right to Development, adopted by the UN General Assembly in 1986, it is noted that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized [8]. In paragraph 1 of the Declaration on the Right of Peoples to Peace, adopted by the UN General Assembly on November 12, 1984, it is solemnly proclaimed that the peoples of our planet have a sacred right to peace. Paragraph 2 of the Declaration, declares that the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of each State [7]. Article 39 of the Constitution of the Republic of Azerbaijan is directly devoted to "the right to life in a healthy environment" [1].

In general, it should be noted that some of the important international documents adopted in other fields, although not directly, but indirectly, are aimed at the preservation of cultural heritage. For example, documents concerning sustainable development, environmental protection, the right to peace, the right to development and other related international instruments should be emphasized in this context. In the XXI Century, another feature of human rights has emerged as a factor in the sustainable and balanced development of society. This was the concept of sustainable development, and basically the value of the condition of sustainable development for each person is related to survival in a society that is predicted and protected. Sustainable development is a balanced development that reconciles conflicts. The document entitled Transforming our world: the 2030 Agenda for Sustainable Development, approved by the UN General Assembly on September 25, 2015, also contains provisions related to the preservation of cultural heritage. The Declaration on Environment and Development, adopted at the UN Conference on Environment and Development in Rio de Janeiro in June 1992, contains a number of principles aimed directly at the preservation of cultural heritage. For example, principle 23 refers to the protection of the environment and natural resources of people under oppression, domination and occupation [14]. In addition, Section 10 of "Azerbaijan 2020: A Look into the Future" Concept of Development, approved by the Decree of the President of the Republic of Azerbaijan dated December 29, 2012, entitled "Protection and effective management of cultural heritage", notes that in historical territories of special importance, actions will proceed in order to create

historical and cultural reserves, the inclusion of historical and cultural monuments of universal value in the World Heritage List of UNESCO and in the Islamic World Heritage List of ISESCO. Activities will be strengthened in the direction [3].

Common forms of "soft" law in the field of cultural heritage protection include the resolutions of international organizations, final texts of summits or international conferences, recommendations of the treaties, executive political agreements, adopted guidelines, recommendations or codes of conduct. In general, "soft" law is also seen as a flexible direction that avoids immediate and uncompromising commitments made on the basis of international treaties, as well as a potentially fast track leading to legal obligations rather than slow pace of development of international traditions. It is more realistic within the framework of UNESCO. In addition, when certain and serious international cooperation cannot be achieved through the norms of "hard" law, cooperation and coordination between States is established within the framework of UNESCO especially through the mechanisms of "soft" law. Such coordination is of particular importance in terms of harmonizing information and policies, mutual learning, exchange of best practices. In this context, during its activity, UNESCO has achieved notable results in the field of science, education and culture, as well as in the field of protection of cultural heritage through its conventions and recommendations.

Thus, in view of the aforementioned, we conclude that in the international legal regulation of the protection of cultural heritage, the norms of "soft" law have a significant place along with other norms of international law, in particular, with the norms of "hard" law. These norms, along with the supplementing of the provisions of any type of international treaties, are important in the development and further harmonization of the legislation of States. At the same time, this relationship is much more comprehensive and broad. Although the norms of "soft" law do not directly establish binding legal obligations, they gradually enter the life of States and play an important role in regulating the relevant relations.

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Date of receipt of the article in the Editorial Office
(23.01.2021)