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COMBATING WAR CRIMES AND THE PROBLEM OF PROTECTING CULTURAL HERITAGE AND HUMAN RIGHTS

In the article, the problem of combating war crimes and protecting of cultural heritage and human rights is widely analyzed with the existing diversity of opinions in the legal literature and important international documents. It is noted that along with the destruction of cultural heritage, which is a type of war crime, other crimes (aggression, genocide, crimes against humanity) are also aimed at this in one form or another. In the article, some important international agreements adopted by UNESCO, an important international organization in the field of cultural heritage protection, are analyzed in close interaction with international agreements adopted in the field of international humanitarian law. The mentioned is carried out simultaneously with the mutual review of the national legislation of the Republic of Azerbaijan.

The article argues that the fight against war crimes and the protection of cultural heritage are closely related to human rights, which should be linked to the protection of cultural rights as a whole. Therefore, the problems of cultural heritage protection should be analyzed in close interaction with human rights. The article also makes a proposal in the direction of international law creation. Thus, it is justified that it is necessary to adopt the Additional Protocol to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which includes the elements of "cultural genocide".

In the end, a number of theoretical and practical proposals are put forward on the problem of combating war crimes and protecting cultural heritage and human rights. Thus, it is noted that in order to increase the responsibility of the states in this field, the implementation mechanisms of the adopted international documents should be precisely formed, appropriate measures should be implemented for their effective national-legal implementation, and finally, responsibility measures should be strengthened within the framework of national legislation.

Keywords: *cultural heritage, war crimes, human rights, international illegal act, international law, international humanitarian law, international crimes, international legal norms, international custom, cultural rights.*

Relevance and main directions of the research. International crimes, being international illegal acts, violate the generally recognized principles and norms of international law, as well as important human rights and freedoms. The fact that international crimes are directly directed against the general interests of humanity is very dangerous and forces the international community to unite more seriously in this direction. The concept and main features of international crimes, which include aggression, genocide, war crimes, and crimes against humanity, have been carefully developed in modern international law. First of all, important international treaties adopted in this field (for example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1998 Rome Statute of the International Criminal Court, etc.) should be mentioned. Currently, important international documents are being adopted in this direction. Thus, it is necessary to consider the basis of the state's responsibility towards other states and the world community in general from the point of view of the Draft Articles dated December 12, 2001, on Responsibility of States for Internationally Wrongful Acts. According to Article 1 of that document, any act of the state against international law leads to the international responsibility of that state, which in itself makes relevant legal consequences inevitable.

War crimes, which are a type of international crime, include a wide system of crimes. The fight against war crimes is one of the main tasks facing the international community today. War crimes are reflected in Article 6 of the Statute of the International Criminal Court and include violations of the laws and customary rules of war (9, p. 374–375). Chapter XXVII of the Criminal Code of the Republic of Azerbaijan is devoted to war crimes and includes the following crimes: Article 114 – Mercenary; Article 115 – Violation of the laws and customary rules of war; Article 116 – Violation of international humanitarian law norms during an armed conflict; Article 117 – Inaction or giving criminal orders during an armed conflict; Article 118 – Military robbery; Article 119 – Misuse of protected marks (18).

Unlike the Criminal Code of the Republic of Azerbaijan, the Rome Statute of the International Criminal Court approaches war crimes from a broader perspective. When analyzing issues related to war crimes, it is rightly noted in the legal literature that the analysis of international legal norms allows distinguishing the following types of war crimes: serious violations of the provisions of the Geneva Conventions of 1949 on the Protection of War Victims in International Armed Conflicts and its Additional Protocols; Violation of other norms and rules on conducting international armed conflicts (including international custom); serious violations of the provisions of the Geneva Conventions of 1949 for the Protection of War Victims in Non-International Armed Conflicts and Additional Protocols; Violation of other norms and rules on conducting non-international armed conflicts (including international custom) (6, p. 5–6). While analyzing the relations in this field, other studies note that the direct objects of war crimes are social relations aimed at ensuring the specific laws and customary rules of war, the rules of treatment of the civilian population, and prisoners of war (11, p. 163).

War crimes include, among other crimes, crimes that are directly related to cultural heritage, as well as crimes that are indirectly related to cultural heritage. In other words, if the main direction here is related to the usurpation, destruction, or intentional damage of educational, art and science departments, religious and historical monuments, works of art and

science, at the same time, other war crimes can be attributed here in one direction or another. This can include the senseless destruction of cities, towns, or villages, and the bombing of unprotected cities, villages, buildings, or houses by any means.

Cultural heritage combines the historical and current characteristics of people. Taking this into account, international legislation should also directly focus on the protection of cultural heritage. One aspect of war crimes is expressed in actions characterized by the destruction or demolition of cultural heritage. This is one of the main factors characterizing the relevance and interaction of research.

The scientific novelty of the research. Scientific innovation can be defined in several directions. First of all, it should be noted the unity of the need to fight against war crimes and the protection of cultural heritage, which is the main object of the research.

Furthermore, war crimes are closely related to other international crimes. Usually, war crimes are accompanied by aggression, which is further complicated by the facts of genocide. A direct connection with crimes against humanity is also specifically defined. In addition, the concept of "cultural genocide" is also known to international law, and recent international judicial practice proves it once again. The above confirms that the problems are closely related to each other.

War crimes are also closely related to the human rights factor. Thus, war crimes are a serious threat to cultural rights. Based on Article 27 of the Universal Declaration of Human Rights of 1948, it should be emphasized that the provision of cultural rights directly determines the future of society (21). Cultural rights protect the rights of each person to expand their worldview, to develop their own values, beliefs, and folklore with their own way of life. These rights, at the same time, are based on the cultural heritage and resources that provide the development processes (1, p. 123–124).

Since the aforementioned has not been analyzed in detail in the legal literature, it once again substantiates the scientific innovation of the subject.

The main content of the research. Thus, one of the war crimes committed by Armenia against Azerbaijan is also seizure of, destruction or willful damage done to institutions dedicated to religion, education, arts and sciences as well as historic monuments and works of art and science, in short, of cultural property. By the way, according to article 1 of UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, under term of "cultural property" is connoted the followings irrespective of origin or ownership: movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; buildings, such as museums, large libraries, archival treasures, whose main and primary purpose is the storage or display of the above-mentioned movable cultural property, as well as shelters intended for the protection of the above-mentioned movable cultural property in the event of an armed conflict; centers containing a large amount of cultural property as defined in both sub-paragraphs, to be known as "centers containing monuments" (14).

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Article 1 of the Law of the Republic of Azerbaijan dated December 21, 2012 "On Culture" states that the national cultural heritage is a collection of cultural examples of universal value, belonging to the people of Azerbaijan, of all-Azerbaijani significance. The law also distinguishes between tangible and intangible cultural heritage. Tangible cultural heritage is immovable and movable cultural heritage, and intangible cultural heritage is the traditions, forms of representation and expression, knowledge and skills, tools, objects, artifacts, and cultural spaces that are accepted by individuals, groups, and society as examples of cultural heritage (22).

This concept is characterized in the legal literature as historical-cultural heritage, which is an integral part of universal culture (8, p. 3). In addition, the concept of cultural property is analyzed in a broader sense in the legal literature, which is directly related to the need to protect historical, religious, cultural, and natural heritage (7, p. 94–95).

Several international documents have been adopted in this direction. In general, the inability to protect cultural heritage due to certain reasons is one of the important problems, in which armed conflicts have a special place. If any state or territory comes under the control and administration of the military forces of another country during military conflicts, then the laws of occupation begin to apply. The basic rule of the law of occupation is that the occupying force does not acquire any sovereignty rights in the territory it occupies except for temporary administration. According to international law, the main duty of the occupying state is to be the protector of the occupied territories. At the same time, the occupying state must fully comply with the existing laws on the protection of cultural values before the occupation takes place. In addition, local workers who control cultural values should be given full opportunity to continue their work. The occupying power must also fully respect local laws regarding the protection of cultural property and its preservation in situ. Provisions in this regard are broadly established in the 4 Geneva Conventions for the Protection of War Victims of 1949 and the 2 Additional Protocols thereto of 1977 (20).

According to the 1954 UNESCO Convention on the Protection of Cultural Property in the Event of Armed Conflict, cultural property may be placed under special protection in a shelter designated for movable cultural property or in centers where monuments and other movable assets of great importance are stored. Any destruction of cultural property in the occupied territory is prohibited and is considered a war crime unless it is a military necessity. In order to regulate this, it is important to have cooperation between the occupying state and the competent authorities. In addition, the occupying party must provide full support to the local authorities in the implementation of legislative and administrative regulations related to the protection of cultural resources in general (2, p. 116–117).

According to Article 1 of the Draft Articles of December 12, 2001 entitled Responsibility of States for Internationally Wrongful acts, any act that violates international law gives rise to the international responsibility of the offending States. In addition, Article 4 of that document states that the behavior of any body of a state, regardless of its position in the state system, including legislative, executive, judicial or any other function, according to international law is considered as an action of the state (24).

One of the most fundamental rules dictating the appropriate respect for cultural property during armed conflicts is the prohibition of the parties to an armed conflict from making cultural property an object of attack by land, sea or air (except when such property is a military object at the time and there is no other alternative to achieve military advantage). If the cultural property is not a military object at the time of the attack, or some other alternative means of attacking cultural property is available for military advantage, then there is no legal basis for attacking cultural property. According to the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, theft, looting or misappropriation of cultural property in any form is prohibited. In the Additional Protocol II dated 1999 to that Convention, it is stipulated that the party occupying all or part of the territory of the other party prevents and prohibits any illegal eviction, taking in another form, or giving ownership rights in relation to that territory. In addition, it is envisaged to implement certain measures to prevent the consequences of military operations. Thus, it is directly stated that the parties involved in the conflict ensure the transportation of cultural assets near military objects at the maximum level and ensure that military objects are not located near cultural assets (13).

In regard to criminal responsibility arising from the serious offenses against cultural property in the event of armed conflict, in concordance with article 15 of II Additional Protocol (1999) to Convention 1954, committing any of the following acts is considered socially dangerous action: making cultural property under enhanced protection the object of attack; using cultural property under enhanced protection or its immediate surroundings in support of military action; extensive destruction or appropriation of cultural property protected under the Convention, 1954, and II Protocol, 1999, additional to it; making cultural property protected under above-mentioned international-legal documents the object of attack; theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention, 1954 (13).

In general, these facts are in contrary with the norm on the protection of cultural objects and of places of worship, stipulated in Article 53 of the First Protocol of 1977 relating to the protection of victims of international armed conflicts and additional to the Geneva Conventions of 1949 related to the protection of the victims of war. So that, this Article, without prejudice to the UNESCO Convention of 1954 and provisions of other appropriate international documents, states the prohibition of the following: to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; to use such objects in support of the military effort; to make such objects the object of reprisals.

Mutual and comparative analysis of the expression "of great importance to the cultural heritage", included in Article 1 of the Hague Convention of 1954, and the term "which constitute the cultural or spiritual heritage of peoples", included in Article 53 of the First Additional Protocol, is of great importance. Even, this issue is more precisely expressed in the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 by the International Committee of the Red Cross. So that, according to the Commentary of the International Committee of the Red Cross, despite the difference in

terminology, the basic idea is the same. However, the reference to places of worship and spiritual heritage clarifies the qualification of protected objects by introducing the criterion of spirituality. It was stated that the cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people. At the same time, basing on the Commentary of the International Committee of the Red Cross, the adjective "cultural" applies to historic monuments and works of art, while the adjective "spiritual" applies to places of worship. However, this should not stop a temple from being attributed with a cultural value, or a historic monument or work of art from having a spiritual value (3, p. 646). In addition, according to paragraph d of Article 85.4 of Additional Protocol I of 1977, it is prohibited to attack clearly distinguished historical monuments, and works of art that constitute the cultural or religious heritage of peoples or are specially protected by a special agreement, such as an agreement initiated within the framework of a competent international organization or places of worship, without evidence that the hostile Party has violated Article 53, subsection b of Protocol I, and unless such historical monuments, works of art, and places of worship are located in the immediate vicinity of military facilities, and resulting in their extensive destruction. It should be noted that, as the International Committee of the Red Cross expressed, the cultural or spiritual heritage covers objects whose value transcends geographical boundaries. A clear example of this is the inclusion of the Shusha historical-architectural reserve in the UNESCO World Heritage Preliminary List since 2001. It should be noted that in 1977 Shusha became a historical-architectural reserve, taking into account the high artistic significance of the historical architecture and urban planning monument even during the Soviet era (7, p. 60). Even the Decision No. 132 of the Cabinet of Ministers of the Republic of Azerbaijan dated August 2, 2001 "On approving the division of immovable historical and cultural monuments taken under state protection in the territory of the Republic of Azerbaijan according to the degrees of importance" provides for the division of those monuments according to the degrees of world, country and local importance. Currently, the Law of the Republic of Azerbaijan dated May 31, 2021 "On the cultural capital of Azerbaijan - Shusha city" has been adopted to implement the effective legal regulation of the mentioned relations.

Conducting "archaeological excavations" in occupied territories is also considered a war crime. This action is also considered a violation of international law. Thus, Article 11 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property states that it is considered illegal to remove cultural property from the country and transfer the ownership right to another under the direct or indirect coercion of the occupation of another country by a foreign state (15). In addition, Article 32 of UNESCO's 1956 Recommendation "On International Principles Applicable to Archaeological Excavations" contains two important provisions in this regard. The first of these is related to the existence of the obligation of any member-state that has occupied the territory of another state during an armed conflict to refrain from conducting archaeological excavations in that territory. The second admirable provision is related to the obligation of the occupying state to take all necessary measures for the protection of any find

discovered during military operations, as well as to hand over the find along with all necessary documents to the occupied country after the end of the military operation (23). Provisions related to this are reflected in the 1992 UNESCO Convention on the Protection of Archaeological Heritage (16). These actions are strongly condemned in the international documents adopted in connection with the occurrence of similar situations in relation to other countries of the world. For example, in Resolution No. 36/15 of the UN General Assembly dated October 28, 1981 "On the recent events related to excavations in East Jerusalem", carrying out excavations in those areas, as well as changing the landscape, historical, cultural and religious objects, was assessed as the serious violation of the principles of international law, as well as the relevant provisions of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (2, p. 120–121).

The destruction of those objects, which are part of the historical, cultural and religious heritage, ultimately means the destruction of the international heritage. Even, Prosecutor of the International Criminal Court F. Bensouda, during his research in connection with the "*Al Mahdi*" case, rightly notes that, attacks against historical monuments and religious buildings are grave crimes. In relation with the attacks against religious buildings, he emphasizes that, these acts are so grave that they warrant action by the international community (12, p. 70). Moreover, the provisions concerning the destruction or demolition of these monuments without military needs (*Armenia also destroyed, demolished or transformed similar monuments of Azerbaijan without military needs and necessity*) can be met in case law of international criminal tribunals. For example, paragraph 185 of the Judgement of Trial Chamber of International Criminal Tribunal for the Former Yugoslavia on "*Blaškić*" case (2000) stated that, the damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives. Even, more precisely specifying the latter provision, the provision "*the Chamber respectfully rejects that protected institutions (i.e. the objects intended in Article 3(d) of the Charter of the Tribunal – author) 'must not have been in the vicinity of military objectives'". The Chamber does not concur with the view that the mere fact that an institution is in the "immediate vicinity of military objective" justifies its destruction*", stated in the Judgement of Trial Chamber of the Tribunal on "*Naletilić and Martinović*" case (2003) reasserts the inadmissibility of the destruction or demolition of appropriate monuments in any case. By the way, according to Article 1 (f) of the Second Protocol of 1999 to the Hague Convention of 1954 "For the Protection of Cultural Property in the Event of Armed Conflict", "military objective" means an object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Namely, this definition reaffirms the idea "cultural property is not military objective" from the point of view of international law.

In the context of the crime of genocide, which is another aspect of the research, it is necessary to draw attention to the fact of the existence of "cultural genocide". It should also

be noted that during the drafting of the 1948 Convention, it was proposed to include the concept of "cultural genocide" in the document. So that, the project proposed in 1947 by the UN Secretariat covered such acts providing the prohibition of the use of the native language, the systematic destruction of books in the native language, as well as historical and religious objects. Simultaneously, prepared by the *Ad Hoc* Committee of the UN Economic and Social Council, the 1948 Draft was guided by the same approach. The said project characterized the crime of "genocide" as any of the following deliberate acts committed with the intent to destroy the language, religion or culture of a national, racial or religious group, on grounds of the national or racial origin, or religious belief: prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group (1, p. 90–91).

However, the Sixth Committee of the UN General Assembly refused the concept of "cultural genocide" (10, p. 9). Even, according to the position, stated in the judgement of the International Court of Justice in the case *"Concerning application of the Convention on the prevention and punishment of the crime of genocide" (Bosnia and Herzegovina v. Serbia and Montenegro)* (2007) destruction of historical, cultural and religious heritage can't be considered as deliberately inflicted damage. Although such destruction may be highly significant in as much as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. The Court concluded that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the 1948 Convention (5, p. 36–37). However, in its decision the Court also endorses the observation made in the paragraph 580 of the judgement on the *"Krstić"* case (2001) of the International Criminal Tribunal for the Former Yugoslavia that *"Physical or biological destruction is often accompanied by an attack on the cultural and religious property and symbols of the targeted group. It is from this point of view that all these attacks can be considered as legitimate evidence of the intention of physical destruction of the group"*. Besides, this decision directly emphasizes that the intention to physically destroy a particular group is inseparable from intention to attack on the cultural and religious property and symbols of the targeted group. At the same time, the provision *"the destruction of cultural monuments must be considered as an act of the same influence as genocide"*, noted in *"Milošević"* case (2003) of the Tribunal, having important significance, also gives the full basis to consider the destruction of monuments as an integral part of the committed genocide in Khojaly. Also, the possibility of applying the provisions in paragraph 238 of the judgement of the Tribunal in the *"Naletilić and Martinović"* case (2003) *"The Muslim houses in the area were burned in order to ensure the possibility that the Muslim population would not return". ... Religious objects of Muslims, such as mosques located in the area, were systematically destroyed..."* as precedent law to similar issues can also be considered (1, p. 90–91).

A third direction of coordination is closely related to the human rights factor. Legal literature notes that cultural rights protect a way of public life, which is important to many members of society. The use of culture or participation in cultural life is essential for a decent lifestyle (4, p. 218–219). Part 1 of Article 15 of the International Covenant on Economic, Social and Cultural Rights of 1966 states that with this Covenant, states are entitled to participate in the cultural life of everyone; use the results of scientific progress and their practical application; recognize the right to defend his moral and material interests arising from any scientific, literary or artistic works of which he is the author (19). In this regard, it is noted in the analysis that cultural rights ensure the moral development of a person, and help each individual to become a worthy participant in political, moral, social, and cultural progress. These include education, access to cultural resources, free participation in the public life of society, creativity, the right to use the results of scientific progress and their experimental application, etc. Human cultural rights and freedoms are special complex human rights and freedoms provided by the constitution or law, which enable a person to realize himself in the cultural and scientific field (1, p. 123–126). In Article 40 of the Constitution of the Republic of Azerbaijan, the right to culture reflects the following elements: everyone has the right to participate in cultural life, to use cultural institutions and cultural resources; everyone should respect historical, cultural, and spiritual heritage, take care of it, protect historical and cultural monuments (17).

Conclusion of the research. The following important conclusions may be considered necessary in connection with the conducted research:

- Along with the destruction of cultural heritage, which is a type of war crimes, other crimes are also aimed at it in one form or another. Thus, the crime of urbicide can be mentioned here. In modern wars, urbicide is characterized as a crime that involves the destruction of the vitality of the urban environment, the continuity of its population, and the destruction of the urban development area.

- Along with the destruction of cultural heritage, war crimes are closely related to the concept of "cultural genocide", and international judicial practice has also been formed in this direction. We believe that it is necessary to adopt the Additional Protocol to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which includes the elements of "cultural genocide".

- The fight against war crimes and the protection of cultural heritage are closely related to human rights, which should be connected with the provision of cultural rights as a whole. Therefore, the problems of cultural heritage protection should be analyzed in close interaction with human rights.

- In order to increase the responsibility of the states in this field, the implementation mechanisms of the adopted international documents should be precisely formed, appropriate measures should be implemented for their effective national-legal implementation, and finally, responsibility measures should be strengthened within the framework of national legislation.

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Л. Ф. Хашімова. БОРОТЬБА З ВОЄННИМИ ЗЛОЧИНАМИ ТА ПРОБЛЕМА ЗАХИСТУ КУЛЬТУРНОЇ СПАДЩИНИ І ПРАВ ЛЮДИНИ

У статті широко аналізується проблема протидії воєнним злочинам і захисту культурної спадщини та прав людини з урахуванням існуючого розмаїття думок у юридичній літературі та важливих міжнародних документах. Зазначається, що поряд із знищенням культурної спадщини, яке є різновидом воєнних злочинів, на це в певній формі спрямовані й інші злочини (згвалтування, геноцид, злочини проти людства). У статті аналізуються деякі важливі міжнародні угоди ЮНЕСКО, важливої міжнародної організації у сфері охорони культурної спадщини, у тісній взаємодії з міжнародними угодами, прийнятими у сфері міжнародного гуманітарного права. Зазначене здійснюється одночасно із взаємним переглядом національного законодавства Азербайджанської Республіки.

У статті стверджується, що боротьба з воєнними злочинами та захист культурної спадщини тісно пов'язані з правами людини, які мають бути пов'язані із захистом культурних прав загалом. Тому проблеми охорони культурної спадщини варто аналізувати у тісній взаємодії з правами людини. У статті також зроблено пропозицію в напрямі створення міжнародного права. Отже, обґрунтовано необхідність ухвалення Додаткового протоколу до Конвенції 1948 р. про попередження злочину геноциду та покарання за нього, який містить елементи «культурного геноциду».

На завершення висувається ряд теоретичних і практичних пропозицій щодо проблеми протидії воєнним злочинам і захисту культурної спадщини та прав людини. Зазначається, що для підвищення відповідальності держав у цій сфері необхідно чітко сформулювати механізми імплементації норм прийнятих міжнародних документів, вжити відповідних заходів для їх ефективною національно-правової

реалізації, нарешті, заходи відповідальності мають бути посилені в рамках національного законодавства.

Ключові слова: культурна спадщина, воєнні злочини, права людини, міжнародне протиправне діяння, міжнародне право, міжнародне гуманітарне право, міжнародні злочини, міжнародно-правові норми, міжнародні звичаї, культурні права.

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