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Arianna Visconti *

Laundering Illicitly Trafficked Cultural Property and Criminal Law Control over the Import and Export of Artworks and Antiquities

Riciclaggio di beni culturali oggetto di traffici illeciti e controllo penale su importazione ed esportazione di opere d'arte e antichità

* Università Cattolica del Sacro Cuore, arianna.visconti@unicatt.it

ABSTRACT. The last decade has been characterised by a growing attention to the criminal dimension of the art and antiquities market. This process culminated in the adoption of the first suppression convention aimed specifically at cultural property trafficking ever entered into force, after the failed attempts dating back to the Eighties and Nineties. After briefly summarising the reasons for this shift in paradigm, the paper delves into the crucial issue of laundering of cultural items of unlawful origin, as addressed by the 2017 Council of Europe Convention, with a specific focus on the crucial role played by international circulation. To this effect, a summary of the main national approaches to the export and import of cultural property is offered for the reader's consideration, together with some reflections on the growing importance of provenance research and provenance documentation as tools to improve transparency in the market and reduce its 'grey' nature.

ABSTRACT. L'ultimo decennio è stato caratterizzato da una crescente attenzione verso la dimensione criminale del mercato dell'arte e delle antichità. Questo processo è culminato nell'adozione della prima convenzione per la soppressione del traffico di beni culturali mai entrata in vigore, dopo i tentativi falliti degli anni Ottanta e Novanta. Dopo aver riassunto brevemente le ragioni di questo cambio di paradigma, l'articolo approfondisce la questione cruciale del riciclaggio di beni culturali di origine illecita, affrontata dalla Convenzione del Consiglio d'Europa del 2017, con un focus specifico sul ruolo cruciale svolto dalla circolazione internazionale. A tal fine, viene offerta una sintesi dei principali approcci nazionali all'esportazione e all'importazione di beni culturali, insieme ad alcune riflessioni sulla crescente importanza della ricerca e della documentazione di provenienza come strumenti per migliorare la trasparenza del mercato e ridurne la natura 'grigia'.

KEYWORDS / PAROLE CHIAVE: Cultural Property Trafficking; Laundering of Tainted Cultural Property; Cultural Property Export and Import; Criminal Law; Art and Antiquities Market / Traffico di beni culturali; riciclaggio di beni culturali di origine illecita; esportazione e importazione di beni culturali; diritto penale; mercato dell'arte e delle antichità

Laundering Illicitly Trafficked Cultural Property and Criminal Law Control over the Import and Export of Artworks and Antiquities

Arianna Visconti

1. *Towards a New Role for Criminal Law Prevention and Punishment of Cultural Property Trafficking: The Reasons of a Shifting Paradigm*

Cultural property trafficking is nowadays receiving a far greater attention than just fifteen years ago, when it was mostly considered more a cultural heritage conservation problem, than a criminal issue (and even less a criminal emergency). This attitude was reflected in the kind of experts and international organisations involved in its documentation and prevention. On the one hand, the study of clandestine excavations and archaeological looting, of art theft and of cultural property contraband, as well as advocacy to put a stop to these offences, were mostly the pro-

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vince of archaeologists, rather than of criminologists and legal scholars [1]. On the other hand, the development of international legal tools to curb this traffic was implicitly but solely entrusted to the United Nations Educational, Scientific and Cultural Organisation (UNESCO), which, albeit strongly committed to the task, has neither a statutory mandate, nor the related specific expertise, to deal with issues of criminality, crime prevention and penal sanctions. The resulting legal panorama, at least at an international level, was one of "penal minimalism" [2]. Thus, the focus has long been, basically, on preventive measures, to be adopted and implemented mostly by the very countries most impacted by cultural property trafficking, on loose forms of international cooperation, and on ways of facilitating the recovery and restoration to the country of origin of trafficked cultural objects.

1.1. *The Long-Lasting Marginalisation of Criminal Law Responses to Trafficking: An Overview*

As it is beyond the scope of this paper to analyse in any detail this long-lasting general picture, it is only possible to summarise here the most salient traits of the international legal framework as it presented itself between the Fifties and the end of the Nineties. The first treaty adopted after World War II specifically to protect cultural heritage, i.e. the 1954 Hague *Convention for the Protection of Cultural Property in the Event of Armed Conflict* [3], was built around a twofold system. On the one hand, the treaty provides for safeguarding duties, i.e. measures that each contracting State has to «undertake to prepare in time of peace for the safe-

[1] While these different competences and approaches have recently reached a better level of integration in cultural property trafficking studies, doubtlessly there is still «an urgent need for more constructive and coordinated research into the mechanics of the trade and potential regulatory solutions»: Brodie/Kersel/Mackenzie/Sabrine/Smith/ Yates (2022), p. 118.

[2] See further Manacorda (2011).

[3] Adopted in the Hague on 14 May 1954, in force 7 August 1956, 249 UNTS 240. See further, e.g., R. O'Keefe (2006), pp. 92-195; Forrest (2010), pp. 78-104.

guarding of cultural property situated *within their own territory* against the foreseeable effects of an armed conflict» (art. 3, italics added). On the other hand, it includes a number of respect duties, i.e. prohibitions of intentional acts apt to endanger, damage or destroy cultural property protected under the Convention itself (art. 4)[4]. It is also worth noticing that safeguarding duties were defined in totally generic terms in the 1954 Convention, while respect duties were, in turn, presided over by an extremely vague criminalisation obligation (art. 28)[5]. Both sets of provisions were to be detailed, clarified, expanded and strengthened only in the Second Protocol, added to the Convention in 1999[6], after the traumatic experiences of the Iran-Iraq war (1980-1988), of the First Gulf War (1990-1991), and of the Yugoslav wars (1991-2001). Moreover, the majority of questions more strictly related to the transnational traffic of cultural property, that is, those pertaining to export, import, and related issues of confiscation, restitution, and indemnity to good faith possessors, were confined to a separate Protocol[7], also adopted in 1954, to allow States unwilling to commit themselves to obligations in this field to become parties to the Convention without being bound also by these specific provisions.

The following UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, adopted in 1970[8], relied on public law rules and preventive and

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[4] That is, making use of cultural property and its immediate surroundings for purposes likely to expose it to destruction or damage; directing an act of hostility against cultural property; allowing the commission of theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property, and requisitioning movable cultural property; directing acts of reprisals against cultural property.

[5] See also, specifically, Maugeri (2008), p. 40; Manacorda (2011), p. 27.

[6] Adopted in the Hague on 26 March 1999, in force 9 March 2004, 38 ILM (1999) 769. See further, e.g., Keane (2004), pp. 27-36; R. O'Keefe (2006), pp. 236-302; Forrest (2010), pp. 110-121.

[7] Adopted in the Hague on 14 May 1954, in force 7 August 1956, 249 UNTS 358. See further, e.g., R. O'Keefe (2006), pp. 195-200; Forrest (2010), pp. 104-108.

[8] Adopted in Paris on 14 November 1970, in force 24 April 1972, 823 UNTS 231. See

protective policies to be adopted by States Parties with respect to their own cultural heritage, thus imposing the heaviest burden on the shoulders of countries often unable to find the resources required to comply in a meaningful and effective way with their conventional obligations. Moreover, penal provisions were not framed as a necessary tool, since they were only considered (as we are going to discuss) in alternative to administrative sanctions and with respect to a limited number of unlawful behaviours (arts 8 and 10). International cooperation against trafficking and for the recovery and restitution of cultural property was entrusted to diplomatic channels and to possible bilateral agreements between States Parties (arts 7.b.ii and 15).

Finally, the UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects*[9], conceived as complementary to the 1970 UNESCO Convention and adopted in 1995, specifically addressed only private law issues of restitution and return, providing minimum uniform rules and direct access to the tribunals of contracting States for natural and legal persons – including States acting as plaintiffs – for the recovery of trafficked cultural property. This also offered, obviously, an indirect contribution to countering this criminal phenomenon, but, by definition, this new treaty was not apt (nor meant) to have any direct effect on national or international criminal policies in this field.

1.2. *Conflicting National Attitudes and Legal Gaps*

The reasons behind this structural weakness of penal responses to cultural property trafficking are many, ranging from the perceived low seriousness of crimes against cultural heritage (even in many countries traditionally most affected by them), to a more general resistance, on States'part, to cede any significant amount of penal sovereignty, at least

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further, e.g., P.J. O'Keefe (2007); Forrest (2010), pp. 166-196; Stamatoudi (2011), pp. 31-66.

[9] Adopted in Rome on 24 June 1995, in force 1 July 1998. See further, e.g., Forrest (2010), pp. 196-219; Stamatoudi (2011), pp. 66-111; Prott (2021).

till the emergence, in the Eighties and Nineties, of serious concerns about organised crime [10]. A specific contributing factor, however, was – and remains today – the very different approaches taken to this issue by, on the one hand, source countries (i.e., countries rich in cultural property which are, mostly involuntarily, net exporters of these specific items) and, on the other, market countries (i.e. both net final importers of cultural property, and countries acting as hubs of the transnational trade in artworks and antiquities, very active as both importers and exporters) [11]. While the former, in fact, tend to push for a strict regulation of cultural heritage and of the trade in cultural property, including severe controls over international circulation, a preference accorded to public ownership (especially of archaeological materials) and inalienability, a number of limitations on private owners'rights, and also a greater use of punitive provisions, the latter favour a liberalistic approach to both internal and international circulation of collectibles and other cultural objects, with lighter regulation of the market, fewer controls, and the use of mostly unspecific – if any – penal provisions [12].

The history of the abovementioned treaties provides evidence of these different attitudes: market States, with the sole exception of the United States, did not even participate in the negotiations for the 1970 UNESCO Convention [13], and only started to join it as contracting parties at the turn of the century (oft with many reservations and understandings), once the international attention for traffic of cultural property had started to rise significantly. As for the 1995 UNIDROIT Convention, no major market State, with the sole exception of China (which, however, has

[10] See further Manacorda (2011); Visconti (2021); in general Forlati (2021).

[11] See, also about the related debate about 'universalistic'vs. 'nationalistic'approaches to cultural heritage, e.g., Merryman (1986); Lewis (2006); Posner (2007); Brodie (2018a); Peters (2020). See also broadly, and for further references about the conflicting interests and positions of source and market countries, Mackenzie/Brodie/Yates/Tsirogiannis (2020).

[12] For a comparative overview see, besides P.J. O'Keefe (2007), also Demuro (2002), pp. 333-497, and Vozza (2015).

[13] See, e.g., P.J. O'Keefe (2007), pp. 7-8; Forrest (2010), pp. 166-167.

long been a source country, and only recently became also powerfully attractive for cultural property importations), has yet ratified it, twenty-five years after its entry into force [14].

This fragmented picture has contributed, and keeps contributing today, to make trafficking in cultural property attractive and widespread [15] (even if exact estimates about its scope and value are impossible, due to the exceedingly vast dark figure which structurally characterises this criminal phenomenon) [16]. Unlike other forms of traffic, it is rooted in a basically legal market: trade in artworks, antiquities and collectibles, differently from (e.g.) trade in drugs or human beings, is per se licit., and in many countries it is but very lightly regulated [17]. Experienced criminals know well how to exploit regulatory gaps between different jurisdictions, transferring cultural items in States with no (or very limited) import and export controls, trading them in countries which favour the position of "good faith" buyers and allow for acquisitive prescription [18], and dodging jurisdictions with stricter regulations – at least till an item has been properly "laundered" and endowed with a paper trail plausibly showing it as having a legitimate origin (as we will see).

Said differences between national regulatory approaches also contribute to make criminal investigation and prosecution of cultural property

[14] The updated list of contracting States is available at https://www.unidroit.org/instruments/cultural-property/1995-convention/status/ (accessed June 4, 2023).

[15] Besides Mackenzie/Brodie/Yates/Tsirogiannis (2020), see also, amongst others, Brodie/Kersel/Mackenzie/Sabrine/Smith/ Yates (2022).

[16] See, e.g., Durney/Proulx (2011), pp. 127-128; Balcells (2019), pp. 40-49; Yates/Brodie (2023).

[17] See note 15 as well as Mackenzie (2005), pp. 62-120.

[18] In this specific respect, differences between source and market countries'attitudes towards cultural property trade should not be overestimated, as the main contributing factor relates, instead, to different national legal traditions and, accordingly, different private law principles ruling ownership acquisition. An example of such possible 'misalignment'is Italy, which, albeit being traditionally considered a 'source country', follows the European continental tradition of favouring good faith purchasers: see, e.g., Giardini (2023).

trafficking particularly difficult: the frequent lack of double criminality, coupled with the absence of specialized law enforcement agencies in all but a few countries, and with the huge evidentiary problems which are most common in this field (especially with respect to archaeological loot), contribute to make this traffic a very low-risk, high-profit activity for criminals, who can count on not being identified at all or, when apprehended, on short time limitations, low conviction rates, low penalties, and easy access to diversion. In fact, while the first steps of cultural property trafficking usually involve "common" criminals (illegal diggers, thieves, smugglers, etc.), as the items proceed along the traffic chain, to be integrated in the art and antiquities market, professional dealers and intermediaries, reputed collectors and curators, and like "respectable" individuals and entities, tend to become the predominant actors, also getting the lion's share of profits [19]. As many scholars have highlighted, cultural property trafficking can thus be defined mostly as a «white-collar crime» [20] or a «crime of the powerful» [21], with all the well-known attached implications in terms of double standards of criminalisation, both in terms of abstract legal provisions and in terms of law enforcement in practice.

1.3. *The International Community's Shifting Attitude and the Shadows of Organised Crime and Terrorism*

Even if the picture just outlined remains mostly true in present days, what has significantly, albeit slowly, changed during the last few decades is the general attitude of the international community towards the role to be played by criminal law in preventing cultural property trafficking [22].

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[19] See further, e.g., Mackenzie/Brodie/Yates/Tsirogiannis (2020), as well as Brodie/Doole/Watson (2000), in part. p. 13.

[20] According to the well-known definition by Sutherland (1944; 1983). See specifically Mackenzie (2005), pp. 121-226.

[21] Mackenzie (2011a).

[22] For a detailed description of this process and all relevant references, see Visconti (2021).

Starting in the Eighties, and peaking in recent years, after major terrorist attacks in the United States (2001) and in Europe (2004, 2005, 2015, 2016) and the conflicts in Iraq (2003-2011, 2014-ongoing) and Syria (2011-ongoing), two broader security concerns have contributed to change perceptions about (amongst others) the seriousness of this specific criminal phenomenon, i.e., firstly, the growing fear of organised crime and of its possible involvement in art and antiquities traffic and, later on, the awareness that this same trafficking may be used as an additional channel to finance terrorist groups and armed militias in territories ravaged by war and political instability.

While the intrinsic opacity of the phenomenon does not allow to assess the exact extent to which these concerns are founded, there are features of the art and antiquities international market which definitely create opportunities for this kind of criminal interactions [23]. Archaeological looting and art theft provenly increase in contexts of unrest and conflict [24], where opportunities for local criminal organisations and armed groups to act undisturbed multiply, and local populations are often involved in forms of subsistence digging to support themselves in a situation of systemic lack of legitimate resources. In general, the smuggling abroad of cultural artefacts may take advantage of the same channels used by organised crime for other forms of trafficking, allowing for an opportunistic interplay of different kinds of criminality. Artworks and antiquities are, besides, usually small, easily portable and tradable, and capable of commanding good market prices, thus making, at the same time, for a desirable source of additional income for both criminal organisations and terrorist groups [25], and for a good channel through which proceeds of differ-

[23] See also Mackenzie (2002) and (2011b).

[24] See, e.g., Brodie (2011) and (2018b); De Bernardin (2021).

[25] The spreading of e-commerce channels, including through social media, has recently made even easier for criminals (including individuals affiliated to terrorist organisations) to exploit this potential source of income, including by dramatically reducing the number of intermediaries involved in the traffic. See, e.g., Al-Azm/Paul/Graham (2019).

ent typologies of (even completely unrelated) crimes could be laundered with a certain ease [26].

The Council of Europe was the first international organisation to commit to an attempt at introducing a specific suppression treaty aimed, broadly, at crimes affecting cultural heritage. In 1985, in Delphi, a first *Convention on Offences relating to Cultural Property* [27] was opened to signature, but times were not ripe yet and it never entered into force, as it failed to reach the required minimum of three ratifications (art. 21). In a like manner, in 1990 the *Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders* produced, amongst others, a draft *Model Treaty for the Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the Form of Movable Property* [28], which, however, differently from other models, was never the object of a resolution converting it into an actual convention and opening it to signature. The following years saw first a strengthening of criminalisation obligations in the framework of international humanitarian law, with the aforementioned *Second Protocol to the Hague Convention*, adopted in 1999 and including punitive measures for violations potentially conducive to trafficking (arts 15.1.e and 21) [29], and later [30] a direct involvement of the United Nations Office on Drugs and Crime (UNODC) in promoting the adoption of new international tools to specifically counter this phenomenon [31].

While the idea to try and add a specific protocol to the recently adopted United Nations *Convention against Transnational Organized Crime*

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[26] See specifically notes 73 and 74.

[27] Adopted in Delphi on 23 June 1985, ETS 119, accompanied by an Explanatory Report. See Manacorda (2011), pp. 36-38.

[28] See the Report on the Conference proceedings, UN Publications, Sales No E.91.IV.2, Chap. I, § B.1, Annex. See further Manacorda (2011), pp. 36-37.

[29] Besides note 2, see also, specifically, Maugeri (2008), pp. 57-89; Manacorda (2011), pp. 28-30.

[30] Starting with ECOSOC Resolution 2004/34.

[31] See, e.g., Castañeda de la Mora (2013).

(UNTOC)[32] was considered unmanageable and quickly abandoned[33], UNODC firstly focused on promoting, as far as possible, UNTOC's direct application also to cultural property trafficking. It thus started encouraging UNTOC's States Parties to make offences against cultural heritage into «serious crimes» according to art. 2(b)[34], in order to attract such offences into the scope of the treaty's cooperation measures, whenever «transnational in nature» and «involve[ing] an organized criminal group» (art. 3) matching the loose definition of art. 2(a)[35]. Secondly, UNODC undertook the drafting of a soft-law tool, i.e. a set of *International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences*, eventually adopted by the UN General Assembly on 18 December 2014[36]. These Guidelines, besides encouraging States to introduce or strengthen criminal offences aimed at protecting cultural heritage, also include a number of recommendations about preventive and cooperation measures, and were largely instrumental in prompting a renewed effort by the Council of Europe towards the adoption of a proper suppression treaty. In fact, on 3 May 2017, in Nicosia, a new *Convention on Offences relating to Cultural Property* was opened to signature, and it eventually entered into force on 1st April 2022[37].

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[32] Adopted with UN Resolution A/RES/55/25 on 15 November 2000, in force 29 September 2003. See broadly Forlati (2021), as well as McClean (2007).

[33] Manacorda (2011), p. 43.

[34] That is, a «conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty».

[35] That is, «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»; where «structured group», in turn, means, according to art. 2(c), «a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure». See also Borgstede (2014); Blake (2020).

[36] With Resolution A/RES/69/196. See further Visconti (2013).

[37] CETS n. 221, accompanied by an Explanatory Report. See also Bieczinski (2017); Fincham (2019); Mottese (2020).

The success of this later attempt is mostly to be attributed – in addition to its simpler structure and, possibly, less ambitious nature, when compared to the 1985 Delphi Convention – to the intervened shift in the perceived seriousness of, and related prevailing attitude of policymakers towards, cultural property trafficking, as briefly summarised above. The extent of said change should not be overestimated, however, as a quick glance to the status of ratifications of the 2017 Nicosia Convention [38] will show that, presently, all six contracting parties appear to be source countries, and no significant market State appears amongst the signatories, either. Nonetheless, the simple fact that this treaty has rapidly entered into force marks a turning point of sorts. Moreover, as we will discuss in the following section, the very design of this convention, coupled with a look at the soft-law instruments adopted in the last decade and at the broader international picture, also demonstrate a changing attitude towards the regulation of the art and antiquities market, with a new attention devoted to improving its transparency and accountability and, thus, reducing its (in)famously "grey" nature.

2. *Regulating the Grey Market in Artworks and Antiquities. From the 1970 UNESCO Convention to the 2017 Council of Europe Convention*

2.1. *A Structurally "Polluted" Market*

As observed, the market for artworks, antiquities and collectibles, besides being traditionally transnational in nature, is in and by itself a licit one. Nonetheless, it is also, structurally, extremely permeable to the trade of cultural objects of unlawful origin. This is not only related to the aforementioned regulatory gaps between different countries, but also to a long-prevailing market and collectors'culture [39]. Even if things are now

[38] Available at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=221 (accessed June 6, 2023).

[39] See broadly, e.g., Mackenzie (2005), in part. pp. 157-226; Mackenzie/Yates (2016); Mackenzie/Brodie/Yates/Tsirogiannis (2020), in part. pp. 29-114; Yates/Berzina (2020).

(slowly) changing, at least amongst cultural institutions and market operators who, by their very prominence, are more subject to public scrutiny and reputational risks, the art and antiquities environment has long been (and still mostly is) characterised by a serious lack of transparency, perfectly embodied by a prevailing "no questions" policy which allows for undocumented, or very loosely documented, items to freely circulate on the market [40]. "From the collection of a Swiss gentleman" and like expressions remain common provenance attributions in catalogues and advertisements, and so-called "orphan works", for which no information besides a generic "guarantee" by the present vendor is available [41], are omnipresent both on the physical market and (even more) on the ever-growing online one [42].

The long tradition of handshake-based sales, indifference to documentation, and prevailing "privacy" concerns, accounts for a market where fully legal, but undocumented, or very poorly documented, items coexist with, and provide a screen to, objects of unlawful origin which have become "legalised" through the passing of time and the sale (and resale) under legal regimes which favour the purchaser's position, as well as with fully illegitimate items which are the product of recent offences (illegal excavation, theft, unlawful export, etc.), both of which can in turn easily circulate with no, very poor, or sometimes forged, provenance infor-

[40] See, e.g., Renfrew (2000); Elia (2001); Gill/Tsirogiannis (2016); for further references see the Authors cited in note 39.

[41] On a similar note, in the notorious Getty Bronze case, one of the main diligence failures which, according to Italian judges, do not allow to consider the museum as "extraneous to the crime" and, thus, contribute to justify the confiscation of the statue (which was found by Italian fishermen in 1964 and bought by the Getty Museum in 1977), consists in the uncritical reliance placed on allegations of legitimacy of title offered by the vendor's law consultants, even more at a time when it was well known the existence of an ongoing criminal proceeding in Italy involving the appropriation and export of the statue. See Cass. pen. III 2 January 2019 No. 22, as well as Scovazzi (2019). About the case see also, e.g., MacKintosh Ritchie (2009); Fincham (2014).

[42] On which see, specifically, besides note 25, also, e.g., Brodie (2015); Topçuoğlu/Vorderstrasse (2019); Sargent/Marrone/Evans/Lilly/Nemeth/Dalzell (2020), pp. 43-67.

mation [43]. Further market-specific cultural factors [44], such as a tendency to neutralise the criminal significance of art and antiquities trafficking through the conceptual frames of "cultural universalism" [45], "better stewardship", etc., as well as a certain "acquisitive greed" and competitive attitude of cultural institutions, have also traditionally contributed to an overall opacity of this market, conducive to facilitating criminal activities against cultural heritage (as well as through cultural heritage, as it is the case with art frauds and money laundering, for instance).

Just to make one example, even today the simple fact that a cultural item can be stated to have left its country of origin or discovery before 1970 (the date of adoption of the aforementioned UNESCO Convention) is frequently considered enough to make it fully "kosher", even if it is common knowledge that many source countries had in place strict cultural heritage legislation (prohibiting, first and foremost, unauthorized excavations and exports) well before that alleged "divide". While this "1970 standard" calls for more scrutiny over the provenance of recently surfaced archaeological items, thus in a way hindering, to some extent, the placing on the market of items which are the product of contemporary looting, its less commendable facet is that, through it, the non-retroactivity of the Convention is often instrumentally converted into a patent of legitimacy for anything that happened (or may be said to have happened) before its introduction [46].

2.2. *The 1970 UNESCO Convention: A Feeble Tool*

The first steps in the long and uphill path towards shared international standards of market regulation were moved by the 1970 UNESCO Convention itself, which, however, for the reasons already briefly sketched

[43] Besides note 39, see also, e.g., Bowman (2008).

[44] See note 39.

[45] See note 11.

[46] See further, e.g., Gerstenblith (2013); Gerstenblith (2019), pp. 286-287; Mackenzie/Brodie/Yates/Tsirogiannis (2020), pp. 95-98.

above, did not provide a very compelling legal framework, while at the same time mostly focusing on the source side of the market [47].

This is especially true with respect to international circulation and the related documentation. Looking at the relevant articles (3, 6 and 7), the clearest provision is the one about export regulations [48]: contracting States commit themselves to implementing a system of export authorisations and related certificates, that must accompany the cultural item when actually exported (art. 6.a); the related prohibition of export not accompanied by said documentation (art. 6.b) must be publicised «by appropriate means, particularly among persons likely to export or import cultural property» (art. 6.c), i.e. professional dealers and intermediaries. As observed, this Convention does not favour specifically the use of criminal law, and thus infringements on provisions adopted in compliance with art. 6(b) need not necessarily be followed by a penal sanction, as States Parties are free to opt for administrative ones according to art. 8 [49].

Coming to cultural property import, provisions appear less clear-cut and, all in all, requirements for States Parties can be considered less strict, to the advantage of market operators in art-importing countries. On the one hand, according to art. 7(b)(i), States Parties are only required to «prohibit» (including by providing sanctions, once again indifferently penal or administrative in nature, for related infringements: art. 8) the import of cultural property

> stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution.

[47] See also Forrest (2010), p. 195.

[48] See further, e.g., P.J. O'Keefe (2007), pp. 41-44 and 54-66; Forrest (2010), pp. 174-183; Stamatoudi (2011), pp. 44-53.

[49] See specifically P.J. O'Keefe (2007), pp. 67-68; Forrest (2010), pp. 187-188; Stamatoudi (2011), pp. 53-54; Manacorda (2011), pp. 32-33.

Even if many scholars (and source countries) affirm that this provision is not the only one relevant to import regulation, and that art. 3 implies [50] that States Parties must also prohibit the import of cultural property whose export is unlawful according to the legislation of the State Party of origin adopted in accordance with art. 6, this interpretation has been widely rejected by art-importing countries.

Thus, read literally and in isolation, art. 7(b)(i) leaves out all products of clandestine archaeological excavations, which, by definition, can never be "inventoried" as cultural property in the country of origin, while at the same time constituting one of the main objects of trafficking. Moreover, the prohibition does not include the import of items which were "just" illegally exported (without having previously been stolen, or without evidence of a prior theft). The latter are thus only to be considered under the less committing provision of art. 7(a) [51], requiring contracting States to take measures

> consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned

as well as, «whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States». As States are not required to make any change to their pre-existing legislation, nor are such acquisitions declared illicit., for many countries this has long meant nothing more than leaving the issue of illegally exported cultural objects to museums self-regulation, while at the same time completely ignoring deals amongst private individuals, professional or otherwise.

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[50] «The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit». In support of this expanded interpretation see, e.g., P.J. O'Keefe (2007), p. 54; Forrest (2010), pp. 176-177.

[51] See note 48.

Progressively, albeit slowly [52], museums and other cultural institutions (especially public ones) have been thus kept to higher standards of diligence than market operators, partly because of the development of stricter legal and social controls, and partly because of self-regulation efforts by national and international associations [53] – first and foremost by the International Council of Museums (ICOM), with its Code of Ethics [54], first adopted in 1986 and presently undergoing its second review after the 2004 one, coupled with other tools like the ICOM Standards on Accessioning (2020) [55]. While open non-compliance with these soft-law rules does not constitute, per se, a legal infringement subject to enforceable sanctions, it can lead to loosing ICOM membership and to other reputational damages compromising, in turn, a cultural institution's attractiveness for potential donors and sponsors, support by the public, access to loans and cultural exchange programmes, etc.

Concerning other possible obligations pertaining to market transparency, the 1970 UNESCO Convention shows itself, once again, as a weak tool. In fact, the Convention does not address the issue of possible public controls over the circulation of rights on cultural property [56], while, with respect to commercial activities, it requires (art 10) contracting States, «as appropriate for each country», to

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[52] For a critical appraisal of the situation in the US see, e.g., Amineddoleh (2014).

[53] See, e.g., P.J. O'Keefe (2007), pp. 147-166; Forrest (2010), pp. 195-196; Gerstenblith (2013); Hilgert (2016).

[54] Available at https://icom.museum/en/resources/standards-guidelines/code-of-ethics/ (accessed June 8, 2023).

[55] Available at https://icom.museum/en/resources/standards-guidelines/code-of-ethics/ (accessed June 8, 2023).

[56] The only provision of possible relevance under this respect, i.e. art. 13(a), being too vague to have any significance other than leaving States Parties free to keep to their specific rules on cultural property ownership: «The States Parties to this Convention also undertake, consistent with the laws of each State: (a) To prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property». See further, e.g., P.J. O'Keefe (2007), pp. 82-83; Forrest (2010), pp. 183-184; Manacorda (2011), p. 33.

> oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject [57].

The explicit concession to flexible national implementation of this provision, coupled with the lack of any proper criminalisation obligation for infringements, has favoured an overall situation in which countries have mostly just stuck to pre-existing national rules, or lack thereof. A recent market survey run by UNESCO [58] as part of the ongoing review process of its 1999 International Code of Ethics for Dealers in Cultural Property [59] shows that only 62% of respondents keep a register recording information on each item sold; of these, less than 75% keep always track of the origin of the item [60]. Besides, only 33% of interviewed market operators have declared to know about the Object ID standard and, of these, only 62% actually use it to describe and identify traded cultural property [61].

It thus comes as no surprise that the Operational Guidelines, adopted in 2015 to promote a more uniform and effective implementation of the

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[57] See further P.J. O'Keefe (2007), pp. 74-76; Forrest (2010), pp. 186-187; Manacorda (2011), p. 33.

[58] UNESCO (2022), pp. 23-44.

[59] Available at https://unesdoc.unesco.org/ark:/48223/pf0000121320 (accessed June 8, 2023).

[60] The most common information regularly recorded relates to the description of the item sold (90%) and to the name and address of the supplier (both about 85%); the price of the item is always recorded by 80% of respondents. The majority of the sample (61%, plus a further 8% of people not answering the specific question) does not provide the recorded information to the purchaser. UNESCO (2022), pp. 28-29.

[61] UNESCO (2022), p. 29. The Object ID is an internationally recognized documentation standard (promoted by ICOM, UNESCO, WCO and INTERPOL) conceived to identify and record cultural items. See also Yasaitis (2005). It is recalled also by the preamble to Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods (on which see below), at understanding 15.

1970 UNESCO Convention by States Parties[62] (in the absence of any willingness to re-negotiate and update the treaty itself), recommend more stringent controls on cultural property international circulation and trade. For instance, it is suggested (gdln. 58) that

> in the spirit of the Convention States Parties should prohibit the entering into their territory of cultural property, to which the Convention applies, that are not accompanied by [an] export certificate. Consequently, the prohibition of the export of cultural property without its corresponding export certificate should make illicit the import of that cultural property into another State Party, as the cultural property has not been exported legally from the country affected.

Besides (gdln. 73),

> States Parties are encouraged to ensure that equally constraining rules, whether legislative or ethical, include the same provisions for collectors and dealers as those being observed by museums or other similar institutions, particularly those concerning the provenance of the cultural property

and specific recommendations address better regulation and monitoring of online sales (gdlns 68-70) and of sales in auction (gdln. 71). Finally, «States Parties are encouraged to penalize offences against cultural property, committed in violation of the Convention, by introducing penal sanctions against the perpetrators of such offences» (gdln. 65), and even to make any offence relating to cultural property trafficking «a serious crime, as defined in article 2 of the UNTOC, in particular with regard to the relevant penalties» (gdln. 66). These Guidelines, like the 2014 UN ones, are just a soft-law, non-binding tool, but they testify to an overall shifting attitude of the international community towards art and antiquities market regulation.

[62] Available at https://en.unesco.org/fighttrafficking/operational-guidelines (accessed June 8, 2023). See further Scovazzi/Ferri (2015).

2.3. *Due Diligence Standards in the 1995 UNIDROIT Convention and Their Influence on EU rules*

A more significant, albeit, in turn, slow and still in progress, impact on market standards and practices is due to the aforementioned 1995 UNIDROIT Convention. Introducing minimum and directly applicable uniform rules for the restitution of stolen cultural objects and the return of illegally exported ones [63], this treaty takes care to enumerate a number of (non-exhaustive) criteria to evaluate due diligence (or lack thereof) in the acquisition of artworks and antiquities [64], i.e. (art. 4.4.)

> all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances

as well as «the absence of an export certificate required under the law» of the State of origin requesting the return of the cultural item (art. 6.2).

These parameters were to be later incorporated, almost verbatim, into the second iteration of the European Union secondary legislation on the return of cultural objects unlawfully removed from the territory of a Member State [65] (i.e. Directive 2014/60/EU [66], repealing Directive 93/7/EEC [67]), when defining the standards of «due care and attention in

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[63] See note 9.

[64] See further, e.g., Forrest (2010), pp. 206-207 and 212-213; Stamatoudi (2011), pp. 85-92 and 99-100; Prott (2021), pp. 70-77 and 90-93.

[65] See also Schneider (2016), in part. pp. 160-162.

[66] Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast). See further, e.g., Górka (2016); Miglio (2016).

[67] Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. See further, e.g., Stamatoudi (2011), pp. 141-157.

acquiring the object», compliance with which gives rise to the right to receive fair compensation for the item which is to be returned (art. 10).

Moreover, they played a crucial role in shaping the abovementioned ICOM ethical standards for cultural institutions and, in general, all the most recent initiatives aimed at improving due diligence standards in the art and antiquities market [68].

2.4. *Binding and Non-Binding Provisions in the 2017 Council of Europe Convention*

Eventually, the 2017 Nicosia Convention coagulated the results of this change in the international approach to cultural property market regulation into a new set of both binding and non-binding provisions. In fact, many relevant statements take the form of (mere) recommendations to States Parties [69]. Thus, contracting countries are asked to «consider», for instance, «introduc[ing] due diligence provisions for art and antiquity dealers, auction houses and others involved in the trade in cultural property, and introduc[ing] an obligation to establish records of their transactions», to «be made available to the competent authorities in accordance with domestic law» (art. 20.c), as well as «prevent[ing] free ports from being used for the purpose of trafficking of cultural property either through legislative measures or by encouraging them to establish and effectively implement internal norms through self-regulation» (art. 20.k). More relevant are, however, the binding criminalisation obligations set in Chapter II of the Convention.

The latter encompass, besides theft and other forms of unlawful appropriation (art. 3), unlawful excavation and removal (art. 4) [70], illegal

[68] See also, broadly, Frigo (2009); Cornu (2017). On said standards see also par. 4.

[69] See note 37. See also, specifically, Mottese (2018).

[70] Art. 4 does not, however, contain a strict criminalisation obligation, considering that para. 2 allows States Parties to declare, at the time of ratification, acceptance, approval or accession, that they reserve «the right to provide for non-criminal sanctions, instead of criminal sanctions» for the offences of unlawful excavation (art.

exportation (art. 6), and destruction and damage of cultural property (art. 10), a number of provisions more strictly related to the circulation on the transnational market of cultural property of criminal (or anyway unlawful) origin, namely illegal importation (art. 5) [71], acquisition (art. 7) and placing on the market (art. 8) of cultural property of criminal origin, as well as falsification of documents pertaining to the provenance of cultural items (art. 9). These provisions, if and when effectively implemented, have the highest potential to disrupt traditional models of laundering tainted artworks and antiquities, and will therefore be the object of specific discussion in the following sections.

3. *Laundering Tainted Cultural Objects: The Crucial Role of International Circulation*

3.1. *A Preliminary Distinction: Laundering Through Cultural Property vs. Laundering of Cultural Property*

There are actually two growing concerns focusing on the art and antiquities market as a possible conduit and facilitator of criminal activities. That is, on the one hand, the idea that it may provide a channel for the laundering of money of (various) criminal origin (laundering through cultural property). On the other, there is increasing awareness that cultural property of unlawful origin usually gets a varnish of "respectability" through market operations aimed at building an amount of apparently legitimate "pedigree" for these items (laundering of cultural property) [72].

4.1.a), unlawful removal or retention of illicitly excavated cultural objects (art. 4.1.b), and unlawful retention of cultural property excavated in compliance with national rules (art. 4.1.c).

[71] In this case, too, there is, however, no strict criminalisation obligation: see par. 3.3.

[72] For an overview of the structural factors linking both phenomena see also Mosna (2022).

To cope with the first of these two risks [73] (which is beyond the scope of this paper to address, but in passing [74]), the Fifth Anti-Money Laundering Directive [75], adopted in 2018, extended AML rules, previously applicable only to "high value dealers", to all «persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses, where the value of the transaction or a series of linked transactions amounts to EUR 10.000 or more» (art. 1.1.c.i), as well as to all «persons storing, trading or acting as intermediaries in the trade of works of art when this is carried out by free ports, where the value of the transaction or a series of linked transactions amounts to EUR 10.000 or more» (art. 1.1.c.j). The United Kingdom has made, and retained after Brexit, similar adjustments to its AML regulations [76], and the US are, in turn, in the process of strengthening their AML rules with respect to art and antiquities dealers [77].

Instead, the 2017 Nicosia Convention, as observed, focuses on behaviours conducive to possible laundering of cultural property, as, one the one hand, money laundering is an offence that does not per se directly affect the preservation of cultural heritage and, on the other, AML concerns are already addressed by a specific body of international legisla-

[73] See also FATF (2023) for a detailed and updated assessment of money laundering risks in this market sector.

[74] On this specific issue see further, e.g., Amato (1994); Ulph (2011); van Duyne/Louwe/Soudijn (2015).

[75] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU. See further Hufnagel/King (2020).

[76] See The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017; see also BAMF Guidance on Anti Money Laundering for UK Art Market Participants, approved by HM Treasury, amended and approved 6 February 2023. See further Hufnagel/King (2020).

[77] See the *Anti-Money Laundering Act* 2020, in particular Secs 6110(a) and 6110(c), as well as the pending ENABLERS Act (*Establishing New Authorities for Businesses Laundering and Enabling Risks to Security Act*), first presented in the House of Representatives on 10 August 2021. See further Burroughs (2019); Dagirmanjian (2019).

tion [78]. And, indeed, the laundering of specific objects, whose market value mostly depends on their rarity and non-fungible nature [79], presents structural differences with the laundering of a completely fungible asset such as money [80]. Thus, while some AML measures (such as customer due diligence) may help also preventing and combating laundering of cultural property, the process through which an artwork or antiquity of criminal origin is presented as "legitimate" on the market includes a number of specific tricks and techniques aimed at preserving, as far as possible, the item's peculiar value while at the same time concealing, or at the very least obfuscating, its unlawful origin [81].

These may include physical (more or less reversible) alterations [82], such as, for instance, smashing pottery so as to easily export and trade the shreds [83], which are to be recomposed and restored after years, or even

[78] See Explanatory Report, § 32.

[79] In this field, rarity must not be understood in absolute terms, but, instead, by comparing the social desirability of given cultural items with their relative scarcity. Even objects common enough (such as, e.g., certain coins, seals, etc.) may be coveted by passionate collectors and thus foster a low-end art and antiquities market which – also because of the high volume and small value of single transactions – is by far harder to monitor for sales of objects of unlawful provenance. See also, e.g., Brodie (2015); Berzina (2021).

[80] See broadly, besides Mackenzie/Brodie/Yates/Tsirogiannis (2020), e.g., Ferri (2005), in part. pp. 169-181 and 252-261; Tijhuis (2011); Bowman Balestrieri (2019); Gerstenblith (2019); Fabiani/Marrone (2021); Mosna (2022) and (2023).

[81] Many, if not all, behaviours aimed at the laundering *of* cultural property will anyway fall under the broad definition of «laundering of proceeds of crime» established in art. 6(1) UNTOC, which in turn builds on other like broad definitions in international and EU law. See further, e.g., McClean (2007), pp. 68-83. This is a further reason for the aforementioned UNODC's policy (see par. 1) encouraging States Parties to this Convention to make offences against cultural heritage into «serious crimes» in the meaning of art. 2(b) UNTOC. See also Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Tenth Session, 2020, Resolution 10/7, Combating Transnational Organized Crime against Cultural Property.

[82] See note 80 for further examples and references.

[83] This was apparently done, for instance, also in the famous case of the Euphronios Krater, looted from an Etruscan tomb circa 1971, smuggled by the dealer Giacomo Me-

decades (usually making the biggest profit over the last fragments to be acquired by the purchaser who is collecting all the different batches); the cutting of sculptures [84] or paintings of large dimensions, and/or a picture's strategic "restoration" made by suppressing or adding figurative elements, so as to alter the artwork's overall aspect [85]; the superimposition of a visibly crude modern patina so as to pass a genuine antiquity for a modern imitation commonly sold as tourist souvenir [86]; the tearing of illuminated pages from ancient manuscripts or incunabula, to be easily concealed, transported, and traded as self-standing artworks [87]; etc.

The production of a (more or less legitimate) paper trail for the stolen, looted or contrabanded item is another traditional technique [88], which is becoming more and more important as the market's appetite for provenance information increases. It may range from the "simple" production of fake information and/or documentation (forged export certificates [89],

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dici in Switzerland and later sold to the American merchant Robert E. Hect and, by him, to the Metropolitan Museum of New York. The vase was returned to Italy in 2008 thanks to an agreement between the MET and the Italian Government reached in 2006. See, e.g., Gill/Chippindale (2006; 2007); Briggs (2007); Watson/Todeschini (2007); Chappell/Polk (2011); Gill/Tsirogiannis (2016).

[84] See for instance the thinning and breaking of Guatemalan stelae, which was common in the Seventies to ease their smuggling abroad, as reported by Yates (2015), pp. 26-27.

[85] Like occurrences are regularly reported, for instance, in the yearly reports published by the Italian Carabinieri Command for the Protection of Cultural Heritage, available at https://tpcweb.carabinieri.it/SitoPubblico/home/contenuti/pubblicazioni (accessed September 2, 2023).

[86] This was, for instance, the technique used by Jonathan Tokeley-Parry to smuggle ancient artefacts out of Egypt, to later have them restored in England: see *R. v. Tokeley-Parry*, [1999] Crim LR 578, C.A., on which also note 112, and Gerstenblith (2009), p. 27.

[87] See for instance the many samples displayed in the exhibition *Storie di pagine dipinte. Manoscritti e miniature recuperati dal Nucleo Tutela del Patrimonio di Firenze*, Firenze, Palazzo Pitti, 24 June – 4 October 2020, information available at https://www.uffizi.it/eventi/storie-di-pagine-dipinte (accessed September 2, 2023).

[88] See note 80 for further examples and references.

[89] A grossly forged export certificate from Egypt was, for instance, part of the docu-

sale contracts, gallery labels, catalogue pages, etc.), to actually subject an item of unlawful origin to one or more sales and resales, either directly between merchants and/or collectors, or in auction, usually with the help of figureheads and/or shell companies, and preferably in (one or more) country(ies) whose private law rules favour "good faith" purchasers [90]. Other common tricks include presenting the object as coming from a badly inventoried, but existing, collection; asking for it to be checked against the Art Loss Register (typically used with archaeological items which cannot be reported as looted, having been found and appropriated directly by criminals), so as to exhibit the resulting declaration that it is not recorded within the database as proof of its lawful origin [91]; and, especially for high-volume, low-value collectibles, channel them through flea markets, bric-à-brac shops, or – more and more commonly, today – e-commerce websites and other online outlets [92].

3.2. *International Circulation as a Laundering Tool: A Comparison of National Regulatory Models*

To all of this, it must be added that the simple act of transferring abroad a stolen or misappropriated cultural property may contribute to its laundering [93], especially for antiquities whose culture of origin, and thus area of possible discovery, crosses modern States'borders: it can be incredibly difficult, if not impossible, once one such item has left its context and has been cleaned, to determine with certainty the original finding spot, and, even if and when this remains possible through expert investigation, it becomes anyway easier to market the item as coming from a different country, where it might be possible to freely export it from, or anyway to

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mentation based on which the Metropolitan Museum of New York acquired in 2017 a gilded coffin which was then returned in 2019, having been looted and illegally smuggled out of the country. See, e.g., Kinsella (2019); Sabar (2021).

[90] A technique also used, for instance, by Medici and his acolytes: see note 83.

[91] See, e.g., Marinello (2013); Burns (2015); Tremayne-Pengelly (2022).

[92] See also note 42.

[93] See note 80 for further examples and references.

obtain an export permission with less difficulties. Moreover, as many States do not enforce other countries'export rules and thus do not require the exhibition of a valid export permission at the moment of entry of a cultural object within their territory, perfectly valid import declarations (presented to comply with custom duties) can be obtained and added to an artwork's or antiquity's documentation, to increase its appearance of legitimacy and ease further circulation on the market, both national and international [94].

It must be also kept in mind that proof of unlawful export is usually easier than proof of unlawful appropriation, so that a State's failure to prohibit the import of items illegally exported from a different country weakens the overall capacity of a legal system to hinder transnational cultural property trafficking. This is the reason why export and import traditionally constitute crucial steps in the laundering process of a tainted cultural property.

In fact, a summary overview of the regulatory models adopted by different countries reveals, even today, an extremely fragmented picture, in which it is possible to identify and sketch three prevailing policy lines in the implementation of the aforementioned import and export provisions of the 1970 UNESCO Convention and, thus, in the evolution of relevant national regulations, and of the criminalisation of related offences, from the Seventies to the adoption of the 2017 Nicosia Convention.

Especially amongst strong market countries, several States Parties opted for introducing very limited modifications to their domestic legislation. As a consequence, also behaviours relating to cultural property trafficking are rarely set out as specific offences, as they are, instead, mostly covered by generic pre-existing provisions (as far as they are applicable). The most notable example is provided by the United States. The US did

[94] Measuring the gap between cultural items declared at export from any given source country and those declared at import in a relevant market State (such as the US) is, in fact, one of techniques used to gather an estimate of the overall dimension of illicit trafficking in artworks and antiquities: see Fisman/Wei (2009); Beltrametti (2013). More broadly on the issue of investigating the dark figure of cultural property trafficking see, e.g., Brodie/Dietzler/Mackenzie (2013).

and do not possess a comprehensive cultural heritage legislation and, due to their peculiar standing when accepting the 1970 Convention in 1983, the related *Convention on Cultural Property Implementation Act* (CPIA)[95] made very limited additions to domestic law, nor does it contain any specific penal provision[96]. The federal regulation of criminal offences relating to cultural property circulation can therefore rightly be defined as a «patchwork system»[97].

In brief[98], the import of a cultural object illegally exported from its country of origin may constitute a criminal offence in case (i) it is misdeclared, or not properly declared, at importation according to the US Customs Statute[99], or (ii) if the object can be characterized as «stolen property» according to the *National Stolen Property Act* (NSPA), or as violating the 1979 *Archaeological Resources Protection Act* (ARPA). Both acts prohibit (interstate and) foreign transportation, transmission and transfer of (NSPA)[100], and more broadly trafficking in (ARPA)[101], respectively, stolen goods worth more than 5.000 USD, and (regardless of value) «any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law»[102], and are interpreted as allowing prosecution of some acts of cultural property trafficking both in entry[103] and in exit (thus providing also a meas-

[95] 19 US Code §§ 2601-2613.

[96] See Demuro (2002), pp. 445-467; P.J. O'Keefe (2007), pp. 107-123; Nafziger (2010), pp. 766-767.

[97] Fincham (2007), p. 611.

[98] See Gerstenblith (2016).

[99] 18 US Code § 542.

[100] 18 US Code § 2314.

[101] «Sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange»: 16 US Code § 470ee (b) and (c).

[102] 16 US Code § 470ee (c).

[103] The possibility that penal prosecution under NSPA may cover, in given circumstances, also import of cultural objects illegally excavated in, and/or exported from, another country has been supported by US case law, most notably *United States v*

ure of export control) [104]. Customs authorities can apply civil forfeiture to illegally imported or exported goods [105]. In 2002 a specific Cultural Heritage Resource Crimes Sentencing Guideline [106] was adopted, in order to better tailor sentencing for offences affecting the intangible value of cultural property; it applies to both entirely domestic crimes, and crimes involving transnational elements [107]. Thus, all in all, the US do not systematically enforce other countries'export rules, nor consistently criminalise the import of "simply" illegally exported cultural items, bar the limited cases of specific bilateral agreements with given source States [108] or of UN Security Council resolutions preventing the export of antiquities from specific conflict zones (i.e., presently, Iraq and Syria) [109].

Another example of market State (in this case, a primary hub of the international art and antiquities trade) that did not make a systemic

McClain, 545 F.2d 988 (5th Cir. 1977), and *United States v Schultz*, 333 F.3d 393 (2nd Cir. 2003). See P.J. O'Keefe (2007), pp. 115-121; Fincham (2007), pp. 611-621; Gerstenblith (2009). A similar use of ARPA is suggested by scholars: see Gerstenblith (2016), p. 14.

[104] See P.J. O'Keefe (2007), p. 109. Specifically relevant to export controls is also 16 US Code § 470ee (b), which refers to trafficking in objects excavated or removed from public lands or Indian lands in violation of the ARPA or any other Federal Law. Also relevant to the protection of US domestic cultural heritage is the 1990 *Native American Graves Protection and Repatriation Act* (NAGPRA), 18 US Code § 1170. See Gerstenblith (2016), pp. 14-15.

[105] 19 U.S. Code § 1595a(c-d). If there is a bilateral agreement between the US and the country of origin providing (a measure of) enforcement to that country's export regulations, the violation of the other State's export controls will also become a violation of US import controls. See P.J. O'Keefe (2007), pp. 110-115; Gerstenblith (2016), p. 6.

[106] 18 US Code App 2B1.5.

[107] See Gerstenblith (2016), p. 16.

[108] See note 105.

[109] See *Emergency Protection for Iraqi Cultural Antiquities Act* 2004, Pub. L. No. 108-429; Executive Order, No. 13350, § 4, 69 Fed. Reg. 46,055, 46,056 (30 July 2004); CBP *Import Restrictions Imposed on Archaeological and Ethnological Material of Iraq*, 73 Fed. Reg. 23,334 (30 April 2008); *Protect and Preserve International Cultural Property Act* 2016, Pub. L. No. 114-151; CBP *Import Restrictions Imposed on Archaeological and Ethnological Material of Syria*, 81 Fed. Reg. 53,916 (15 August 2016).

change to domestic legislation is the United Kingdom, which, however, does provide specific penal enforcement at least for some offences, and particularly export infringements. Like the US, the United Kingdom never had a comprehensive cultural heritage legislation, nor did it introduce one after the ratification, in 2002, of the 1970 UNESCO Convention, but its domestic law includes since 1952 a measure of control over the export of «national treasures»[110], infringements of which are partly punished under specific penal provisions[111], and partly (intentional evasion of restrictions to export) under the general rules of the *Customs and Excise Management Act* 1979 (art. 68.1-3). But the UK legal framework does not include a system of specific import controls, nor, therefore, specific violations. The criminal offence of handling stolen goods under art. 22 of the *Theft Act* 1968 may apply in some instances of import of illegally excavated and exported objects[112], and in 2003 a new offence of dealing in tainted cultural objects was introduced to comply with the recently ratified 1970 UNESCO Convention[113]. Said offence includes both importing and exporting (besides acquiring and disposing of) cultural objects which were removed (i.e., detached from a building, structure or monument of cultural interest) or excavated in breach of either UK law or another country's law, and it is punished with imprisonment not exceeding seven years, or a fine, or both[114]. The offence does not cover, however, dealing in objects which were merely exported in violation of the laws of the country of origin, and has known extremely scant appli-

[110] The matter is currently regulated by the *Export of Objects of Cultural Interest (Control) Order* 2003, adopted under the *Export Control Act* 2002. See P.J. O'Keefe (2007), pp. 138-143; Vozza (2015), pp. 217-224; Wilson (2019).

[111] See *Export of Objects of Cultural Interest (Control) Order* 2003, arts 4 (misleading applications for licences), 5 (failure to comply with licence conditions) and 6 (failure to provide evidence of the destination of the object).

[112] See P.J. O'Keefe (2007), p. 140. See also *R v. Tokeley-Parry* (1999) Crim. L.R. 578, C.A., on which Ulph (2011), pp. 43-45.

[113] *Dealing in Cultural Objects (Offences) Act* 2003. See also Ulph (2011), pp. 45-46.

[114] In case of summary conviction punishment is reduced (art. 1.3).

cation since its introduction [115], resulting in a more symbolic than effective provision.

An unbalance between strict rules, and related strong enforcement, for cultural property export, one the one hand, and an absence of specific [116] rules and offences for cultural property import, on the other, is often present in the legal framework of States Parties to the 1970 UNESCO Convention which possessed specific and comprehensive cultural heritage laws well before ratifying said treaty. This is the case, for instance, with Italy (till the ratification of the 2017 Nicosia Convention) [117], Spain [118] or India [119] (the same was also true for France till 2016) [120]. These countries

[115] See also Mackenzie/Green (2009).

[116] Naturally, even in these countries the dealing in trafficked cultural objects may on occasions fall, when all elements of the (unspecific) offence are matched, under general criminal law provisions variously punishing the receiving and handling of proceeds of a crime.

[117] Comprehensive cultural heritage regulations were firstly introduced with Law 12 June 1902 n. 185 and perfected with Law 20 June 1909 n. 364. The matter is currently primarily regulated by Legislative Decree 22 January 2004 n. 42 (*Cultural Heritage Code*), and related amendments, which, till 2022 (see below), also included the largest number of relevant criminal offences. See Lenzerini (2010); Manes (2011); Visconti (2019).

[118] Starting with the *Law on the Defence, Conservation and Accretion of Historic and Artistic Heritage* of 13 May 1933. The matter is currently regulated by Law 25 June 1985 n. 16 on Spanish Historic Heritage, and related amendments. See Demuro (2002), pp. 343-380; Sofía de Salas (2010); Vozza (2015), pp. 192-202.

[119] Strict export restrictions, backed by criminal punishment, were already present in the *Antiquities (Export Control) Act*, 1947, adopted under colonial rule, and the subsequent *Antiquities and Art Treasures Act*, adopted by the independent Republic of India in 1972, kept to this model (see §§ 3, 25 and 28; unlawful export is punishable with imprisonment between six months and three years and with a fine).

[120] France's history of cultural heritage regulation started with the Law of 31 December 1913 on Historic Monuments; the matter is currently regulated by the *Cultural Heritage Code* (*Code du patrimoine*) 2004, and related amendments. France became a party to the 1970 Convention in 1997. See Demuro (2002), pp. 381-413; Cornu (2010); Boustany (2019). Only with Law 7 July 2016 n. 925 arts L111-8 and L111-9 were introduced, prohibiting, respectively, import of cultural objects from a State Party to the 1970 Convention in the absence of an export certificate (when required by the law of

have a long tradition of limiting and strictly controlling possible "losses" of cultural objects, including by way of criminal [121] (or a mix of criminal and administrative) [122] offences and sanctions for violations; this ingrained and exclusive focus on possible detriments to the national heritage, and, thus, on export regulation was retained even after becoming parties to the 1970 UNESCO Convention (respectively in 1978, 1986 and 1977), as none of these countries introduced specific import controls, nor, therefore, specifically related offences.

But the same exclusive focus on export control and enforcement is displayed also by some States which adopted new comprehensive cultural heritage legislations in preparation to, or a relatively short time after, becoming parties to the 1970 UNESCO Convention, such as China [123] or

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said country), and import, export, transportation of, or any dealing in, cultural objects illicitly exported from a country according to a UN Security Council resolution. The same Law 925/2016 provided for infringements to be punished with two years of imprisonment and a fine of EUR 450.000 (art L114-1.II and III), i.e. the same sanctions applicable to unlawful exports (art L114-1.I).

[121] This is the case with India and France: see notes 119 and 120.

[122] Art. 174(1) and (2) of Italian CHC (now repealed and substituted by art. 518 *undecies* It.PC: see below) used to punish, with imprisonment (from one up to four years) or a fine, unlawful export of cultural property, i.e. (i) intentional export of objects whose permanent exit is prohibited, (ii) intentional failure to bring back within the assigned deadline objects whose temporary export was granted by the competent authority, and (iii) intentional export of an object for which an export certificate (and/or a EU export licence) is required without having asked for, or obtained, said certificate; in case a cultural object is exported without being accompanied by the required export permission, which was however released by the authority, art. 165 It.CHC provides for an administrative pecuniary sanction. Art. 75 of Spanish PHHL, referring to arts 2(2)(a) and 11(1) of the *Law on Contraband* (n. 12/1995), establishes as a felony punished with imprisonment from one to five years and a fine the illegal export of cultural property worth EUR 50.000 or more, and as an administrative offence punished with a pecuniary sanction the illegal export of objects under said value threshold; art. 76 PHHL establishes further administrative offences for other infringements of export regulations.

[123] China ratified the 1970 Convention in 1989. The *Law of the People's Republic of China on Protection of Cultural Relics* was first adopted in 1982, and amended in 1991, 2002, 2007, and 2013. For punishment of «serious» offences (including smuggling of cultural relics: art. 64.6) it refers to the Penal Code, while providing for administrative

Egypt [124], which are also mostly perceived, and definitely perceive themselves, only as source countries. This stance can be quite problematic with respect to countries which, like China, have recently become also relevant markets for imported artworks and antiquities [125].

However, a gradual shift in attitudes is shown by some other traditional source countries, which soon after the ratification of the 1970 UNESCO Convention, and for long decades afterwards, adopted this same approach, and have instead recently (even before the adoption of the 2017 Nicosia Convention) introduced criminal offences punishing importation of cultural objects taken in violation of the laws of the country of origin. This is, for instance, the case with Mexico [126], which has also introduced, with the same 2014 reform, a specific aggravation of sanctions for traffickers, to be equated to habitual offenders for purposes of pun-

sanctions in case the unlawful export is «not serious enough to constitute a crime» (art. 65). In turn, the Penal Code, which included a crime of smuggling of exit-prohibited valuable cultural objects when first enacted in 1979 (art. 173, currently art. 151, punished with imprisonment over five years in serious cases, and a fine), was amended in 1997 with a whole section devoted to crimes of disrupting the administration of cultural relics, which includes a "preliminary" offence of selling or giving to foreigners precious cultural relics the export of which is banned (art. 325). See Demuro (2002), pp. 469-487; Huo (2015).

[124] Egypt had a long tradition of controls over archaeological excavations and cultural property export under Ottoman domination and, later, the British protectorate, but the first comprehensive law adopted by the independent State is Law n. 117 of 1983, amended by Law n. 3 of 2010, promulgating the *Antiquities Protection Law*. Art. 41 punishes any smuggling of an antiquity outside Egypt by intensive imprisonment and a fine, except in case the culpable leads to confiscation of the object or helps repatriating it (art. 45 *bis*). Egypt became a party to the 1970 Convention in 1973.

[125] See Huo (2015), pp. 507-508.

[126] Mexico became a party in 1972, when it also adopted the *Federal Law on Archaeological, Artistic and Historic Objects and Areas*, which initially only included export rules (art. 16) and a criminal offence of unlawful export (art. 53). In 2014 a new art. 53 *bis* was added, punishing the import, export or transfer of ownership of cultural objects effected in violation of the laws of the country of origin. The sanctions differ: under art. 53, imprisonment from five to twelve years and a fine (penalties to be both raised by half for leaders, organisers or financiers of the unlawful export); under art. 53 *bis*, imprisonment between three and twelve years and a lower fine.

ishment under Federal Law (art. 54). Other countries, such as Peru, keep reserving specific criminal punishment for unlawful export, but have introduced administrative sanctions for the import of cultural objects not accompanied by an export permission released by the competent authorities of the country of origin [127].

Finally, several countries which adopted comprehensive cultural heritage laws as a consequence of (such as Canada [128] or Algeria [129]), or in preparation for (such as Australia [130]), becoming parties to the 1970 UNESCO Convention, took a more balanced approach, introducing specific criminal offences of both unlawful export [131] and unlawful import [132], to be typically punished with identical penalties.

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[127] Peru became a party in 1979. It had granted some measure of legal (including constitutional) protection to its cultural heritage since the Thirties, but it only adopted a really comprehensive *General Law of the Cultural Heritage of the Nation* – n. 28296 – in 2004, followed by an implementing Regulation in 2006. The 1991 Penal Code presents a specific section (Title VIII) for crimes against cultural heritage, including two offences of unlawful export (arts 228 and 230), punished more severely in case of pre-hispanic objects (imprisonment between three and eight years and a fine) than for all other declared cultural objects (imprisonment between two and five years and a lesser fine). Law 28296 provides export rules (arts 10 and 33-34; to be complemented by arts 54-60 of the Regulation), including administrative sanctions for infringements (art. 49.1.c), as well as an administrative offence of unlawful import (art. 49.1.d). Both administrative offences imply a pecuniary sanction as well as confiscation of the object.

[128] Canada became a party in 1978 and adopted in 1985 a specific *Cultural Property Export and Import Act* (CPEIA). See P.J. O'Keefe (2001), pp. 20-28; Mueller/Zedde (2012).

[129] Algeria became a party in 1974. In 1998 it adopted a comprehensive *Law for the Protection of Cultural Heritage*.

[130] Australia became a party in 1989 and, building on the model provided by Canada (another federal state) and in preparation to acceptance of the Convention, in 1986 adopted the *Protection of Movable Cultural Heritage Act* 11/1986 (PMCHA). See P.J. O'Keefe (2007) pp. 100-106.

[131] For Canada, see arts 40-42 and 44-46 CPEIA: punishment (which is identical for illegal import) is imprisonment not exceeding five years, or a fine, or both; in case of summary conviction punishments are reduced (art 45.1.a). For Algeria see arts 62 and 102(1) of the 1998 Law: punishment (which is identical for illegal import) is imprisonment between three and five years and a fine, and it gets doubled for recidivists (art.

More recently, Germany, which had ratified the 1970 UNESCO Convention in 2007, eventually proceeded, in 2016, to introduce a national comprehensive cultural heritage law (*Kulturgutschutzgesetz*) [133], providing, besides a system of export bans and controls, also an articulated set of import prohibitions and controls, notably banning import of cultural property (i) exported contrary to the laws of the country of origin [134], or (ii) removed from its country of origin contrary to EU specific rules [135], or (iii) removed in violation of par. I(1) of the 1954 Hague *Convention First Protocol*. Both sets of provisions are backed up by penal and administrative sanctions (the latter for infringements about documentary requirements: art. 84.2-3), as well as by provisions for seizure and confiscation (arts 33-39 and 85-86); the 2016 Law also includes a ban on placing on the market cultural property lost, unlawfully excavated, or unlawfully

102.2). For Australia, see § 9(3-3B) PMCHA: punishment (which is identical for unlawful import) is imprisonment not exceeding five years, or a fine, or both; criminal responsibility is also extended to legal persons (§ 9.3B.b).

[132] For Canada, see arts 37(2) CPEIA (which defines illegal import as import of cultural property exported from a State which is party to a cultural property agreement contrary to said State's export rules), 43 and 45-46. For Algeria, see art. 102(3) of the 1998 Law (which defines illegal import as the illicit introduction of a movable property whose historic, artistic or archaeological value is recognised by the country of origin). For Australia, see § 14(2) PMCHA (unlawful import is defined as importation of objects whose export was prohibited according to the law of the country of origin); criminal responsibility is also extended to legal persons.

[133] KGSG, 31 July 2016. See Bennett-Schaar (2019); Peters (2019). For an overview of the previous legal framework see Demuro (2002), pp. 415-443.

[134] Export contrary to the laws of the country of origin is to be considered "unlawful", according to art. 32(1)(1), in case of illicit export from any EU member State effected after 31 December 1993 (entry into force of Regulation EEC 3911/92), and in case of illicit export from a State Party to the 1970 UNESCO Convention effected after 26 April 2007 (ratification of the Convention by Germany).

[135] This will currently affect cultural objects removed from Iraq after 6 August 1990 (see art. 3 of Council Regulation EC 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation EC 2465/96) and objects removed from Syria after 15 March 2011 (see art. 11c of Council Regulation EU 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation EU 442/2011).

imported (art. 40) [136], and due diligence provisions in dealing with cultural property (arts 41-47). With respect to unlawful export (art. 31), intentional infringements are punished with imprisonment not exceeding five years or a fine (art. 83.1.1-2 and 2) and specific negligent behaviours are also punished (art. 83.1.1 and 6 as referring to art. 21.1-2 and 4-5) [137]; the same penalties apply to intentional unlawful import (art. 83.1.3), for which, however, no negligent behaviours are criminalized.

The underlying idea behind this latter approach is that, on the one hand, protecting cultural heritage as a universal interest of humankind means protecting each and every country's heritage, according to a principle of solidarity which, by itself, requires to consider equally deserving of sanctioning any harm to cultural heritage, wherever it might occur, and that, on the other, no effective prevention of offences occurring at the source side of the market is actually possible without also adopting measures to curb demand-driven opportunities and, thus, without corresponding controls, and sanctions, on the importing side of the transnational trade [138].

3.3. *The Most Recent European Inputs*

This awareness, coupled with the already mentioned and generalised increasing concern for the possible links between cultural property trafficking and organised crime and terrorism financing, is, indeed, one of the driving forces which led to the adoption, in 2019, of the new EU Regulation on the import of cultural goods [139].

This Regulation, which entered into force in June 2019 but is not yet fully applicable, delegates (art. 11) Member States to provide unspecified

[136] Intentional violation of which constitutes a criminal offence punished with imprisonment not exceeding five years or a fine (art. 83.1.4-5).

[137] The sanction is imprisonment not exceeding three years or a fine.

[138] See, e.g., Peters (2019; 2020).

[139] Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods. See further Dehouck (2019); de Jong (2021); Schreiber (2021); Szabados (2022).

in nature, but necessarily «effective, proportionate and dissuasive», penalties for violations of the new shared minimum rules on entry into the EU territory of cultural objects exported from non-member States. Said rules include, first and foremost, the prohibition of importing objects unlawfully removed from the territory of another State (art. 3.1 and Annex Part A); a ban which has been fully applicable since 28 December 2020 and which, as we will discuss, partly overlaps with obligations stemming (for contracting parties) from art. 5 of the 2017 Nicosia Convention. Further provisions in the 2019 Regulation impose certification and documentation requirements for the import of cultural goods into the EU (arts 3.2, 4 and 5, and Annex Parts B and C). At the very latest by 28 June 2025 importers will need either to provide proof (art 4)[140], or declare under their responsibility (art 5)[141], either that the item was exported in compliance with the law of the country of origin, or that it was lawfully exported from the last country where it was located for a period of more than five years, whenever either the source country cannot be deter-

[140] When applying for an import licence, which will cover the kind of cultural items deemed most at risk of trafficking, i.e. «products of archaeological excavations (including regular and clandestine) or of archaeological discoveries on land or underwater», and «elements of artistic or historical monuments or archaeological sites which have been dismembered» (which in turn explicitly include «liturgical icons and statues, even free-standing»), in both instances «whatever the value» and provided they are «more than 250 years old» (Annex, Part B). The application must be «accompanied by any supporting documents and information providing evidence that the cultural goods in question have been exported from the country where they were created or discovered in accordance with the laws and regulations of that country or providing evidence of the absence of such laws and regulations at the time they were taken out of its territory» (art. 4.4), and «evidence that the cultural goods in question have been exported in accordance with paragraph 4 shall be provided in the form of export certificates or export licences where the country in question has established such documents for the export of cultural goods at the time of the export» (art. 4.5).

[141] Importer statement, to be presented for the typologies of cultural goods listed in Part C of the Annex, provided that the item is «more than 200 years old» and that it has a customs value of «EUR 18.000 or more». The importer's declaration must be accompanied by a «standardised document describing the cultural goods in question in sufficient detail for them to be identified by the authorities and to perform risk analysis and targeted controls» (art. 5.2.b).

mined, or the object was taken out of said source country before 24 April 1972 (when the 1970 UNESCO Convention came into force).

While the 2019 EU Regulation does not imply a proper criminalisation obligation (as Member States remains free to opt for administrative or civil sanctions, rather than for penal ones) for any form of unlawful import, on the other hand arts 3(1) and 11 do impose an enforceable prohibition, valid throughout all EU territory, of importing illegally removed «cultural goods»[142]. On the same issue, instead, the 2017 Nicosia Convention remains to some extent blander. Indeed, it merely recommends (art. 20.b) that States Parties

> introduce import and export control procedures, in accordance with the relevant international instruments, including a system whereby the importation and exportation of movable cultural property are subject to the issuance of specific certificates.

Consequently, art. 5(1) requires contracting parties to «ensure that, when committed intentionally, the importation of movable cultural property» of unlawful origin «constitutes a criminal offence under its domestic law where the offender knew that the cultural property had been stolen, excavated or exported in violation of the law of [another] State» only insofar as

> the importation of [said cultural property] is prohibited pursuant to its domestic law on the grounds that it has been: (a) stolen in another State; (b) excavated or retained under circumstances described in Article 4 of this Convention; or (c) exported in violation of the law of the State that has classified, defined or specifically designated such cultural property in accordance with Article 2 of this Convention.

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[142] As defined under Part A of the Annex: the list is long and articulated, mostly matching the typologies of «cultural property» and «cultural objects» identified as such under (respectively) the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, with no money value threshold applicable, and no age threshold bar the cases of «antiquities […] such as inscriptions, coins and engraved seals» and of «articles of furniture», that must both be «more than one hundred years old» to be subject to the aforementioned import prohibition.

Thus, no State Party to the Nicosia Convention is actually bound to criminalise the import of tainted cultural items when said import is not already prohibited under its domestic legislation [143], any alteration of which to this effect is, as observed, merely suggested, but not imposed by the Convention itself. Moreover, according to art. 5(2), «any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right to provide for non-criminal sanctions, instead of criminal sanctions for the conduct» of illegal importation.

Nonetheless, the combined effect of Regulation EU 2019/880 and of the 2017 Nicosia Convention for States bound by both may actually result in a stringent criminalisation of unlawful import, as the example recently provided by Italy demonstrates. Indeed, while late in implementing art. 3(1) EU Reg., once ratified (with Law 21 January 2022, n. 6) the Nicosia Convention, Italy, on the occasion of the comprehensive reform of its cultural heritage criminal law enacted with Law 9 March 2022, n. 22 [144], opted, reversing its previous attitude, for strict criminal punishment of any import of cultural property

> derived from a felony, or discovered as a result of unauthorised archaeological researches, whenever an authorisation is required according to the law of the country where the item was found, or exported in violation of regulations of the country of export pertaining to the protection of its national cultural heritage [145].

The new art. 518 *decies* of the Italian Penal Code punishes the intentional importation of said objects with imprisonment between two and

[143] See also Explanatory Report, § 46.

[144] On which see broadly, also for further references, Visconti (2023), in part. pp. 65-79 and 165-404.

[145] For an unofficial English translation of criminal offences against cultural heritage in Italian law see https://asgp.unicatt.it/asgp-CulturalHeritageCriminalLaw_Italy_2022(2).pdf (accessed May 31, 2023).

six years and a fine between EUR 258 and EUR 5.165, a penalty which is equal, in the minimum deprivation of liberty, to unlawful export (now punished by art. 518 *undecies* It.PC), albeit being lower than what provided with respect to maximum deprivation of liberty and maximum monetary sanction (respectively set at eight years of imprisonment and at EUR 80.000 for unlawful export). Moreover, when involving the responsibility of a legal entity, in the interest or to the advantage of which the offence is committed [146], the organisation is subject to the same sanctions in case of both unlawful import and unlawful export (art. 25.2 and 5 of Lgs. Decree 8 June 2001, n. 231, as amended by Law 22/2022).

Another interesting feature of this new felony is that it is expressly declared applicable only outside the cases of participation in the offences set in arts 518 *quater* (receiving of cultural property of criminal origin), 518 *quinquies* (employment of cultural property of criminal origin), 518 *sexies* (laundering of cultural property of criminal origin) and 518 *septies* (self-laundering of cultural property of criminal origin, punished less severely than the former), thus in practice acknowledging that importation may as well constitute a step in the laundering of tainted antiquities and artworks.

When it comes to further steps in the laundering process, the 2017 Nicosia Convention presents, in fact, a simpler structure than the new Italian legislation just summarised. It requires States Parties only to ensure criminalisation of, on the one hand, «acquisition» (art. 7.1) and, on the other, «placing on the market» (art. 8.1) of «cultural property that has been stolen in accordance with Article 3 of this Convention or has been excavated, imported or exported under circumstances described in Articles 4, 5 or 6 of this Convention», «where the person knows of such unlawful provenance». States Parties are also invited to «consider» punishing these same behaviours «also in the case of a person who should have known of the cultural property's unlawful provenance if he or she had exercised due care and attention» – a provision mostly conceived to

[146] Liability of legal persons for criminal offences relating to cultural property is required to the States Parties of the 2017 Nicosia Convention by art. 13: see par. 4.

strengthen due diligence duties for professional collectors and art and antiquities market operators [147]. States Parties are not required, however, to additionally and specifically criminalise more complex and deceptive activities, conceived and structured to prevent, or anyway make harder, the discovery of the illegitimate origin of a cultural object. They remain, of course, free to do so (as Italy has recently done), or to apply to such instances (whenever all requirements are met) any unspecific criminal provision possibly covering also the laundering of non-fungible items of criminal origin (as it was the case with Italy prior to the 2022 reform), or (if they are not otherwise bound to criminalise laundering of proceeds of crime) [148] to consider such further elements of obstruction to justice immaterial in the structuring of their criminal law system.

There is, however, one specific instance where the 2017 Nicosia Convention places on States Parties a criminalisation obligation which is directly instrumental to preventing a frequent occurrence in the artificial "cleaning" of artworks, antiquities and collectibles of unlawful origin – that is, falsification of provenance documentation.

4. *Some Final Considerations on Provenance Documentation, Due Diligence and the "Rehabilitation" of the Market*

According to art. 9, States Parties to the 2017 Nicosia Convention are bound to criminalise «the making of false documents and the act of tampering with documents relating to movable cultural property», «where these actions are intended to present the property as having licit provenance». Differently from provisions pertaining to archaeological excavations and import, States are not left free to expressly opt for non-criminal sanctions, which testifies to the importance attributed to the genuineness and reliability of provenance documentation in the prevention and suppression of cultural property trafficking.

[147] See Explanatory Report, §§ 57-60.

[148] See note 81.

As already observed above, provenance information [149] has nowadays become more relevant for collectors, cultural institutions and market operators, especially those who are more in the public eye and need thus take better care of their reputation. Provenance research has even become a new, sought-after skill for professionals working in these fields, starting with the need to assess issues of possible Holocaust-era confiscation, and progressively trickling down to issues of "problematic" colonial takings and, eventually, of more recent and "plainer" unlawful origin of cultural items [150]. Besides this, provenance information has traditionally been one of the three pillars – together with art-historical or archaeological expertise and scientific analysis – founding the authentication process of artworks and antiquities [151].

This may well explain why the 2017 CoE suppression treaty considers counterfeiting of provenance documentation a serious danger for the transparency and cleanliness of the art and antiquities market and thus, indirectly but consistently, for the safety of the cultural heritage as a whole. In fact, as the appetite of collectors, curators and merchants for documents testifying the origin and ownership history of movable cultural property increases, the production of forged contracts, invoices, export licences, etc., will increase accordingly, to satisfy a growing demand for documental "pedigree". It is therefore reasonable to try and prevent a foreseeable accumulation of deceitful provenance documentation also through the provision of criminal offences.

But, however important to discourage and punish such opportunistic behaviours, the effectiveness of provisions such as art. 9 CoE Convention in reducing the overall "greyness" of the art and antiquities market should not be overestimated. Not only because discovering counterfeited provenance documentation, and even more the forgers behind it, is as difficult as any other fight against fakes and forgeries, which are deceptive

[149] See note 150 as well as Gerstenblith (2020).

[150] See broadly, e.g., Hilgert (2014); Vikan (2014); Milosch/Pearce (2019); Tompkins (2020).

[151] See, e.g., Sloggett (2000); Amineddoleh (2015); Hecker (2020); Thomas (2022).

and hard to spot by nature. But even more because placing too much emphasis on the mere passive collection of paper trails risks actually slowing down a change in culture and practices which is most needed, as we discussed above, in this field. As Gerstenblith points out [152], what really matters is not "simple" provenance documentation, but objectively verifiable and verified provenance documentation. And, unfortunately, active provenance research methodology with respect to archaeological artefacts (the most exposed to looting and trafficking) has not seen, as of today, a development comparable to provenance research applied to artworks looted under the Nazi regime [153]. Thus, simply relying on criminal provisions aimed at "sanitizing" circulating provenance documentation appears to some extent disingenuous, as it risks, in the end, to weaken the operators'sense of responsibility with respect to proper provenance checks.

The most important tool to counter laundering of cultural property is, indeed, performing proper object due diligence on cultural items proposed for sale, acquisition, donation, etc. As we have seen, the 1995 UNIDROIT Convention has been a milestone in establishing the first shared due diligence standards in this field, including standards of active validation (consulting accessible registers of stolen cultural objects, consulting accessible agencies and authorities, and in general taking all steps a reasonable person would take).

Later initiatives have built on this, asking museums to «establish the full history of the item since discovery or production» before acquisition (ICOM 2004 Code, art. 2.3), and, more specifically, to «verify whether the object was lawfully obtained, lawfully exported and/or imported, and that no other legal provisions are violated», including by (i) assessing the «trustworthiness of the seller or donor and examine: 1) available documents, including purchase contracts, insurance documents and documentation of prior ownership beyond the current owner; 2) related customs documents including export and/or import licenses, declarations of im-

[152] Gerstenblith (2019), p. 302.

[153] Gerstenblith (2019), p. 294.

port or export; and 3) references in auction catalogues, inventories, or correspondence»; (ii) physically examining the object for «evidence of damage that might have resulted from illegal excavation, theft, looting, or suspicious restoration», as well as «for previous inventory numbers or markings that may indicate that the object originates from another collection or provides information about its provenance»; (iii) checking the item against all available national and international databases of stolen, looted or missing cultural objects; (iv) verifying if the object falls under specific national or international legal protection, including the one reserved to cultural heritage in armed conflicts (ICOM Standards on Accessioning). Bottom-up initiatives aimed at market operators, such as the *Responsible Art Market Art Transaction Due Diligence Toolkit* [154], have recently promoted like standards for merchants and intermediaries [155].

But to make the market more transparent and less prone to easy laundering of tainted cultural property, such due diligence rules should be made compulsory on penalty of sanctions, even if not necessarily criminal in nature, following the example of the 2016 German legislation (arts. 40-44 and 84.1.2-4 KGSG) [156]. In this respect, even the 2017 Nicosia Convention has been quite timid, as we have seen. The introduction of «due diligence provisions for art and antiquity dealers, auction houses and others involved in the trade in cultural property» is the object of a mere recommendation to States Parties (art. 20.c), as it is the criminalisation of negligent acquisition or placing on the market of cultural property of unlaw-

[154] Published in 2018 and available at http://responsibleartmarket.org/guidelines/art-transaction-due-diligence-toolkit/ (accessed June 10, 2023).

[155] Similar initiatives have been undertaken also by associations of scholars and experts who might be called to work on unprovenanced cultural items as part of their research activity or as consultants for auction houses and dealers. See, e.g., Archaeological Institute of America, *AIA Policy on the Presentation and Publication of Undocumented Antiquities*, 4 January 2020, available at https://www.archaeological.org/wp-content/uploads/2020/01/AIA-Publication-Presentation-Policy.pdf (accessed September 7, 2023). On the ethical challenges faced by experts see specifically, e.g., Brodie (2021); Yates (2022); Loges (2023).

[156] On which see, besides note 133, also Fabel (2016).

ful origin (arts 7.2 and 8.2). And while amply drawing on the 2014 UN Guidelines for the preventive measures recommended in art. 20, the 2017 Nicosia Convention has notably left out any reference to «introducing obligations, as appropriate, to report suspected cases of trafficking of and related offences against cultural property and […] to criminalize the failure to meet those obligations» (gdln. 18).

Yet, some regulatory changes appear to be occurring, albeit slowly and indirectly. Considering the Italian 2022 reform, for instance, even if it has not directly affected the – overall unsatisfactory – discipline of provenance (and authenticity) documentation [157], the sheer introduction of corporate quasi-criminal responsibility for (almost) all crimes against cultural heritage (including, besides unlawful export and import and falsification of provenance documentation, also receiving and laundering of cultural property of criminal origin) is likely to prompt changes in corporate approaches to object due diligence in the art and antiquities market [158]. While it is true that said offences are only punishable when committed intentionally, the very structure of Lgs. D. 231/2001 [159] requires legal entities (auction houses, corporate galleries, artists'archives, and in general any entity potentially dealing in cultural objects) to take a risk-based approach to crime prevention, meaning that they have to perform a risk assessment with respect to the possible commission of said offences on behalf of the organization by individuals related to it (managers, employees, consultants, etc.) and, based on that, to develop organizational risk reduction strategies to be implemented through specific adjustments to their compliance models. But said mitigation of criminal risks can only be achieved, in the end, through the systematisation of

[157] See arts 64 and 164 It.CHC. For a discussion of the current inadequacy of these provisions, as well as for further references, see Visconti (2023), pp. 195-199 and 326.

[158] For a more detailed discussion see Visconti (2023), pp. 211-216, 293-294, 309-311 and 328-330.

[159] On which see broadly, e.g., Alessandri/Seminara (2018), pp. 87-127; Castronuovo/De Simone/Ginevra/Lionzo/Negri/Varraso (2019); Piva (2021).

organisational due diligence protocols and procedures, including, by definition, accurate provenance checks on cultural objects the legal person is dealing in [160].

It must be acknowledged that this part of the 2022 reform is going to influence only a very limited portion of the art and antiquity market, as it only affects legal entities, and – according to general rules of corporate quasi-criminal liability in Italy – it does not oblige said entities to introduce the above mentioned compliance programmes (whose adoption is voluntary, and is to be rewarded, when effective and effectively implemented, with exoneration from liability). Moreover, Italy's role in the international art and antiquities market remains quite marginal, as of today [161]. Nonetheless, it is possible that long-term changes will be more widespread.

On the one hand, arts 13 and 14(2) of the 2017 Nicosia Convention require all States Parties to introduce a form of corporate liability – which may be «criminal, civil or administrative» in nature – for the criminal offences listed in the Convention itself committed «for [the] benefit» of the legal entity, to be mandatorily backed up by «criminal or non-criminal monetary sanctions», and possibly also by «other measures, such as: (a) temporary or permanent disqualification from exercising commercial activity; (b) exclusion from entitlement to public benefits or aid; (c) placing under judicial supervision; (d) a judicial winding-up order». As the number of ratifications will hopefully increase, so will the number of countries pressuring cultural institutions and corporate art and antiquities dealers into adopting more structured organisational preventive measures to counter the risks of getting involved in criminal offences against cultural heritage, thus, indirectly, improving their due diligence standards with respect to all aspects of transactions involving cultural items. Moreover, the trend does not appear necessarily limited to current or prospective States Parties to the 2017 Nicosia Convention, as other countries may

[160] Besides note 158, see Troyer/Tettamanti (2022), in part. pp. 1179-1182.

[161] See Art Basel – UBS (2023).

decide, consistent with their own domestic jurisdiction, to implement like forms of corporate responsibility [162].

Of course, such pressures will be of direct concern only for legal entities, which are also, in general, the subjects more exposed to reputational losses in case wrongdoing comes to light. These initiatives are thus unlikely to change, in and by themselves, the culture and practices of individual market operators and, more broadly, of smaller firms and institutions. Nonetheless, usually in the long run attitudes which prevail at the top of any given social group tend to trickle down and influence the behaviours of lower-level social actors, and self-regulation (and even more enforced self-regulation) policies have been known to evolve, on occasions, into mandatory legal standards.

While completely eliminating cultural property trafficking (or any other form of criminality, for that matter) is an unrealistic perspective, it is not at all unconceivable to achieve, in time, a substantive scaling down of this criminal phenomenon. This, in turn, requires acting for the reduction of opportunities and motivations, in a concerted and consistent manner in all countries involved. And while some tasks appear well beyond the reach of single governments (e.g., the reduction of armed conflicts and situations of political unrest in heritage-rich countries), other appear more feasible in the medium-to-long term, provided that the present increased attention to cultural property trafficking as a criminal problem will not fade into political declamation. Amongst these, all measures aimed at making the art and antiquities market more transparent and open to scrutiny are certainly the most important [163]. It is not on

[162] See also the 2014 UN Guidelines at §§ 23-24, as recalled also by § 67 of the 2015 UNESCO Operational Guidelines.

[163] Interestingly, building on the EU *Action Plan against trafficking in cultural goods*, presented by the European Commission on 13 December 2022 (Com.2022.800), the Council of the European Union has released, on 8 June 2023, a document of Conclusions on the fight against trafficking in cultural goods inviting the Commission to take several steps in the direction of a stricter and better coordinated regulation of the European art and antiquities market. Amongst these, there is the suggestion to extend the application of the EU electronic system for the import of cultural goods (cur-

the harshness of punishments for art theft, archaeological looting, unlawful export, etc., but rather on each country's actual commitment to work towards a regulatory reduction of the "greyness" of the market for cultural items, that the quality and credibility of criminal policies aimed at combating cultural property trafficking is ultimately to be tested.

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rently under implementation: see also Commission Implementing Regulation EU/2021/1079 of 24 June 2021 laying down detailed rules for implementing certain provisions of Regulation EU/2019/880 of the European Parliament and of the Council on the introduction and the import of cultural goods) to handle and keep track also of exports towards non-member States, as well as to issue guidance for Member States on sales registers, also covering online sales, and propose the mandatory keeping of transactions records.

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