



## BACKGROUND PAPER

**ACT FOR  
HERITAGE!  
CONFERENCE**  
Promoting the  
Council of Europe  
Convention on  
Offences relating to  
Cultural Property,  
within governments  
and civil society  
24–26/10/2019  
NICOSIA, CYPRUS

# **Fighting and preventing offences relating to cultural property: existing rules and proposals for functioning regulatory systems by Alessandro Chechi**

\*\*\* This text has been prepared by Alessandro Chechi for the Council of Europe as a background paper for the Conference “Act for Heritage”. The views expressed in this document are those of its author and not necessarily those of the Council of Europe.

# Fighting and preventing offences relating to cultural property: existing rules and proposals for functioning regulatory systems

**Alessandro Chechi\***

## 1. Introduction

In May 2017, the Council of Europe (CoE) opened for signature the Convention on Offences relating to Cultural Property (hereinafter '2017 CoE Convention'). This is a criminal law convention aimed at preventing and fighting the illicit destruction of, damage to, cultural property, on the one hand, and the illicit trafficking in cultural property, on the other.<sup>1</sup>

- The destruction of monuments, buildings, sites and movable cultural objects is frequent in times of armed conflicts, where damage can result from collateral damage or deliberate attacks. In the latter case intentional attacks are carried out in pursuit of strategic objectives. The systematic targeting of ancient sites and antiquities in Syria, Iraq and Mali by terrorist groups in the past few years testifies to this. In these cases cultural heritage destruction was part of a larger design to erase the cultural identity of the individuals and groups that cherished that heritage. However, the destruction of cultural heritage items occurs also during peacetime. This is proved by the devastation of archaeological sites resulting from the clandestine excavations of antiquities for the black market.<sup>2</sup>

- The trafficking (or illicit trade) in cultural property comprises three main offences:

1. Theft, which is universally recognized as the act in which property belonging to another is taken without that person's consent, and which comprises any intentional and fraudulent taking of property, regardless of whether the taking occurred with violence or threat of violence or with trespass or not;
2. illicit removal, which alludes to: the unauthorized and unscientific looting of archaeological sites by clandestine excavators aimed at the extraction of ancient relics; and the forcible dismemberment of objects (such as statues and frescos) from buildings or monuments; and
3. illicit exportation, which refers to the smuggling of cultural property in breach of the legislation of the exporting country.

Cultural objects are normally trafficked from 'source' (or 'exporting') countries to 'market' (or 'importing') countries – often through the so-called 'transit' countries. It follows that the functioning and wealth of the markets of importing countries depends also on the destruction of cultural heritage in exporting countries.

An international legal framework has been developed since the second half of the twentieth century with a view to prevent the loss of cultural property as a result of armed conflicts and the criminal activities of looters and traffickers. This framework comprises the treaties adopted under the aegis of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), the CoE, as well as the measures adopted by the European Union (EU). In addition, apart from UNESCO, other United Nations (UN) bodies have focused on offences relating to cultural property, such as the UN Security Council, the UN General Assembly and the UN Office on Drugs and Crime (UNODC). The 2017 CoE Convention is intended to complement this complex legal framework.

The present paper aims at:

- mapping and examining the rules contained in existing binding legal instruments that call on States to impose penalties or administrative sanctions on persons responsible for offences relating to cultural property (section 2);

---

\* Senior Researcher, Art-Law Centre, Faculty of Law, University of Geneva (Switzerland).

<sup>1</sup> Article 1(1) of the 2017 CoE Convention.

<sup>2</sup> The immovable cultural heritage is also threatened by the realisation of large-scale development projects (such as dams, mines, railways) in breach of existing national legislation.

- identifying the steps that each State should take to build effective regulatory systems aimed at the prevention and criminalisation of offences relating to cultural property (section 3);
- identifying concrete measures for promoting the ratification and implementation of the 2017 CoE Convention (section 4).

At this juncture, however, it is worth pausing to consider a number of key issues. The brief examination that follows aims to prepare the scene for the ensuing discussion of the question whether the existing international legal framework is effective to prevent and respond to the loss of cultural property resulting from the criminal activities of looters and traffickers.

### **A. The international dimension of the illicit trade in cultural property**

The illicit trafficking in cultural property is transnational by nature. In effect, stolen or illegally removed objects are usually exported from the State where theft and removal occurred. The reason is that traffickers tend to export misappropriated cultural property to countries with a weak law enforcement capacity, where the objects can easily be concealed, or where the tainted title can be laundered through inter alia expiration of the limitation periods required for adverse possession or prescription, or the norms protecting good faith purchasers.

The most common structure of the illicit trade is that of a supply chain or network of local looters, intermediaries and buyers that works as follows: bandits loot artefacts, mostly in ‘source’ countries; the pieces are exported to States where title laundering occurs, where false documents are prepared, or where the objects remain hidden away in storage sites until they are deemed to be ripe for sale (these are referred to as ‘transit’ countries); finally, the pieces are shipped out to dealers or other intermediaries, who sell the pieces on the global art market to collectors, auctioneers and museums, mostly in ‘market’ countries.

It follows that the distinction between cultural property looted in the event of (present or past) armed conflicts, on the one hand, and cultural property stolen in peacetime, on the other, is not useful for the reason that both are invariably put on sale on the international art market, where they are acquired by private or public collectors.

### **B. Links with organised crime**

The illicit trade in cultural property has attracted the attention of international organized criminal groups.<sup>3</sup> Similarly to other criminal activities, the trafficking is complex and requires a certain degree of organization. This does not mean that all groups have a mafia-like organization with a hierarchical and stable internal structure. Offences are often performed by criminals operating within changing and fluid networks.

These networks connect looters to buyers. Indeed, there is criminological evidence that organised criminal groups are involved at all stages of the illicit trafficking: directing looting, moving objects from dig sites to local markets, exporting objects from the country of origin, and interfacing with the professionals of the international art market.

By definition, the illicit trade happens clandestinely, and the routes involved are largely unknown. However, traffickers often use the same routes as those being used for other types of illicit goods such as drugs and weapons.<sup>4</sup>

Terrorist groups have also been involved in the destruction and trafficking of cultural heritage items. For instance, it has been proved that trafficking in antiquities became one of the sources of funding of the ‘Islamic State of Iraq and Syria’ (ISIS) along with oil and kidnapping. In Syria and Iraq, temples and other buildings were destroyed for the camera by ISIS militants in order to obscure the excavations and trafficking that were taking place behind the scenes in order to fuel their criminal activities.<sup>5</sup>

<sup>3</sup> Brodie N., ‘The Concept of Due Diligence and the Antiquities Trade’ (1999) *Culture without Context*, No. 5, 12-15, 14. See also European Commission, *Illicit trade in cultural goods in Europe*, Final Report, 2019, p. 19.

<sup>4</sup> European Commission, *Illicit trade in cultural goods in Europe*, Final Report, 2019, pp. 16, 71, 104.

<sup>5</sup> Fisk R., ‘Isis Profits from Destruction of Antiquities by Selling Relics to Dealers – and Then Blowing Up the Buildings They Come From to Conceal the Evidence of Looting’, *The Independent*, 3 September 2015; Baker A. and Anjar M., ‘Syria’s Looted Past: How Ancient Artifacts Are Being Traded for Guns’, *Time*, 12 September 2012; and Shelley L., *Dirty Entanglements*, Cambridge, 2014, p. 31.

### C. Links with other criminal activities

Illicit trafficking is often associated to other illicit conducts. These include:

- corruption of the persons tasked with the conservation or protection of cultural heritage such as guards, police or customs agents, civil servants, or professional experts;
- tax offences;
- money laundering;<sup>6</sup>
- falsification or the tampering with documents in order to deceive and induce customs agents or other officials to believe that cultural property has a licit provenance and that can be legitimately be exported.

### D. The causes

Many are the causes of the international illicit trade in cultural objects.

Structural reasons include the opening of frontiers and the blossoming of a florid international art market. The multiplication of conflicts is a further cause of theft, looting and illicit exportation. Moreover, export regulations cannot be easily enforced due to their excessive breadth and stringency. It must also be mentioned that domestic rules on chance find lack satisfactory systems of reward. Furthermore, criminal laws provide for light penalties and, hence, little deterrence. In addition, national rules on good faith, due diligence, statutes of limitations, money laundering are not harmonised due to incorrect or partial implementation of existing international legal instruments. Another weak aspect is the lack of regulation of the art market, where insufficient due diligence and a culture of confidentiality create favorable conditions for illicit practices. This lack of transparency, monitoring and control also affect free ports, which are vastly used by art dealers and collectors.<sup>7</sup> Finally, advancements in technology allows illegal digging at an increasingly accelerated pace, also in regions that used to be unreachable,<sup>8</sup> and the sale of wrongfully taken cultural property through internet sales platforms like eBay and social networks like Facebook.

### E. The consequences

Destruction and trafficking provoke losses that go beyond the mere disappearance of tangible materials. Indeed, they also result in the loss of scientific, historical and cultural information and of the store of meanings that are precious to individuals, peoples and nations, which are fundamental components of their identity.

Another consequence of the trafficking is that it provides organised criminal groups, terrorists and other violent non-State actors with an income that can be used to support their recruitment efforts and strengthen their operational capability.<sup>9</sup>

### F. The dimension

It is problematic to provide an assessment of the global extent of the illicit trade in cultural property.<sup>10</sup> A number of previous studies have reported that the illicit trade in cultural property would be the third most common form of international criminality after arms and drugs trafficking, providing billions of dollars of revenue. In reality, the billion-dollar figure is unfounded. Indeed, complete and reliable statistics that might help to estimate the true dimension and scope of the illicit trafficking or the monetary value of the black market in cultural property do not exist. Generally speaking, it is not possible to provide a reliable estimate of the precise nature and magnitude of the illicit trade in cultural property because this is fueled by clandestine activities that by nature are secretive.<sup>11</sup> As a result, it is not possible to establish to what extent the proceeds of the illicit trade fund organised crime and armed violence, including terrorism.

---

<sup>6</sup> See Van Duyne P.C. et al., 'Money, Art, and Laundering: Coming to Grips with the Risks', in Kila J.D. and Barcells M. (eds.), *Cultural Property Crime*, Leiden, 2015, 79-95; and De Sanctis F.M., *Money Laundering through Art. A Criminal Justice Perspective*, Dordrecht/London, 2013.

<sup>7</sup> See eg 'Looted Palmyra Relics Seized by Swiss Authorities at Geneva Ports', *The Guardian*, 3 December 2016.

<sup>8</sup> Passas N. and Proulx B., 'Overview of Crimes and Antiquities', in Manacorda S. and Chappell D. (eds.), *Crime in the Art and Antiquities World. Illegal Trafficking in Cultural Property*, New York, 2011, 51-67, 59.

<sup>9</sup> UN Security Council Resolution 2199 (2015), para. 16.

<sup>10</sup> See Mackenzie S., *Going, Going, Gone: Regulating the Market in Illicit Antiquities*, Leicester, 2005, 10-16.

<sup>11</sup> Gerstenblith P., 'The Public Interest in the Restitution of Cultural Objects' (2000-2001) *Connecticut Journal of International Law* 197-246.

## G. Online sales

A significant part of the illicit trade in cultural goods has shifted online. This poses significant problems for law enforcement. In effect, online marketplaces provide easier access (and anonymity) to a larger pool of cultural objects (especially low-value small objects) for a much larger audience of potential buyers than do traditional sale points.<sup>12</sup>

## 2. Beyond the 2017 CoE Convention: The Existing Rules on Offences Relating to Cultural Property

### 2.1. Overview and analysis of the relevant legal instruments

The international community has worked towards the building of a comprehensive legal framework to fight against the illicit destruction of, damage to, cultural property, on the one hand, and the illicit trafficking in cultural property, on the other, since the second half of the twentieth century. This legal framework comprises:

- the treaties adopted under the aegis of UNESCO, including:
  - o Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954;
  - o Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970;
  - o Convention on Stolen or Illegally Exported Cultural Objects of 1995;<sup>13</sup>
  - o Convention on the Protection of the Underwater Cultural Heritage of 2001;
  - o Declaration concerning the Intentional Destruction of Cultural Heritage of 2003;
- the treaties adopted by the CoE, including:
  - o European Convention on the Protection of the Archaeological Heritage;<sup>14</sup>
  - o European Convention on Offences relating to Cultural Property;<sup>15</sup>
- the measures adopted by the EU, including:
  - o Regulation 116/2009 of 12 December 2008 on the Export of Cultural Goods;<sup>16</sup>
  - o Directive 2014/60 of 15 May 2014 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State;<sup>17</sup>
  - o Regulation 2019/880 of 17 April 2019 on the Introduction and the Import of Cultural Goods.

Apart from UNESCO, other UN bodies have focused on offences relating to cultural property:

- UN Security Council, which has adopted various resolutions, including Resolution 1483 (2003), 2199 (2015) and Resolution 2347 (2017);
- UN General Assembly, which has adopted various documents, including Resolution 66/180 of 30 March 2012;
- UNODC, which has adopted the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and other Related Offences.

---

<sup>12</sup> European Commission, Illicit trade in cultural goods in Europe, Final report, 2019, pp. 106-108.

<sup>13</sup> This treaty was adopted by the International Institute for the Unification of Private Law (UNIDROIT) following the request of UNESCO.

<sup>14</sup> Adopted on 6 May 1969, revised on 16 January 1992.

<sup>15</sup> This treaty was adopted on 23 June 1985 but has never entered into force. The 2017 CoE Convention is intended to supersede and replace this earlier treaty.

<sup>16</sup> This repealed and replaced Regulation 3911/92 of 31 December 1992.

<sup>17</sup> This repealed and replaced Directive 93/7 of 27 March 1993.

The assumption lying at the basis of the standard-setting activity of these international organisations is that the legislative and policy measures adopted by individual States cannot suffice to prevent and combat offences that are transnational by nature, and that robust international cooperation is of paramount importance to that effect.

The following sections provide a brief examination of the binding legal instruments that contain clauses calling on States Parties to impose penalties or administrative sanctions on persons responsible for offences relating to cultural property.

### **A. The Convention for the Protection of Cultural Property in the Event of Armed Conflict**

The Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter ‘1954 Convention’)<sup>18</sup> specifies the responsibilities of invading and occupying forces with respect to cultural property. In particular, the 1954 Convention obliges the Contracting Parties to avoid damage to ‘movable or immovable property of great importance to the cultural heritage of every people’ (Article 1(a)), encourages the marking of such property (Articles 6 and 16), and limits the lawfulness of attacks to exceptional situations where a waiver can be invoked in case of ‘imperative military necessity’ (Article 4(2)). Furthermore, Article 4(3) of the 1954 Convention establishes that the theft, pillage or misappropriation of (public or private) cultural property in conflict-affected settings is unlawful. Consequently, any State Party must undertake to prohibit and prevent any requisition of movable objects located in the territory of another State Party.

Provisions on illicit trafficking are set forth in Article I of the First Protocol to the 1954 Convention. This contemplates the obligations for occupying powers to prevent and avoid any exportation of cultural property from occupied territories and, in the event that such exportation would occur, to provide restitution.

The 1954 Convention enshrines the principle that violations of its norms entail individual criminal liability. However, its Article 28 is not detailed in that it only provides that the ‘High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention’. The Second Protocol to the 1954 Convention is more precise. Its Article 9 requires States to create offences in relation to the export, removal or transfer of ownership of cultural property, as well as to the illicit excavation of archaeological sites. Moreover, the Second Protocol requires Contracting States to establish penal sanctions to punish the ‘serious violations’ committed intentionally enumerated in Article 15(1): (a) making cultural property under enhanced protection the object of attack; (b) using cultural property under enhanced protection or its immediate surroundings in support of military action; (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; (d) making cultural property protected under the Convention and this Protocol the object of attack; (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention’. Finally, Article 16 introduces the principle of universal jurisdiction over the ‘serious violations’ listed in Article 15.

Individual members of criminal and terrorist groups are bound by most of the provisions set out in the 1954 Convention and its Second Protocol, regardless of the type of internal armed conflicts they are active in or whether they exercise control over a given territory – as long as the armed conflict in question occurs on the territory of a State Party.<sup>19</sup> The reason is that cultural heritage should benefit from the same level of respect in situations of armed conflict, regardless of the nature of the conflict or of the warring parties.<sup>20</sup>

---

<sup>18</sup> Adopted 14 May 1954. As of September 2019, it has been ratified by 133 States. The Convention was completed with the adoption of the First Protocol on 14 May 1954 (as of September 2019, it has been ratified by 110 States) and the Second Protocol on 26 March 1999 (as of September 2019, it has been ratified by 82 States).

<sup>19</sup> International Committee of the Red Cross (ICRC), Practice relating to Rules 38, 39, 40 and 41 ([https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul)); and Hausler K., ‘Culture under Attack: The Destruction of Cultural Heritage by Non-State Armed Groups’ (2015-2) *Santander Art and Culture Law Review*, 117-146, 122-135.

<sup>20</sup> Hausler, *ibid.*, 121.

## **B. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property**

The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter '1970 Convention')<sup>21</sup> was adopted by UNESCO to reinforce the solidarity between source and market nations in the fight against the illicit trade.<sup>22</sup>

The 1970 Convention operates mainly by imposing obligations on State Parties. They are required to: set up specific services for the protection of cultural property;<sup>23</sup> introduce certification system;<sup>24</sup> establish rules in conformity with the ethical principles set forth in the Convention;<sup>25</sup> control trade in cultural objects;<sup>26</sup> adopt measures to discourage State-controlled museums and similar institutions from acquiring property illegally exported;<sup>27</sup> and ensure the return of stolen or illegally removed objects.<sup>28</sup>

The 1970 Convention also enjoins States Parties to impose penalties or administrative sanctions. However, these provisions are very limited in scope. States are obliged to impose penalties or administrative sanctions only on the persons responsible for the exportation of cultural property without the required export certificate,<sup>29</sup> or on the antique dealers that fail to maintain a register recording information of any transactions.<sup>30</sup>

## **C. The Convention on the Protection of the Underwater Cultural Heritage**

The Convention on the Protection of the Underwater Cultural Heritage (hereinafter '2001 Convention'),<sup>31</sup> which is inspired by the objectives and general principles listed in Article 2,<sup>32</sup> sets up an international cooperation regime encompassing reporting, consultations, and coordination in the implementation of protective measures, and obliges States Parties to control and prevent the illicit trafficking in cultural heritage.<sup>33</sup>

The 2001 Convention does not contain provisions on sanctions. Article 17 provides that each 'State Party shall impose sanctions for violations of measures it has taken to implement this Convention. Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they occur and shall deprive offenders of the benefit deriving from their illegal activities [...]'. In addition, Article 18 enjoins States Parties to 'take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner not in conformity with this Convention'.

## **D. Regulation 116/2009 on the Export of Cultural Goods**

Regulation 116/2009 of 12 December 2008 aims to prevent the exportation outside of the EU territory of objects that have been unlawfully removed from the EU Member State of origin. To this end, it sets up a procedure according to which cultural objects can be exported to third countries from a Member State other than the EU Member State of origin only if accompanied by an export certificate issued by the EU Member State of origin.<sup>34</sup> In sum, Regulation 116/2009 requires that each Member

---

<sup>21</sup> Adopted 17 November 1970.

<sup>22</sup> Articles 2, 9 and 12.

<sup>23</sup> Article 5.

<sup>24</sup> Article 6.

<sup>25</sup> Article 6(e).

<sup>26</sup> Article 10(a).

<sup>27</sup> Article 7(a).

<sup>28</sup> Article 7(b). The duty to prohibit the import and to return cultural property is conditional on the following conditions: the objects must have been stolen 'from a museum or a religious or secular public monument or similar institution' and should be 'documented as appertaining to the inventory of that institution'; the 'request for recovery and return shall be made through diplomatic offices'; the requesting State must pay 'just compensation' to the innocent buyer or to any person who has valid title to the object.

<sup>29</sup> Article 8.

<sup>30</sup> Article 10.

<sup>31</sup> Adopted 2 November 2001. As of September 2019, it has been ratified by 61 States.

<sup>32</sup> 'States Parties shall preserve underwater cultural heritage for the benefit of humanity' (para. 3); 'preservation *in situ* [the current location on the seabed] ... shall be considered the first option' (para. 5); and '[u]nderwater cultural heritage shall not be commercially exploited' (para. 7).

<sup>33</sup> Article 14.

<sup>34</sup> Articles 2, 3 and 4. All Member States issue the same EU export license. The Regulation covers the cultural objects defined as 'national treasures' within the meaning of Article 36 of the Treaty on the Functioning of the European Union and belonging to one of the categories (type of object, age and financial threshold) listed in Annex I to the Regulation.

State controls the export of its own cultural property and of the cultural property of other Member States.

The Regulation calls on the Member States to 'lay down the rules on penalties applicable to infringements of the provisions of this Regulation', which 'must be effective, proportionate and dissuasive' (Article 9).

## **E. Regulation 2019/880 on the Introduction and the Import of Cultural Goods**

Regulation 2019/880 of 17 April 2019 on the Introduction and the Import of Cultural Goods completes the EU legal framework which has included until now only legislation on the export of cultural goods (Regulation 116/2009 and Directive 2014/60). Regulation 2019/880 does not apply to cultural objects which were either created or discovered in the customs territory of the EU. Rather, it applies to items originating from non-EU countries that are imported into the EU in violation of the national laws of the countries of origin. The Regulation therefore aims at safeguarding humanity's cultural heritage and fighting the illicit trade. To this end, it sets out conditions and procedures for the introduction and import of cultural goods within the territory of the EU.

The Regulation calls on the Member States to 'lay down the rules on penalties applicable to infringements of this Regulation', which must 'be effective, proportionate and dissuasive' (Article 11).

## **2.2. An Appraisal**

From the analysis set out above it emerges that only a few international binding legal instruments provide for punitive responses against the criminals involved in the destruction of monuments, buildings or sites, or in the illicit trade in cultural property.<sup>35</sup> Moreover, on a closer look it appears that these instruments are limited in many respects.

First, the 1954 Convention and its two Protocols – as well as the instruments adopted in the areas of international humanitarian law<sup>36</sup> and international criminal law<sup>37</sup> that contain norms on the protection of cultural property – focus only on extreme situations (international or non-international armed conflicts) and on the most important cultural assets (the 1954 Convention applies to 'movable or immovable property of great importance to the cultural heritage of every people').<sup>38</sup>

Second, the 1970 Convention focuses on preventive measures and on the return of cultural objects, whereas criminal law sanctions have a residual role. The main reason is that in this field other interests prevail, notably the principle of free circulation and the rights of good faith possessors.<sup>39</sup>

Third, the few international instruments that provide for punitive responses largely leave it up to States to decide which conducts and omissions must be punished and which sanctions must be imposed on the person responsible (non-criminal or criminal sanctions).

It follows that the only international treaty with a focus on the criminalization of offences against cultural property is the 2017 CoE Convention. This treaty seeks to provide a comprehensive and coherent set of rules targeting the illicit destruction of, damage to, cultural property, and the various segments of the illicit trade in cultural property. Given that the Council of Europe has 47 Member States (including source, market and transit States) and that it has been open for signature to any country in the world,<sup>40</sup> the impact of the 2017 CoE Convention could be immense.

It must be noted that the 2017 CoE Convention can be regarded as a response to the calls for action contained in several non-legally binding instruments adopted in the past few years. These include:

- Resolution 2347 (2017) of the UN Security Council, which was adopted following the episodes of destruction of cultural heritage committed by terrorist groups in Iraq and Syria

---

<sup>35</sup> Although the Convention of the CoE on the Protection of the Archaeological Heritage deals with the 'illicit circulation of elements of the archaeological heritage' (Article 10), it does not contain any clause as to the criminalisation of clandestine excavation and exportation archaeological objects.

<sup>36</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (1977); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977).

<sup>37</sup> See Statute of the International Criminal Court (1998), and Statute of the International Criminal Tribunal for the former Yugoslavia (1993).

<sup>38</sup> Manacorda S., 'Criminal Law Protection of Cultural Heritage: An International Perspective', in Manacorda S. and Chappell D. (eds.), *Crime in the Art and Antiquities World. Illegal Trafficking in Cultural Property*, New York, 2011, 17-48, 40.

<sup>39</sup> *Ibid.*, 41.

<sup>40</sup> For instance, Mexico was one of the first to sign the Convention.



and the reports demonstrating that those groups generated income by engaging directly or indirectly in the smuggling of cultural property from archaeological sites, museums, libraries, and other sites. This resolution requests States to ‘introduce effective national measures at the legislative and operational levels where appropriate [...] to prevent and counter trafficking in cultural property and related offences, including by considering to designate such activities that may benefit organized criminal groups, terrorists or terrorist groups, as a serious crime in accordance with article 2(b) of the UN Convention against Transnational Organized Crime’.<sup>41</sup>

- Resolution 66/180 of 2012 of the UN General Assembly, which urges States to inter alia criminalise ‘all forms and aspects of trafficking in cultural property and related offences by using a broad definition that can be applied to all stolen, looted, unlawfully excavated and illicitly exported or imported cultural property, and [...] to make trafficking in cultural property, including stealing and looting at archaeological and other cultural sites, a serious crime, as defined in article 2 of the United Nations Convention against Transnational Organized Crime [...]’.<sup>42</sup>
- UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage of 2003, which establishes that States should take all appropriate measures [...] to provide effective criminal sanctions against those persons who commit, or order to be committed, [...] acts of intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization’.
- UNESCO Operational Guidelines for the Implementation of the 1970 Convention,<sup>43</sup> which encourage States Parties to (i) take actions against illicit trade; (ii) take sanctions against any person involved in theft and clandestine excavations of archaeological sites,<sup>44</sup> (iii) control the activities of art trade professionals, and (iv) impose sanctions if these professionals do not record the essential information of sales (including information on the origin of items sold, description and price of each item, names and addresses of the supplier).<sup>45</sup>
- International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and other Related Offences, which were developed in 2014 by UNODC (hereinafter ‘UNODC Guidelines’). The UNODC Guidelines recognize the ‘growing involvement of organized criminal groups in all forms and aspects of trafficking in cultural property’, and call on Member States to assess and review their legislation, procedures, and practices ‘in order to ensure their adequacy for preventing and combating trafficking in cultural property and related offences’. In particular, States are encouraged to: ‘consider adopting legislation criminalizing trafficking in cultural property and related offences in accordance with applicable existing international instruments’;<sup>46</sup> ‘consider criminalizing, as serious offences, [...] (a) trafficking in cultural property, (b) illicit export and illicit import of cultural property, (c) theft of cultural property, (d) looting of archaeological and cultural sites [...], (e) conspiracy or participation in an organized criminal group for trafficking in cultural property and related offences, (f) laundering [...]’;<sup>47</sup> ‘consider introducing in their criminal legislation other offences, such as [...] acquiring [...] trafficked cultural property’.<sup>48</sup> Specific aspects of the UNODC Guidelines focus on the criminalization of the conducts of private art trade operators, be they individuals<sup>49</sup> or legal persons.<sup>50</sup>

These Guidelines were developed by UNODC in order to harness the potential of the UN Convention against Transnational Organized Crime (UNTOC) to address serious crimes relating to the illicit art trade when committed by organized crime groups. The UNTOC explicitly mentions the illicit trade in cultural property only in the preamble.<sup>51</sup> Nevertheless, the Convention addresses criminal actions that are relevant to the trafficking in cultural

---

<sup>41</sup> Paras. 8-9.

<sup>42</sup> Para. 6.

<sup>43</sup> Adopted on 18 May 2015 (UNESCO Doc. C70/15/3.MSP/11).

<sup>44</sup> Para. 46.

<sup>45</sup> Paras. 72-80.

<sup>46</sup> Guideline 13.

<sup>47</sup> Guideline 16.

<sup>48</sup> Guideline 17.

<sup>49</sup> Guidelines 16-19

<sup>50</sup> Guidelines 23-24.

<sup>51</sup> ‘Strongly convinced that the United Nations Convention against Transnational Organized Crime will constitute an effective tool and the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as [...] offences against cultural heritage [...]’.

property (participation in an organised criminal group, laundering of proceeds of crime, corruption)<sup>52</sup> provided that the criminal act concerned fits three conditions:<sup>53</sup>

- it is committed by an ‘organised criminal group’, i.e. a ‘structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit’;<sup>54</sup>
- it is of transnational nature, i.e. (a) it is committed in more than one State; (b) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) it is committed in one State but has substantial effects in another State;<sup>55</sup>
- it is a ‘serious crime’, i.e. a ‘conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty’).<sup>56</sup>

### **3. Identifying the components of effective regulatory systems for the prevention and criminalisation of offences relating to cultural property**

The preceding sections demonstrate that (i) the looting and the illicit trade in cultural property have a devastating effect on the physical integrity of cultural items and on the cultural heritage of nations; and (ii) a comprehensive international legal framework has been put in place with a view to prevent and fight against the illicit destruction of, damage to, cultural property, on the one hand, and the illicit trafficking in cultural property, on the other.

In addition to this, it must be noted that most countries have legislation designed to protect cultural property or to regulate the movement of cultural objects. Such legislation can take a variety of forms, ranging from tight State control to decentralised, regionally-administered laws. More importantly, these national laws vary from State to State, even among the States belonging to regional organizations such as the EU and the CoE. These differences reflect different views on the criminal relevance of certain conducts. In effect, it appears that the use of criminal law to change behaviours that incentivize looting and illegal export has been underutilized in domestic legal systems.<sup>57</sup>

In light of this state of affairs, it is submitted that the development of effective national regulatory systems aimed at the prevention and criminalisation of offences relating to cultural property requires the adoption of – at least – the following actions.<sup>58</sup>

1. States should ratify and fully implement the legal instruments indicated in Section 2, including the 2017 CoE Convention.<sup>59</sup>
2. States should introduce import restrictions.<sup>60</sup> The reason is that source nations can counter the illicit trafficking only with the collaboration of market nations. The practice demonstrates, however, that many (market) countries consider lawful the importation of cultural objects that have been exported in breach of the legislation of the country of origin. The assumption is that controls should already have been carried out at the exportation. This means that, if objects are smuggled in breach of the laws of source countries, such objects can be returned

---

<sup>52</sup> See Articles 5, 6 and 8, respectively.

<sup>53</sup> This explains why Resolution 2347 (2017) of the UN Security Council and Resolution 66/180 of the UN General Assembly call on States to designate the trafficking in cultural property as serious crimes.

<sup>54</sup> Article 2(a).

<sup>55</sup> Article 3.

<sup>56</sup> Article 2(b).

<sup>57</sup> Fincham D., ‘The Blood Antiquities Convention as a Paradigm for Cultural Property Crime Reduction’ (2019) *Cardozo Arts & Entertainment Law Journal*, Vol. 37, 299-336, 301.

<sup>58</sup> For more proposals and recommendations to be taken at the EU level see ‘Study on Preventing and Fighting Illicit Trafficking in Cultural Goods in the European Union, CECOJI-CNRS, Final Report, October 2011 (<https://publications.europa.eu/en/publication-detail/-/publication/ca56cfac-ad6b-45ab-b940-e1a7fa4458db>).

<sup>59</sup> Under EU law, EU Member States have already the obligation to apply the norms of regulations (which are immediately enforceable as a national law does) and to transpose directives into national legislation within the prescribed time limits.

<sup>60</sup> EU Member States have this obligation following the adoption of Regulation 2019/880.

only with the collaboration of the countries of destination. Market States should therefore enact rules prohibiting the entering into their territory of the objects that are not accompanied by the export certificate prescribed by the legislation of the country of origin.

3. States should establish detailed regulations for the activities of the institutions, bodies or persons that conduct business – whether professionally or not – in the art market,<sup>61</sup> and for the activities of the institutions, bodies or persons that provide services for those that conduct business in the art market, such as the free ports. In particular, the institutions, bodies or persons that conduct business in the art market should comply with the due diligence obligation to check provenance and/or origin of a cultural object at the moment of the acquisition or sale, and to maintain a register recording information of all transactions.

In many States the art market is secretive and opaque due to the lack of State regulation. This lack of transparency brings about concerns about the entry of stolen or looted artefacts (and fakes) into the market, as well as the abusive use of the market by criminals for laundering maneuvers. In this sense, trade opponents maintain that curators, dealers and auctioneers have particular responsibilities in the development of the black market because their practices obscure the true origin of objects, thereby favoring thieves as well as criminal organizations that resort to the art trade for laundering the proceeds of their illicit activities.

A stricter regulation of the art market makes sense also in light of the fact that the practices that are prevalent in the art market are inexistent or forbidden by law in other sectors. In the public-equity market, for instance, basic information such as how much stock an investor holds relative to the assets he is buying must be disclosed, and independence must be legally established for businesses or individuals who recommend investment in certain stocks. Insider trading, where individuals with access to non-public information profit from it, is illegal in most countries. Also illegal is the related practice of ‘front-running’, where an intermediary buys stock that it is soon to market externally, thus benefiting from – again – proprietary information and the price that is then set by its purchase. The equivalents of such practices are not only prevalent in the art market, they are its accepted behavior.

In order to developing or strengthening policies and rules in this area, States could refer to the standards set up by international organizations, including the 2017 CoE Convention, the UNODC Guidelines, and the International Code of Ethics for Dealers in Cultural Property of UNESCO. In addition, in order to increase transparency, the regulation of the art market should be brought in line with existing anti-money laundering obligations.

4. States should establish detailed regulations on online sales by acting at the international level in cooperation with other States and the most relevant international organisations.
5. States should evaluate and review their criminal justice policies, strategies and legislation in order to criminalize the illicit destruction of, damage to, cultural property, and the various segments of the illicit trade in cultural property, and any other related offence. In connection to this, States should establish and apply effective, proportionate and dissuasive criminal penalties. For the deterrent effect of the legal regime to be most effective, the risk of detection and the certainty and severity of punishment must be high. In particular, in light of the abovementioned structure and dynamics of the illicit trade, States should consider introducing or extending liability (criminal, administrative or civil in nature) of the institutions or bodies that conduct business – whether professionally or not – in the art market. Penalties for these legal persons (such as galleries and auction houses) might include fines, bans or disqualifications, revocation of licenses and revocation of benefits.
6. States should develop procedures and rules to ensure the collection, analysis and dissemination of data and statistics on offences relating to cultural property disaggregated, for instance, by type of crime, type of object, market value and country of provenance. This action is key to allow every State to tailor adequate preventive and repressive measures.
7. States should create a specialised law enforcement unit.<sup>62</sup>

---

<sup>61</sup> These rules would supersede and reinforce the due diligence guidelines and ethical codes adopted by trade organisations and independent institutions. See in particular the Responsible Art Market (RAM) Initiative established in Geneva in 2015 (<http://responsibleartmarket.org/about-us/>) with the participation of the Art-Law Centre of the University of Geneva.

<sup>62</sup> The Italian Carabinieri (Carabinieri del Reparto Operativo Tutela Patrimonio Culturale), Italy’s elite police cultural heritage protection unit, could work as a model in this respect.

All in all, the above proposals for action focus on both prevention and criminalisation and aim at:

- regulating and controlling the supply and demand sides of the art market;
- pursuing and punishing thieves, looters, traffickers, as well as sellers and buyers, be they complicit or negligent;
- investigating and punishing corruption, fraud and money-laundering; and
- ensuring the seizure of wrongfully removed objects – and ultimately their restitution.

#### **4. Promoting the ratification and implementation of the Convention on Offences relating to Cultural Property**

The prevention and the fight against the illicit activities that affect cultural heritage items require the establishment of effective national regulatory systems as well as intense cooperation among States and international organisations.

Various factors can negatively affect the development of these strategic actions, including:

- lack of awareness, on the part of governmental officials, the institutions, bodies or persons that conduct business – whether professionally or not – in the art market, and the public at large;
- lack of financial resources for law making and law enforcement due to financial crises, austerity and priority given to other criminal activities deemed more serious or urgent;
- the opposition of lobbies to the increased regulation of the art market.

It can therefore be argued that the wide ratification, entry into force and implementation of the 2017 CoE Convention can be achieved provided that the CoE – but also the international organisations and the non-governmental organisations concerned – makes efforts to tackle such obstacles.

In particular, the CoE should envisage the following awareness-raising measures:

- funding researches on all aspects of the offences relating to cultural property and the publication of their findings for specialists and the laypersons;
- funding researches on the positive effects (also in economic terms) stemming from the protection of cultural property (for individuals, communities and nations) and the increased regulation of the art market, and the publication of their findings for specialists and the laypersons;
- liaising with non-governmental organisations, university centres and the private sector in order to foster knowledge and adherence to due diligence standards;
- organising events, such as seminars or conferences, also in association with governments or universities, focusing on offences relating to cultural property and their detrimental effects.

These initiatives should emphasise that cultural heritage items are important for both their tangible and intangible aspects. The former denotes the possibility to possess cultural objects, focuses on physical integrity and indicates that marketable assets represent a store of financial value. The latter refers to the symbolic, historical and scientific values embodied by any cultural object, irrespective of aesthetic significance and monetary value. This intangible aspect emphasises the human dimension of cultural heritage, that is, the store of meanings that are precious to individuals and peoples as the substratum of their identity and as witnesses of the lives of their ancestors and their societies. Moreover, in so far as cultural heritage represents the sum of movable and immovable cultural objects that a community or group recognize as part of their history and identity, it is axiomatic that members of that community or group, individually and collectively, must be entitled to enjoy such heritage as a matter of right. It follows that cultural objects encapsulate the relationships between human rights and cultural identity. Hence, in the case of destruction or theft of an artefact, what is destroyed or stolen is not just the mere financial value but also the store of symbolic values the object represents. Arguably, the effectiveness of the awareness-raising measures mentioned above might be increased by emphasising such symbiosis between cultural heritage protection, the

identity of individual and communities, and human rights. In turn, such focus on the detrimental effects of the offences relating to cultural property might contribute to rise the political profile of this issue and hence to foster the ratification of the 2017 CoE Convention.